DuaneMorris

CLASS ACTION REVIEW 2024

DISCLAIMER

The material in this Review is of the nature of general commentary only. It is not meant as or offered as legal advice on any particular issue and should not be considered as such. The views expressed are solely those of the authors. In addition, the authors disclaim any and all liability to any person in respect of anything and of the consequences of anything done wholly or partly in reliance on the contents of this Review. This disclaimer is from the Declaration of Principles jointly adopted by the Committee of the American Bar Association and a Committee of Publishers and Associations.

CITATION FORMATS

All citations in the Duane Morris Class Action Review are designed to facilitate research.

If available, the preferred citation of the opinion included in the West bound volumes is used, such as *Baysal, et al. v. Midvale Indemnity Co.,* 78 F.4th 976 (7th Cir. 2023).

If the decision is not available in the preferred format, a Lexis cite from the electronic database is provided, such as *Moehrl, et al. v. National Association of Realtors,* 2023 U.S. Dist. LEXIS 53299 (N.D. Ill. Mar. 29, 2023).

If a ruling is not available in one of these sources, the full case name and docket information is included, such as *Yates, et al. v. Traeger Pellet Grills*, Case No. 19-CV-723 (D. Utah Sept. 7, 2023).

eBOOK HIGHLIGHTS

The Duane Morris Class Action Review is available for use on a smartphone, laptop, iPad, or any personal electronic reader by using any eBook reader application. eBook reading allows users to quickly scroll, highlight important information, link directly to different sections of the Review, and bookmark pages for quick access at a later time. The eBook is designed for easy navigation and quick access to informative data.

The eBook is available by scanning the below QR code:
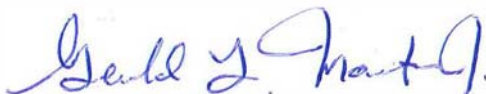
NOTE FROM THE EDITORS

The stakes at issue in class action litigation are typically significant and are apt to keep corporate counsel and senior management up at night. A company's market share and corporate reputation are often implicated by a class action and these exposures and risks put immense pressure on corporate decision-makers.

The purpose of the Duane Morris Class Action Review is multi-faceted. We hope it will demystify some of the complexities of class action litigation, and keep corporate counsel updated on the ever-evolving nuances of Rule 23 issues. In this respect, we hope this book will provide our clients with an analysis of trends and significant rulings that enable them to make informed decisions in dealing with complex litigation risks.

The scope and content of the Duane Morris Class Action Review is unique. No other annual study exists that addresses class action litigation across all substantive areas of law. In 23 chapters and six appendices, this book analyzes virtually any class action issue that corporate executives and general counsel are apt to encounter. Quite literally, there is nothing else like it available.

Defense of class actions is a hallmark of the litigation practice at Duane Morris. We hope this book – manifesting the collective experience and expertise of our class action defense group – will assist our clients by identifying developing trends in the case law and offering practical approaches in dealing with class action litigation.

Sincerely,

Gerald L. Maatman, Jr. | General Editor
January 9, 2024

Jennifer A. Riley | General Editor
January 9, 2024

CONTRIBUTORS

The Duane Morris Class Action Practice Group consists of over 100 lawyers who defend class actions in all varieties and areas of law.

We wish to thank various members of the practice group for their contributions to this Review, including Eden Anderson, Nick Baltaxe, Elizabeth Bassani, Rebecca Bjork, Kelly Bonner, Kathryn Brown, Emilee Crowther, Niyah Dantzler, Ciara Dineen, Ethan Feldman, Haley Ferise, Derek Franklin, Michael Futterman, Sarah Gilbert, Seth Goldberg, Katelynn Gray, Neil Gray, Zev Grumet-Morris, Kourosh Jahansouz, Alex Karasik, Patrice LeTourneau, Sean McConnell, Elizabeth Mincer, Alessandra Mungioli, Nathan Norimoto, Christian Palacios, Andrew J. Rudowitz, George Schaller, Dan Selznick, Bryan Shapiro, Brandon Spurlock, Jesse Stavis, Nelson Stewart, Brian Sullivan, Greg Tsonis, Shireen Wetmore, Sheila Wiggins, Tyler Zmick, and Jeffrey Zohn.

GLOSSARY AND KEY U.S. SUPREME COURT DECISIONS

Adequacy Of Representation – Plaintiffs must show adequacy of representation per Rule 23(a)(4) to secure class certification. It requires representative plaintiffs and their counsel to be capable of fairly and adequately protecting the interests of the class.

***Amchem Products, Inc. v. Windsor, et al.*, 521 U.S. 591 (1997)** – *Windsor* is the U.S. Supreme Court decision that elucidated the requirements in Rule 23(b), insofar as common questions must predominate over any questions affecting only individual class members and class resolution must be superior to other methods for the adjudication of the claims.

Ascertainability – Although not an explicit requirement of Rule 23, some courts hold that the members of a proposed class must by ascertainable by objective criteria.

***Comcast Corp. v. Behrend, et al.*, 569 U.S. 27 (2013)** – *Comcast* is the U.S. Supreme Court decision that interpreted Rule 23(b)(3) to require that, for questions of law or fact common to the class, the plaintiffs' damages model must show damages are capable of resolution on a class-wide basis.

Commonality – Plaintiffs must show commonality per Rule 23(a)(2) to secure class certification. This requires that common questions of law and fact exist as to the proposed class members.

Class – A group of individuals that has suffered a similar loss or alleged illegal experience on whose behalf one or more representatives seek to bring suit.

Class Action – The civil action brought by one or more plaintiffs in which they seek to sue on behalf of themselves and others not named in the suit but alleged to have suffered the same or similar harm.

Class Certification – The judicial process in which a court reviews the submissions of the parties to determine whether the plaintiffs have met their burden of showing that class treatment is the most appropriate form of adjudication. In federal courts, the process is governed by Rule 23 of the Federal Rules of Civil Procedure.

Collective Action – A type of representative proceeding governed by 29 U.S.C. § 216(b) where one or more plaintiffs seeks to bring suit on behalf of others who must affirmatively opt-in to join the litigation. It is applicable to claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act.

***Cy Pres* Fund** – In class action settlement agreements, this is the money set aside for distribution to a § 501(c) organization when class members do not return a settlement claim form and money is left over after distribution to the class.

Decertification – Following an order granting conditional certification of a collective action or certification of a class action, a defendant can move for decertification based on the grounds that the members of the collective action are not actually similarly-situated or that the requirements of Rule 23 are no longer satisfied for the class action.

***Epic Systems Inc. v. Lewis, et al.*, 138 S. Ct. 1612 (2018)** – *Epic Systems* is the U.S. Supreme Court decision holding that arbitration agreements requiring individual arbitration and waiving a litigant's right to bring or participate in class actions are enforceable under the Federal Arbitration Act.

Opt-In Procedures – Under 29 U.S.C. § 216(b), a collective action member must opt-in to join the lawsuit before he or she may assert claims in the lawsuit or be bound by a judgment or settlement.

Opt-Out Procedures – If a court certifies a class under Rule 23(b)(3), class members are bound by the

court's judgment unless they opt-out after receiving notice of the lawsuit.

Numerosity – Plaintiffs must show that their proposed class is sufficiently numerous that adding each class member to the complaint would be impractical. This is a requirement for class certification imposed by Rule 23(a)(1).

***Ortiz, et al. v. Fibreboard Corp.,* 527 U.S. 815 (1999)** – *Ortiz* is the U.S. Supreme Court ruling that interpreted Rule 23(b)(3) to require personal notice and an opportunity to opt-out of a class action where money damages are sought in a class action.

Predominance – The Rule 23(b)(3) requirement that, to obtain class certification, the plaintiffs must show that common questions predominate over any questions affecting individual members.

Rule 23 – This rule from the Federal Rules of Civil Procedure governs class actions in federal courts and requires that a party seeking class certification meet four requirements of section (a) and one of three requirements under section (b) of the rule.

Rule 23(a) – It prescribes that a class meet four requirements for purposes of class certification, including numerosity, commonality, typicality, and adequacy of representation.

Rule 23(b) – To secure class certification, a class must meet one of three requirements of Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).

Rule 23(b)(1) – A class action may be maintained if Rule 23(a) is satisfied and if prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members or adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Rule 23(b)(2) – A class action may be maintained if Rule 23(a) is satisfied and the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Rule 23(b)(3) – A class action may be maintained if Rule 23(a) is satisfied and questions of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Similarly-Situated – Under 29 U.S.C. § 216, employees may bring suit on behalf of themselves and others who are similarly-situated. The standard is not clearly defined in the statute and many courts have found that, if plaintiffs make a preliminary showing that they are similarly situated to those they seek to represent, conditional certification is appropriate. A finding in this regard is usually not based on the merits of the claims.

Superiority – The Rule 23(b)(3) requirement that a class action can be permitted only if class resolution is the superior method of adjudicating the claims.

Typicality – The plaintiffs' claims and defenses must be typical to those of proposed class members' claims. This is required by Rule 23(a)(3).

***Wal-Mart Stores, Inc. v. Dukes, et al.,* 564 U.S. 338 (2011)** – *Wal-Mart* is the U.S. Supreme Court ruling that tightened the commonality requirement of Rule 23(a)(2) and held that judges must conduct a "rigorous analysis" to determine whether there is a "common" contention central to the validity of the claims that is "capable of class-wide resolution."

TABLE OF CONTENTS

APPENDICES

CHAPTER 1

Overview

I. Introduction

Class action litigation presents one of the most significant risks to corporate defendants today. Procedural mechanisms like the one set forth in Rule 23 of the Federal Rules of Civil Procedure have the potential to expand a claim asserted on behalf of a single person into a claim asserted on behalf of a behemoth that includes every employee, customer, or user of a particular company, product, or service, over an extended period.

A class action allows one or more individuals to pursue claims on behalf of a defined and sometimes sprawling group of similarly situated individuals. When the plaintiffs' bar aggregates the claims of many individuals in a single lawsuit, a class action can present substantial implications for a corporate defendant. As a result, class action litigation poses some of the most significant legal risks that companies face.

By joining the claims of many individuals in a single lawsuit, class actions have the potential to increase potential damages exponentially. A negative ruling in a class action has the potential to reshape a defendant's business model, to impact future cases, as well as to set guidelines for the entire industry. This can make the outcome of a class action lawsuit significant and potentially devastating for a company.

Due to their potential implications, class actions are often costly to defend. Defending against a class action can be a time-consuming and resource-intensive process that diverts management attention from core business activities. Plaintiffs can attempt to leverage this reality to make class actions as expensive and disruptive as possible, in an effort to bring about litigation fatigue and to extract a sizable settlement.

Given the potential size and impact of class actions, class actions and class action settlements inevitably attract media attention and lead to public scrutiny. Negative publicity surrounding a class action or class action settlement can have widespread implications, including potential harm to a company's reputation, potential damage to its brand, and potential drop in consumer trust. It sometimes spells the end of the career of a general counsel or chief executive officer if the problems at the heart of the lawsuit happened on their watch.

Class actions are often complex legal proceedings with uncertain outcomes. The complexity can arise from managing multiple claims, myriad legal issues, and assorted class members, making it challenging for corporate defendants to predict and control the result. Due to these factors, corporate defendants should approach class actions from a broad vantage point with a thoughtful and multi-faceted defense strategy.

We developed this one-of-a-kind resource to provide a practical desk reference for corporate counsel faced with defending class action litigation. We have organized this year's book into 23 chapters, with five appendices, each of which provides a rundown of the trends in a particular area of class action litigation, along with the key decisions from courts across the country that companies can use to shape their defense strategies.

This chapter offers an overview of 2023 in terms of the most significant trends and developments that shaped the class action landscape. We identified 10 key trends that characterize the past year. These trends involve: (i) the continued prevalence of massive class action settlements; (ii) expansive growth in privacy class action litigation; (iii) plaintiff-friendly class certification conversion rates; (iv) an expansive growth of data breach litigation; (v) decisions by the U.S. Supreme Court fueling class action litigation; (vi) transformative rulings on the PAGA front, bolstering its popularity among the plaintiffs' class action bar; (vii) a resurgence of broader and more aggressive government enforcement activity; (viii) the emergence of

generative artificial intelligence (AI) and its potential to reshape class action litigation; (ix) a new focus on ESG-related class action risks; and (x) the continued impact of the arbitration defense in the class action space.

II. The Class Action Trends Of 2023

Trend # 1 – Class Action Settlement Numbers Continued To Spike At Unprecedented Levels

Top 20 Class Action Settlements In 2023

$6 billion
$5 billion
$4 billion
$3 billion
$2 billion
$1 billion
$0 billion

© Duane Morris LLP 2024

1. **$12.5 billion**   6. **$1.4 billion**   11. **$750 million**   16. **$573 million**
2. **$6 billion**   7. **$1.2 billion**   12. **$735 million**   17. **$500 million**
3. **$5.6 billion**   8. **$1.18 billion**   13. **$725 million**   18. **$500 million**
4. **$2.67 billion**   9. **$1 billion**   14. **$700 million**   19. **$500 million**
5. **$2.4 billion**   10. **$1 billion**   15. **$626 million**   20. **$500 million**

In 2023, settlement numbers exceeded expectations for the second year in a row.

The cumulative value of the top ten settlements across all substantive areas of class action litigation hit near record highs, second only to the settlement numbers we observed in 2022.

When the numbers for 2022 and 2023 are combined, the totals signal that we have entered a new era of heightened risks and higher stakes in the valuation of class actions.

On an aggregate basis, across all areas of litigation, class actions and government enforcement lawsuits garnered more than $51.4 billion in settlements in 2023.

The largest 20 settlements during 2023 included those on the left chart:

Such numbers are second only to the value of class actions and government enforcement settlements in 2022, which topped $66 billion. Combined, the two-year settlement total eclipses any other two-year period in the history of American jurisprudence.

Duane Morris Class Action Review – 2024

In 2023, parties agreed to resolve 10 class actions for $1 billion or more. These settlements include the following:
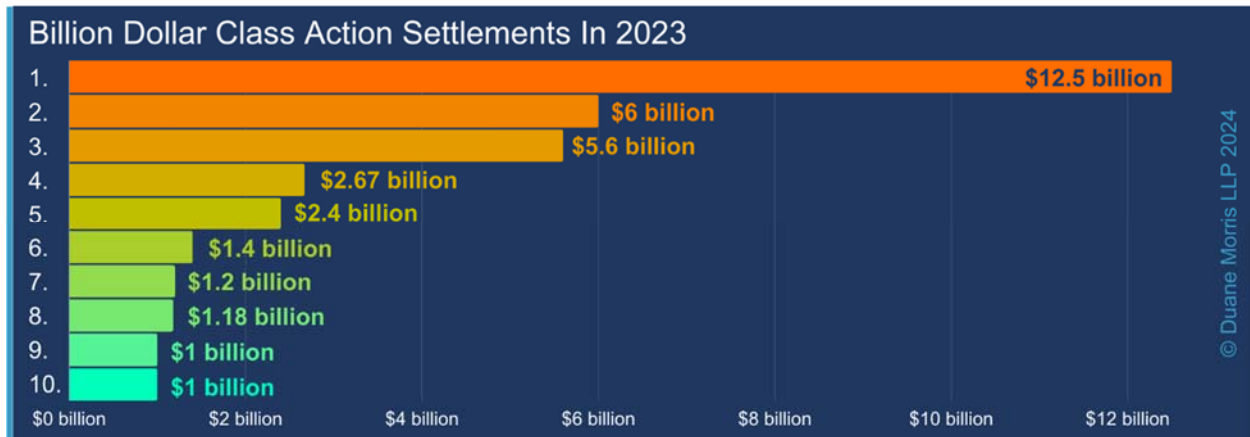
In 2022, parties resolved 14 class actions for $1 billion or more in settlement dollars, making 24 billion-dollar settlements in two years. Reminiscent of the Big Tobacco settlements nearly two decades ago, 2022 and 2023 marked the most extensive set of billion-dollar class action settlements and transfer of wealth in the history of the American court system.

The plaintiffs' class action bar scored rich settlements in 2023 in virtually every area of class action litigation. The following list shows the 10 most lucrative settlements across key areas of class action litigation:

$25.82 Billion – Products liability class actions and mass tort
$11.74 Billion – Antitrust class actions
$5.4 Billion – Securities fraud class actions
$3.29 Billion – Consumer fraud class actions
$1.32 Billion – Privacy class actions
$762.2 Million – Discrimination class actions
$742.5 Million – Wage & hour class and collective actions
$643.15 Million – Civil rights class actions
$580.5 Million – ERISA class actions
$515.75 Million – Data breach class actions
$263.58 Million – Government enforcement actions
$139.67 Million – Labor class actions
$103.45 Million – TCPA class actions
$100.15 Million – Fair Credit Reporting Act class actions

Many of the settlements in 2023 emanated outside of the products and pharmaceutical space, signaling a wider base and greater threat to businesses as settlements continue to redistribute wealth at a substantial rate. Furthermore, the settlements reached virtually all industries and areas of the country.

Particularly when viewed next to the settlement values observed in 2022, the settlement numbers in 2023 signal a new era of class action settlement values.

 Corporations should expect such numbers to incentivize the plaintiffs' class action bar to be equally if not more aggressive with their case filings and settlement positions in 2024.

Trend #2 – Privacy Class Actions Gained Momentum, Increasing In Number And Sophistication

Class action litigation in the privacy space has continued to generate a multitude of filings as it continues its reign as the hottest area of growth in terms of activity by the plaintiffs' class action bar.

1. Illinois Biometric Information Privacy Act Claims

In 2023, the Illinois Biometric Privacy Act (BIPA) continued to fuel a swell of class action litigation. Its technical requirements, coupled with stiff statutory penalties and fee-shifting, provided a recipe for increased filings and hefty settlement demands from the plaintiffs' class action bar.

Enacted in 2008, the BIPA regulates the collection, use, and handling of biometric identifiers and information by private entities. Subject to limited exceptions, the BIPA generally prohibits the collection or use of an individual's biometric identifiers and biometric information without notice, written consent, and a publicly-available retention and destruction schedule.

In terms of lawsuit filings, for nearly a decade following enactment of the BIPA, activity under the statute was largely dormant.

Plaintiffs filed an average of approximately two total lawsuits filed per year from 2008 through 2016. Those numbers grew exponentially in 2017 and 2018 and then spiked as the plaintiffs' class action bar filed a surge of class action lawsuits.

In 2022, companies saw more than five times as many class action lawsuit filings for alleged violations of the BIPA than they saw in 2018, and more than the number of class action lawsuit filings that they saw from 2008 through 2018 combined.

Filings continued to accelerate in 2023, prompted by two rulings from the Illinois Supreme Court that increased the opportunity for recovery of damages under the BIPA.
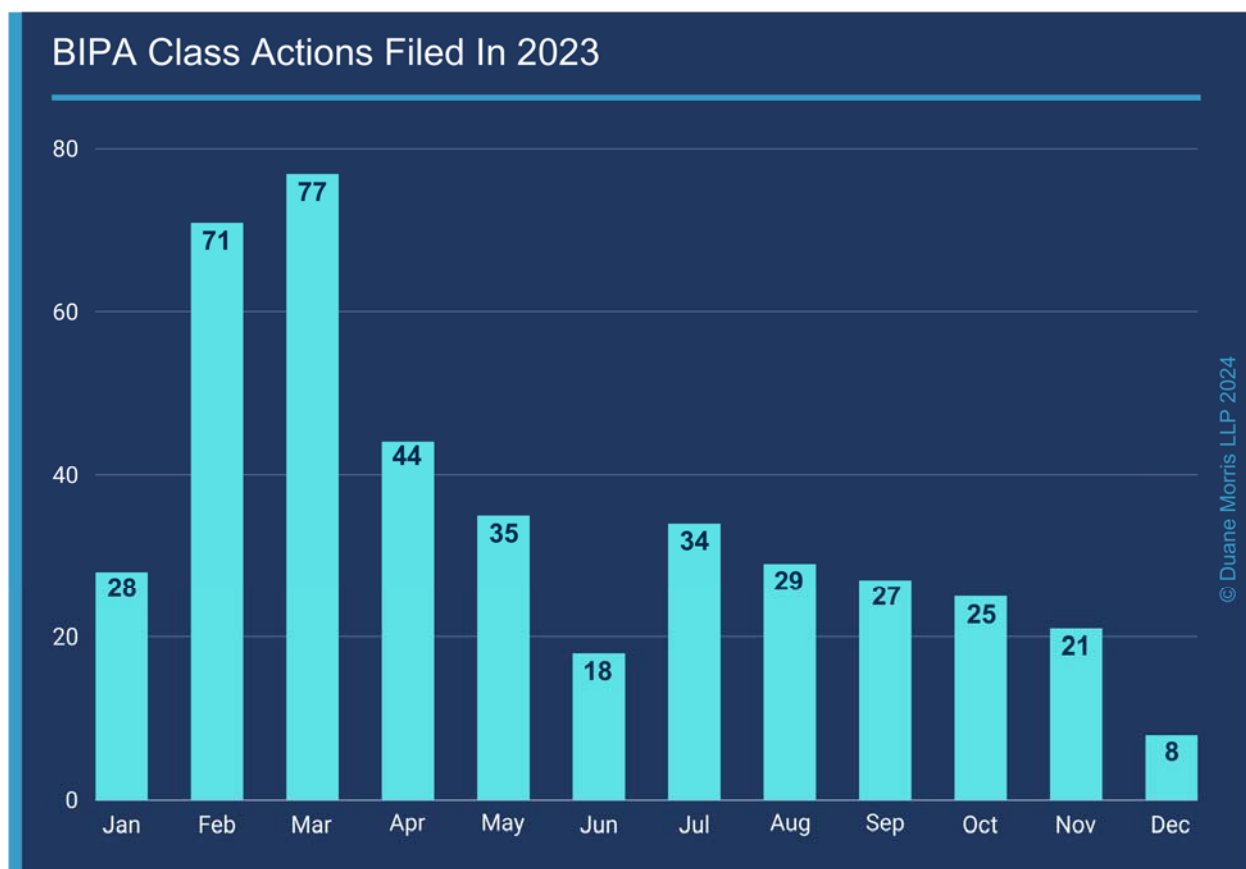
In 2023, the Illinois Supreme Court issued two seminal decisions that increased the opportunity for recovery of damages under the BIPA. On February 2, 2023, the Illinois Supreme Court issued its ruling in *Tims v. Black Horse Carriers*, 2023 IL 127801 (Feb. 2, 2023), and held that a five-year statute of limitations applies to claims under the BIPA. Perhaps even more significantly, on February 17, 2023, the Illinois Supreme Court issued its ruling in *Cothron, et al. v. White Castle System, Inc.*, 2023 IL 1280004 (Feb. 17, 2023), and held that a claim accrues under the BIPA each time a company collects or discloses biometric information.

These rulings have far-reaching implications. Together, they have the potential to increase monetary damages in BIPA class actions in an exponential manner, especially in the employment context, where employees might scan in and out of work multiple times per day across more than 200 workdays days per year.

In the wake of these rulings, class action filings more than doubled. From January 1, 2023, to the ruling in *Cothron*, plaintiffs filed approximately 61 lawsuits in Illinois state and federal courts alleging violations of the BIPA.

By contrast, in the same period of time following the ruling, plaintiffs filed 150 lawsuits in Illinois state and federal courts, representing an increase of 71%.

Duane Morris Class Action Review – 2024

Below is a chart outlining this litigation spike:

BIPA Class Actions Filed In 2023

Month	Count
Jan	28
Feb	71
Mar	77
Apr	44
May	35
Jun	18
Jul	34
Aug	29
Sep	27
Oct	25
Nov	21
Dec	8

© Duane Morris LLP 2024

Throughout the remainder of 2023, lawsuit filings continued to grow in number and sophistication as they targeted more advanced and innovative technologies. Given the five-year statute of limitations, and the potential for enhanced monetary penalties, we anticipate that filings and settlement numbers in BIPA litigation will continue to expand.
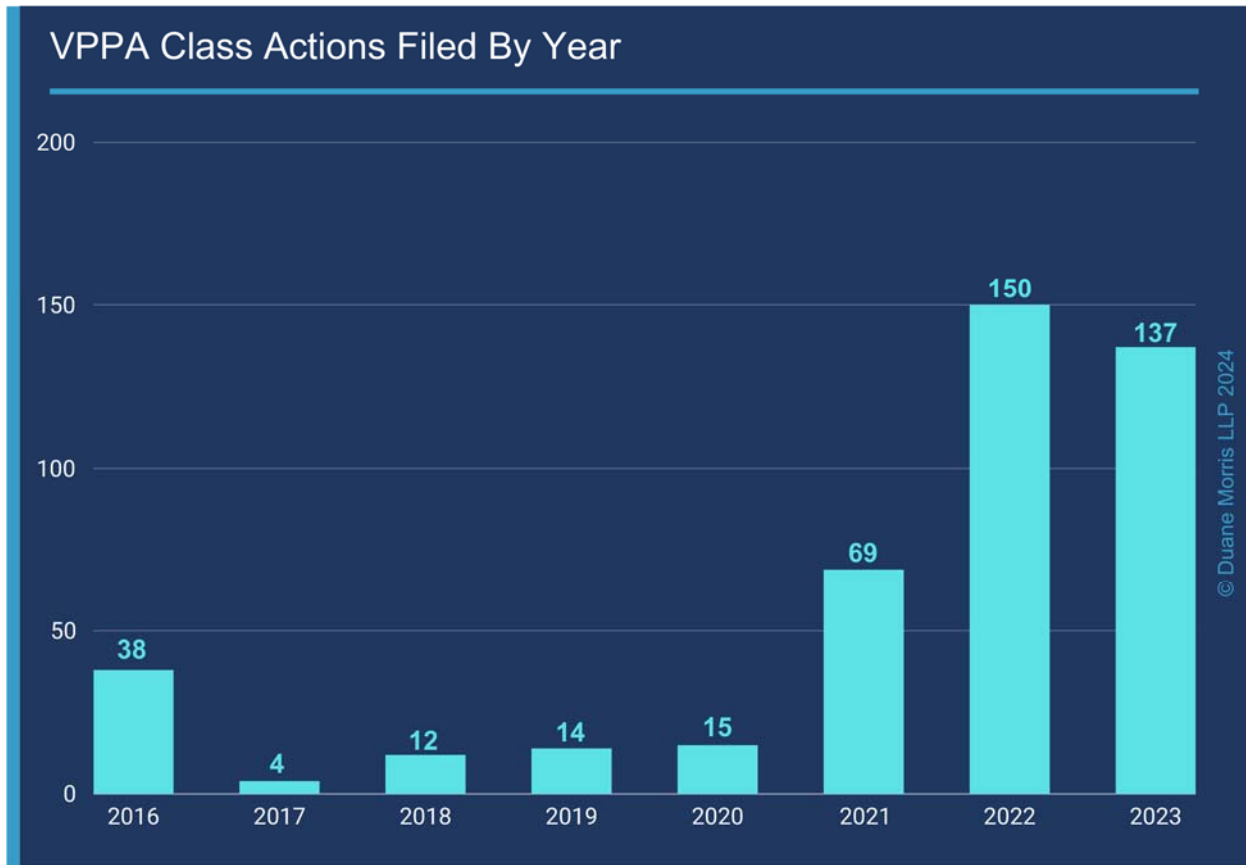
2. Other Sources Of Privacy Class Actions

Various provisions of state privacy, anti-surveillance, and wiretap statutes have had a similar impact, fueling creativity by the plaintiffs' class action bar as it looks to apply many pre-existing laws to challenge the use of innovative and novel technologies that companies use to collect information about consumers and their online activities.

Over the past year, plaintiffs have filed a barrage of class action lawsuits under the federal Video Privacy Protection Act (VPPA). Congress originally passed the VPPA in 1988 to prevent the wrongful disclosure of video tape sale and rental records. Plaintiffs have filed lawsuits under the VPPA against companies that offer video content on their websites.

The VPPA prohibits a "video tape service provider" from knowingly disclosing personally identifiable information concerning any consumer of such provider." 18 U.S.C. § 2710(b)(1). The statute defines a "video tape service provider" to include any person "engaged in business, or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio-visual materials." 18 U.S.C. § 2710(a)(4).

Some courts have construed "similar audio-visual materials" broadly, generally concluding that its definition encompasses streaming video delivered electronically. Plaintiffs allege that companies that maintain videos on their websites and deploy pixel tracking tools violate the VPPA because their websites track the videos that visitors watch and share the viewing data with third parties.

The VPPA provides for damages up to $2,500 per violation in addition to costs and attorneys' fees for successful litigants, making it an attractive source of filings for the plaintiffs' class action bar. Indeed, plaintiffs have initiated more than 137 class actions under the VPPA over the past year.

VPPA Class Actions Filed By Year

Year	Count
2016	38
2017	4
2018	12
2019	14
2020	15
2021	69
2022	150
2023	137

© Duane Morris LLP 2024

Similarly, state wiretapping and anti-surveillance laws are continuing to generate filings by enterprising plaintiffs' lawyers. Plaintiffs have initiated class actions against companies that use third-party software to track user activity on their webpages, or to create and record transcripts of conversations conducted via chat features, based on the theory that such practices potentially violate electronic interception provisions of various state laws.

The plaintiffs' bar grounded these claims in the electronic interception provisions of wiretap statutes like the California Invasion of Privacy Act, the Pennsylvania Wiretapping and Electronic Surveillance Act, and the Florida Security of Communications Act, among other laws, which generally prohibit the unauthorized interception of communications transmitted electronically.

The plaintiffs' bar has targeted technologies that track a user's interactions with the website (*e.g.*, clicking, scrolling, swiping, hovering and typing) and create a recording of those interactions and inputs through session replay software.

It also has attacked coding tools that create and store transcripts of conversations with users in a website's

Duane Morris Class Action Review – 2024

chat feature. Plaintiffs generally allege that recording users' interactions with a website and sending that recording to a third party for analysis without their consent is an illegal invasion of their privacy. Over the past year, these lawsuits met mixed results.

During 2023, federal district courts in California ruled on the initial round of "chatbot" cases filed under the California Invasion of Privacy Act (CIPA) and several responded with skepticism. Courts granted motions to dismiss on various grounds finding, among other things, that the statutory provisions at issue do not apply to communications over the internet, see, *e.g., Licea, et al. v. American Eagle Outfitters, Inc.*, 2023 WL 2469630, at *5-6 (C.D. Cal. Mar. 7, 2023); a party cannot "eavesdrop" on its own conversation, *see id.* at *7-8; *Licea, et al. v. Cinmar, LLC*, 2023 WL 2415592, at *7-8 (C.D. Cal. Mar. 7, 2023); or that allegations that a defendant used the code embedded in a chat program to "harvest valuable data" were too vague and conclusory to state a claim. See, *e.g., Cody, et al. v. Boscov's, Inc.*, 2023 WL 2338302, at *2 (C.D. Cal. Mar. 2, 2023).

Other courts denied motions to dismiss similar claims. See, *e.g., Valenzuela, et al. v. Nationwide Mutual Insurance Co.*, 2023 WL 5266033, at *4-10 (C.D. Cal. Aug. 14, 2023); *D'Angelo, et al. v. Penny OpCo, LLC,* 2023 WL 7006793, at *2-4, *8-9 (S.D. Cal. Oct. 24, 2023).

These rulings contribute to a patchwork quilt of decisions in this space.

Given the stakes, we do not anticipate that this initial round of decisions will spell the death knell for suits attacking session replay or chatbot suits, many of which remain in the pipeline before various courts.

Instead, we anticipate that plaintiffs will respond with additional creativity as they attempt to plead around these potential issues and identify new technologies at which to target their claims.

Trend #3 – The Likelihood Of Class Certification In 2023 Remained Strong

In 2023, the number of class certification rulings issued by courts eclipsed the numbers issued in recent years, and the overall rate of class certification remained high, as plaintiffs continued to succeed in certifying class actions at high rates.
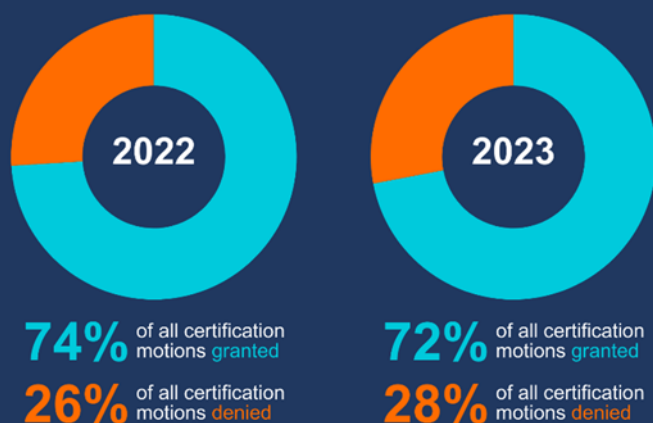
1. Plaintiffs Continued To Certify Cases At High Rates

In 2023, the plaintiffs' class action bar succeeded in certifying class actions at a high rate. Across all major types of class actions, courts issued rulings on 451 motions to grant or to deny class certification in 2023. Of these, plaintiffs succeeded in obtaining or maintaining certification in 324 rulings, an overall success rate of 72%.

The numbers show that, when compared to 2022, plaintiffs filed more motions for class certification in 2023, resulting in more certified class actions in 2023.

Across all major types of class actions, courts issued rulings on 451 motions to grant or deny class certification, and plaintiffs succeeded in obtaining or maintaining certification in 324 rulings, with an overall success rate of 72%. In 2022, by comparison, courts issued rulings on 335 motions to grant or to deny class certification, and plaintiffs succeeded in obtaining or maintaining certification in 247 rulings, an overall success rate of nearly 74%.

Certification Rates In 2022 And 2023

74% of all certification motions granted (2022)
26% of all certification motions denied (2022)

72% of all certification motions granted (2023)
28% of all certification motions denied (2023)

In 2023, the number of motions that courts considered varied significantly by subject matter area, and the number of rulings varied across substantive areas. The following summarizes the results in each of ten key areas of class action litigation:

Securities Fraud – 97% granted / 3% denied (35 of 36 granted / 1 of 36 denied)

Data Breach – 14% granted / 86% denied (1 of 7 granted / 6 of 7 denied)

Discrimination – 50% granted / 40% denied (4 of 8 granted / 4 of 8 denied)

ERISA – 82% granted / 18% denied (41 of 50 granted / 9 of 50 denied)

FCRA / FDCPA – 75% granted / 25% denied (3 of 4 granted / 1 of 4 denied)

RICO – 70% granted / 30% denied (7 of 10 granted / 3 of 10 denied)

TCPA – 70% granted / 30% denied (7 of 10 granted / 3 of 10 denied)

WARN – 54% granted / 46% denied (7 of 13 granted / 6 of 13 denied)

FLSA (Conditional Certification) – 75% granted / 25% denied (125 of 167 granted / 42 of 167 denied)

FLSA (Decertification) – 44% granted / 56% denied (8 of 18 granted / 10 of 18 denied)

Antitrust – 75% granted / 25% denied (15 of 20 granted / 5 of 20 denied)

Products Liability / Mass Torts – 69% granted / 31% denied (9 of 13 granted / 4 of 13 denied)

Civil Rights – 62% granted / 38% denied (30 of 48 granted / 18 of 48 denied)

Class Certification Rates By Practice Area In 2023

Consumer Fraud – 66% granted / 34% denied (38 of 58 granted / 20 of 58 denied)

The plaintiffs' class action bar obtained the highest rates of success in securities fraud, antitrust, FLSA, and ERISA actions. In cases alleging securities fraud, plaintiffs succeeded in obtaining orders certifying classes in 35 of the 36 rulings issued during 2023, a success rate of 97%. In antitrust litigation, plaintiffs

Duane Morris Class Action Review – 2024

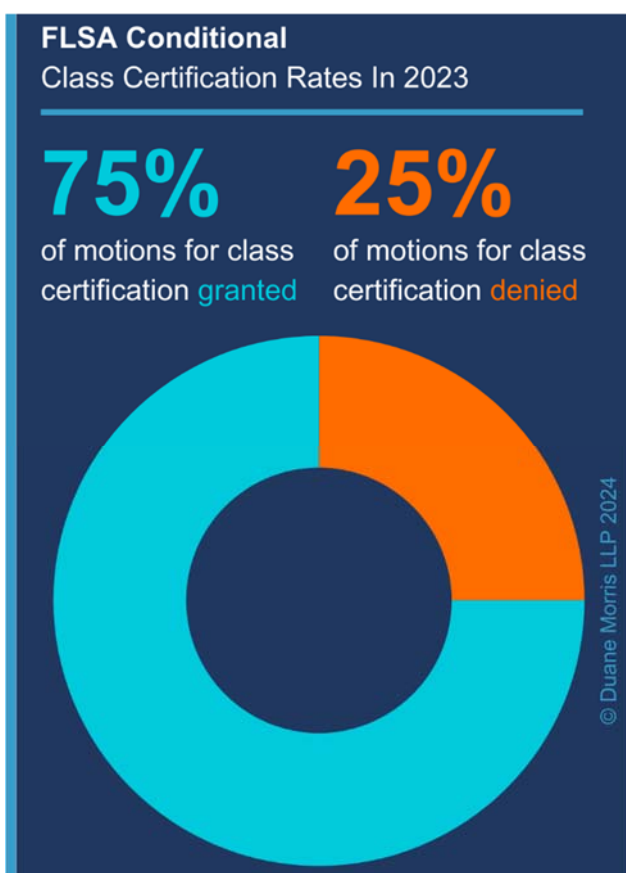succeeded in obtaining orders certifying classes in 15 of 20 rulings issued during 2023, a success rate of 75%. In cases alleging ERISA violations, plaintiffs succeeded in obtaining orders certifying classes in 41 of 50 rulings, for a success rate of 82%. And in cases alleging FLSA violations, plaintiffs managed to obtain first-stage certification rulings in 125 of 167 rulings issued during 2023, a success rate of nearly 75%.

As additional judicial nominations emanate from the White House to fill open slots in federal courts, we can expect the makeup of the judiciary to continue to evolve toward the left during the upcoming year, thereby reducing the likelihood we will see any significant shift in this trend.

2. Courts Issued More Rulings In FLSA Collective Actions Than In Any Other Areas Of Law

In 2023, courts again issued more certification rulings in FLSA collective actions than in other types of cases. Plaintiffs historically have been able to obtain conditional certification of FLSA collective actions at a high rate, which surely has contributed to the number of filings in this area.

FLSA Conditional Class Certification Rates In 2023

75% of motions for class certification granted

25% of motions for class certification denied

© Duane Morris LLP 2024

In 2023, courts considered more motions for certification in FLSA matters than in any other substantive area. Overall, courts issued 183 rulings. Of these, 165 addressed first-stage motions for conditional certification of collective actions under 29 U.S.C. § 216(b), and 18 addressed second-stage motions for decertification of collective actions. Of the 167 rulings that courts issued on motions for conditional certification, 125 rulings favored plaintiffs, for a success rate of nearly 75%.

These numbers are lower than the numbers observed in 2022, during which courts issued 236 rulings. Of these, 219 addressed first-stage motions for conditional certification of collective actions under 29 U.S.C. § 216(b), and 18 addressed second-stage motions for decertification of collective actions. Of the 219 rulings that courts issued on motions for conditional certification, 180 rulings favored plaintiffs, for a success rate of 82%. Such rate was in line with and slightly higher than the historic rate of success that plaintiffs have achieved with respect to such motions.

The decline in success rates in 2023 likely reflects the impact of courts in certain federal circuits more closely scrutinizing motions for conditional certification. Until recently, courts almost universally applied a two-step process to certification of FLSA collective actions.

At the first stage, courts applied a lenient burden such that they required a plaintiff to make only a "modest factual showing" that he or she was similarly situated to others, and plaintiffs often met such burden by submitting declarations from a limited number of potential collective action members.

At the second stage, courts conducted a more thorough examination of the evidence to determine whether in fact the plaintiff was similarly situated to those he or she sought to represent such that the matter should proceed to trial on a representative basis.

Duane Morris Class Action Review – 2024

Recently, however, federal appellate courts in two circuits – the Fifth Circuit and Sixth Circuit -- took a closer look at the so-called two-step process. In 2021, the Fifth Circuit in *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430, 436 (5th Cir. 2021), rejected the two-step approach to evaluating collective action certification, holding instead that district courts must "rigorously scrutinize the realm of 'similarly situated' workers … at the outset of the case."

This past year, in 2023, the Sixth Circuit joined the Fifth Circuit in jettisoning the traditional two-step approach.

In *Clark, et al. v. A&L Homecare & Training Center, LLC*, 68 F.4th 1003 (6th Cir. 2023), the Sixth Circuit rejected the traditional two-step approach, but expressly declined to adopt the standard approved by the Fifth Circuit.

Instead, the Sixth Circuit introduced a new standard that focuses on whether the plaintiff has demonstrated a "strong likelihood" that other employees he or she seeks to represent are "similarly situated" to the plaintiff.

As these new, stricter standards in the Fifth and Sixth Circuits take hold, we are likely to see success rates normalize as plaintiffs shift their case filings away from these two circuits toward jurisdictions with more lenient, more plaintiff-friendly standards for conditional certification.

Indeed, the success rate for plaintiffs in the Fifth Circuit declined by a noticeable amount in 2023, likely as a trickle-down effect of *Swales*.

In 2022, courts in the Fifth Circuit issued 7 rulings on motions for conditional certification, and plaintiffs prevailed in 5, or 71%. In 2023, courts in the Fifth Circuit issued 6 rulings on motion for conditional certification, and plaintiffs prevailed in 3, or 50%.

At the decertification stage, courts generally have conducted a closer examination of the evidence and, as a result, defendants historically have enjoyed an equal if not higher rate of success on these second-stage motions as compared to plaintiffs.
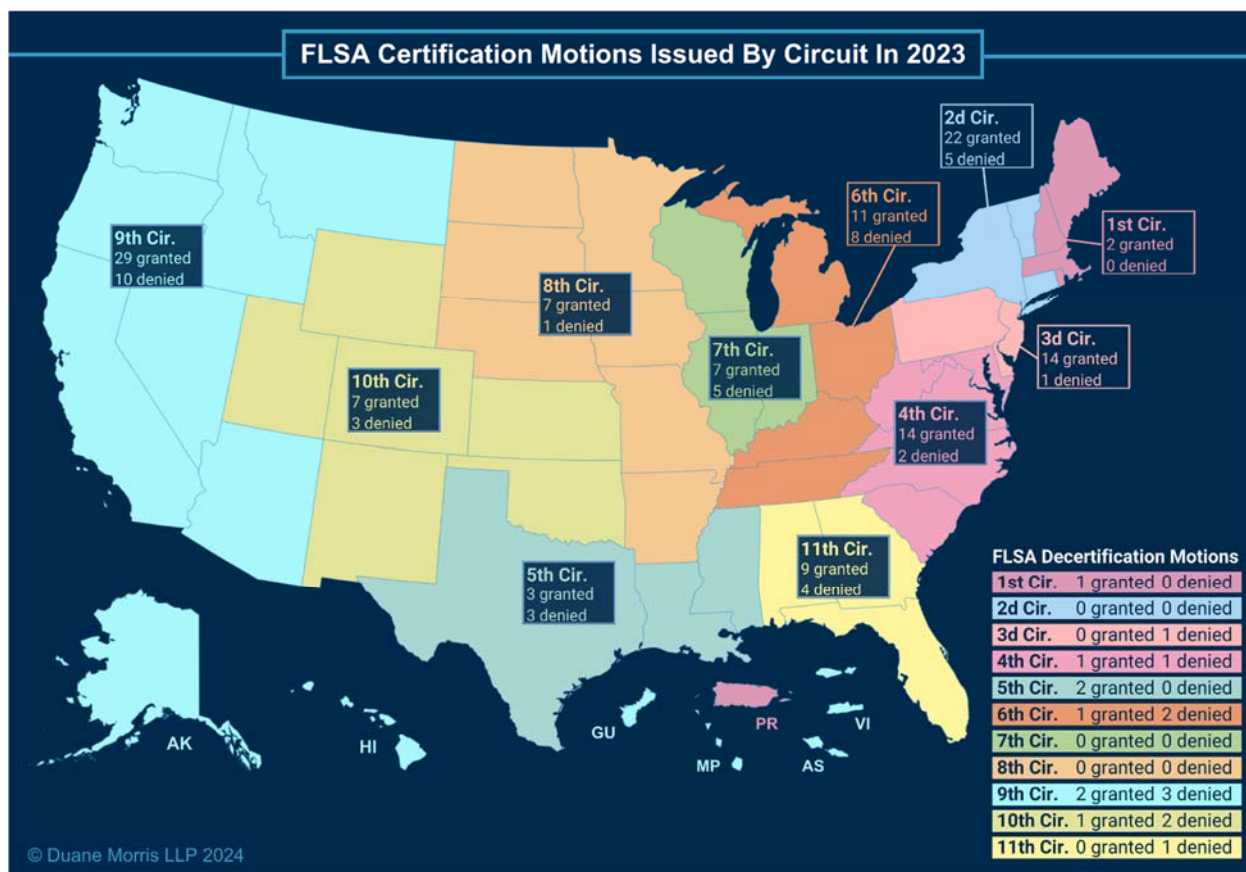
The results in 2023 were no exception.

Of the 18 rulings that courts issued on motions for decertification of collective actions, 8 rulings favored defendants, for a success rate of 44%. Such rate aligns with the success rate defendants enjoyed in 2022, and aligns with the historic rate of success that defendants have achieved at the decertification stage.

An analysis of these rulings demonstrates that a disproportionate number emanated from traditionally pro-plaintiff jurisdictions, including the judicial districts within the Second Circuit (27 decisions) and Ninth Circuit (44 decisions), which include New York and California, respectively.

Similar to recent years, however, the number of rulings emanating from the Sixth Circuit (22 decisions) proved nearly as high if not higher than the number of rulings in the traditional pro-plaintiff forums, a trend that, as mentioned above, is likely to reverse as we start to see the impact of *Clark* and plaintiffs begin shifting their filings toward other jurisdictions.

The following map illustrates these variations:

FLSA Certification Motions Issued By Circuit In 2023

2d Cir.
22 granted
5 denied

6th Cir.
11 granted
8 denied

1st Cir.
2 granted
0 denied

9th Cir.
29 granted
10 denied

8th Cir.
7 granted
1 denied

3d Cir.
14 granted
1 denied

7th Cir.
7 granted
5 denied

10th Cir.
7 granted
3 denied

4th Cir.
14 granted
2 denied

11th Cir.
9 granted
4 denied

5th Cir.
3 granted
3 denied

AK   HI   GU   PR   VI
                        MP   AS

FLSA Decertification Motions

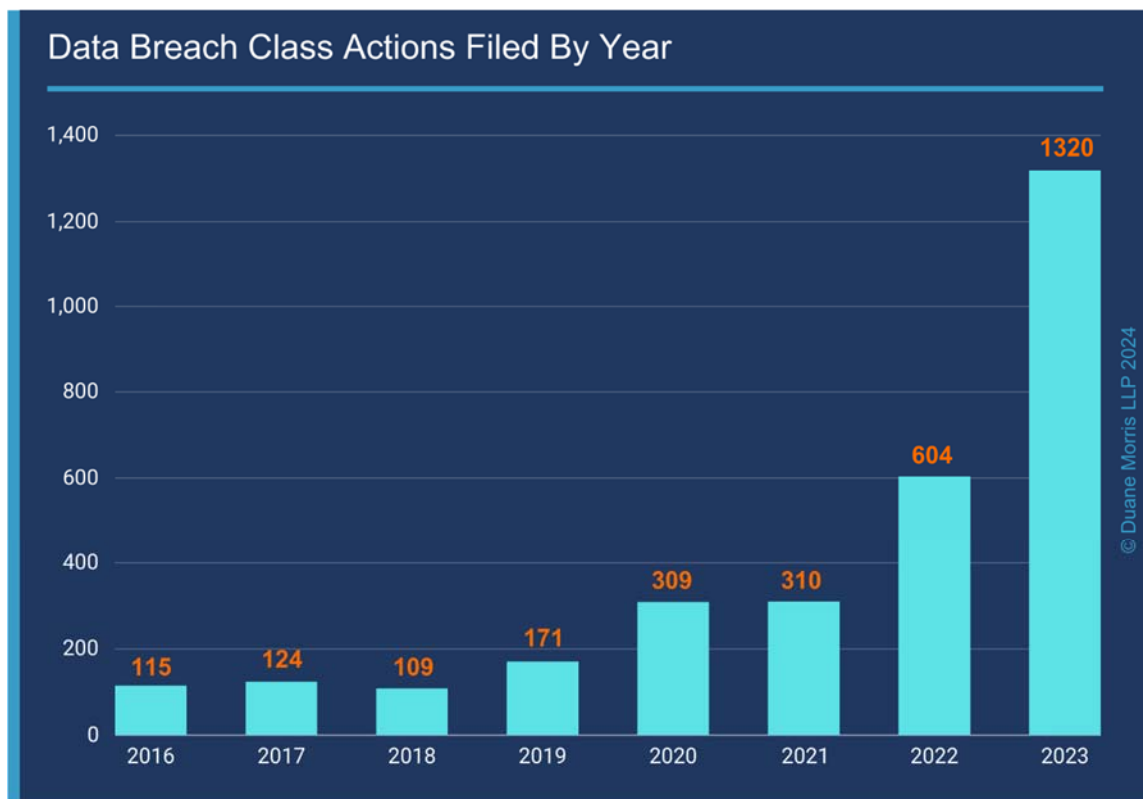|	
1st Cir.	1 granted 0 denied
2d Cir.	0 granted 0 denied
3d Cir.	0 granted 1 denied
4th Cir.	1 granted 1 denied
5th Cir.	2 granted 0 denied
6th Cir.	1 granted 2 denied
7th Cir.	0 granted 0 denied
8th Cir.	0 granted 0 denied
9th Cir.	2 granted 3 denied
10th Cir.	1 granted 2 denied
11th Cir.	0 granted 1 denied

© Duane Morris LLP 2024

The numbers no doubt flow from the different standards and approaches that courts in different federal circuits take in evaluating motions for conditional certification and decertification and, in turn, the likelihood of plaintiffs' success on such motions. If more courts join the Fifth and Sixth Circuits in abandoning the traditional two-step certification process, and thereby increase the time and expense of gaining a conditional certification order, it may lead to a reshuffling of the deck in terms of where plaintiffs file their cases and the types of claims they pursue.

Trend #4 – Data Breach Class Actions Continued Their Growth, But With Inconsistent Outcomes

The volume of data breach class actions exploded in 2023, and their unique challenges, including issues of standing and uninjured class members, continued to vex the courts, leading to inconsistent outcomes. Data breach has emerged as one of the fastest growing areas of class action litigation. After every major (and not-so-major report) of a data breach, companies now can expect the resulting negative publicity to prompt one or more class action lawsuits, saddling companies with the significant costs of responding to the data breach as well as the significant costs of dealing with high-stakes class action lawsuits on multiple fronts.

Companies unfortunate enough to fall victim to data breaches in 2023 faced class actions, including copy-cat and follow-on class actions across multiple jurisdictions, at an increasing rate. In 2023, we saw a notable increase in data breach class actions as compared to 2022. Plaintiffs filed approximately 246 data breach class actions within the first half of 2023, roughly equivalent to the total number of filings for the entirety of 2022. On average, plaintiffs filed 44.5 data breach class actions per month during 2023 through the end of August, marking a significant increase from the average of 20.6 per month that we saw in 2022. From September 2023 to the end of the year, Plaintiffs filed over 450 additional data breach class actions,

for an average of over 125 a month.

Data Breach Class Actions Filed By Year

© Duane Morris LLP 2024

Year	Value
2016	115
2017	124
2018	109
2019	171
2020	309
2021	310
2022	604
2023	1320

Several factors likely contributed to this surge in data breach class actions in 2023, including the MOVEit data breach. The shift to remote work, rise of cloud-based storage, and the escalation of sophisticated cybercriminal activity has threatened data security like never before, giving rise to more large-scale data breaches across industries and thereby prompting more lawsuits. In 2023, the Judicial Panel on Multidistrict Litigation consolidated more than 100 class actions arising from an alleged Russian cybergang's exploitation of a vulnerability in the file transfer software MOVEit. See *In Re MOVEit Customer Data Security Breach Litigation*, MDL No. 3083 (J.P.M.L. Oct. 4, 2023). Further, whereas data breach actions pursued a decade ago faced little prospect of success, recent court decisions provided a roadmap for plaintiffs to attempt to show standing and successfully plead duty, causation, and damages, thereby providing additional momentum for the plaintiffs' class action bar.

The U.S. Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez, et al.*, 141 S.Ct. 2190 (2021), has presented a fundamental threshold challenge for many data breach class action plaintiffs – *i.e.*, whether the plaintiff suffered a concrete injury such that he or she has standing to assert a claim. In *TransUnion*, the Supreme Court ruled that certain putative class members, who did not have their credit reports shared with third parties, did not suffer concrete harm and, therefore, lacked standing to sue. Since the *TransUnion* decision, standing has emerged as a key defense to data breach litigation because the plaintiffs often have difficulty demonstrating that class members suffered concrete harm.

Courts, however, have continued to disagree over the application of *TransUnion* in the data breach context and have handed down varying decisions. For instance, whereas some courts have found allegations of mere access to personal information insufficient, courts have disagreed as to the amount of harm and level of causation plaintiffs must plead to maintain a claim.

In *Ruskiewicz, et al. v. Oklahoma City University,* 2023 U.S. Dist. LEXIS 178928 (W.D. Okla. Oct. 4, 2023),

Duane Morris Class Action Review – 2024

for example, the plaintiff alleged that an unauthorized third party accessed and stole her personal information during a data breach, released it into the public domain, and, because of the data breach, she faced a heightened risk of identity theft. The plaintiff claimed that she was required to take mitigation measures, including "placing 'freezes' and 'alerts' with credit reporting agencies, contacting [her] financial institutions, closing or modifying financial accounts, and closely reviewing [her] credit reports." *Id.* at *5. The court granted the defendant's motion to dismiss on the basis that a plaintiff suing for damages and injunctive relief from a data breach based on a risk that fraud or identity theft may occur in the future, without any facts to show a misuse of the data had occurred, failed to allege a concrete injury and lacked standing. *Id.* at *6; *see, e.g.*, *Holmes v. Elephant Insurance Co.*, 2023 U.S. Dist. LEXIS 110161 (E.D. Va. June 26, 2023) (holding that allegations regarding an increased risk of harm from future fraud or identity theft and time spent on preventative and mitigation efforts, such as monitoring credit and financial documents, did not demonstrate Article III standing).

In *Bohnak, et al. v. Marsh & McLennan Co.*, 2023 U.S. App. LEXIS 22390 (2d Cir. Aug. 24, 2023), by contrast, the plaintiff alleged that an unauthorized third party accessed her name and Social Security number through a targeted data breach. The district court granted the defendants' motion to dismiss for lack of standing, finding that the risk of future misuse of her personal information did not give rise to standing. On appeal, the Second Circuit reversed. It held that, under *TransUnion*, "disclosure of private information" is sufficiently "concrete" for purposes of Article III, and the fact that plaintiff alleged that she incurred "out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft" and "lost time" and other "opportunity costs" associated with attempting to mitigate the consequences of the data breach, was sufficient. *Id.* at *19; *see Florence, et al. v. Order Express, Inc.*, 2023 U.S. Dist. LEXIS 89410 (N.D. Ill. May 23, 2023) (finding loss of privacy resulting from data breach, including the mitigation costs, constituted a concrete injury).

Courts continue to grapple with the application of *TransUnion* in the data breach context, where many plaintiffs are unaware or unable to identify any concrete harm traceable to the alleged exposure of their information. Thus, while it is well-settled that individuals who have experienced direct economic injury from a breach (such as fraudulent charges) have legal standing, courts have disagreed as to the standing of persons who have not contended that an unauthorized party misused their data.

Plaintiffs who clear the standing hurdle as to their own claims relative to their ability to demonstrate an injury from the alleged data breach have continued to face a larger and more daunting obstacle at the class certification phase. Indeed, only 16% of the class certification decisions issued in data breach cases in 2023 came out in favor of plaintiffs. Some of this difficulty arises from the problem of uninjured class members.

By definition, individuals who did not suffer injury as the result of the defendant's conduct cannot maintain claims, and courts do not have the power to award them relief. As the U.S. Supreme Court reiterated in *TransUnion*, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez, et al.*, 141 S.Ct. 2190, 2208 (quoting *Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 466 (2016). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.*

Courts have continued to grapple with the application of these concepts in the class certification context. In particular, they disagree over whether to certify a class, a plaintiff must demonstrate that every putative class member has standing or, stated differently, must demonstrate that the class excludes those individuals who did not suffer harm. In *TransUnion*, the Supreme Court expressly left open the question of "whether every class member must demonstrate standing before a court certifies a class." *Id.* at n.4. Such a requirement has significant consequences in the data breach context.

In *Steinmetz, et al. v. Brinker International, Inc.*, 2023 U.S. App. LEXIS 17539 (11th Cir. July 11, 2023), for instance, the plaintiffs alleged that hackers targeted Chili's restaurant systems, stole customer data and

personally identifiable information, and posted that information on an online market place for stolen payment data. *Id.* at *2-3. Two named plaintiffs also alleged that, after their visits to Chili's, they had unauthorized charges on their credit cards. *Id.* After the district court certified a nationwide class and California state-wide class, the Eleventh Circuit vacated the district court's ruling. The Eleventh Circuit held that, although the plaintiffs alleged a concrete injury sufficient to demonstrate Article III standing, the phrase "data accessed by cybercriminals" in both class definitions was too broad and the class would have to be limited to "cases of fraudulent charges or posting of credit information on the dark web." *Id.* at *15. The Eleventh Circuit determined that the district court needed to refine the class definition to include those two categories only and then conduct a new predominance analysis as to uninjured individuals who simply had their data accessed.

Similarly, in *Attias, et al. v. Carefirst, Inc.,* 344 F.R.D. 38 (D.D.C. Mar. 28, 2023), the plaintiffs filed a class action alleging that unauthorized individuals accessed the names, birth dates, email addresses, and subscriber identification numbers for over a million insureds. The district court denied plaintiffs' motion for class certification. The court found that the plaintiffs met the requirements for Rule 23(a), but it expressed concerns about predominance. The court found potential individualized issues related to demonstrating class-wide injury-in-fact, particularly if the injuries for some class members were only future speculative injuries. For these reasons, the court ruled that the plaintiffs failed to meet the predominance requirement of Rule 23 and denied the motion for class certification.

Given the potency of the standing defense, we anticipate that it will continue to occupy a center-stage role in data breach litigation, particularly as plaintiffs attempt to maneuver around negative precedent at the outset to state a claim, only to encounter a similar obstacle at the class certification stage on a broader scale.

Trend #5 – U.S. Supreme Court Rulings Continue To Impact The Class Action Landscape

As the ultimate referee of law, the U.S. Supreme Court traditionally has defined the playing field for class action litigation and, through its rulings, has impacted the class action landscape. The past year did not buck that trend. On June 29, 2023, the U.S. Supreme Court ruled in *Students for Fair Admissions, Inc., et al. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), that two colleges and universities that considered race as a factor in the admissions process violated the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964. The ruling is fueling controversy along with a wave of claims that is likely to expand.

1. The U.S. Supreme Court's Decision

Students for Fair Admissions, an advocacy group, brought two lawsuits alleging that the use of race as a factor in admissions by Harvard and the University of North Carolina, respectively, violated Title VI and the Equal Protective Clause of the Fourteenth Amendment. The U.S. Supreme Court agreed.

After reviewing the language of the Fourteenth Amendment (no State shall "deny to any person . . . the equal protection of the laws"), the Supreme Court began its analysis by recapping its early jurisprudence, including its decision in *Brown v. Board of Education*, 347 U. S. 483, 493 (1954), wherein it held that the right to a public education "must be made available to all on equal terms." *Students*, 600 U.S. at 201, 204. The Supreme Court noted that these decisions, and others like them, reflect the broad "core purpose" of the Equal Protection Clause: "[D]o[ing] away with all governmentally imposed discrimination based on race." *Id.* at 206.

The Supreme Court explained that, accordingly, any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," which asks, first, whether the racial classification is used to "further compelling governmental interests" and, second,

Duane Morris Class Action Review – 2024

whether the government's use of race is "narrowly tailored" or "necessary" to achieve that interest. *Id.* at 206-07. In *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), the Supreme Court endorsed the view that "student body diversity is a compelling state interest" but insisted on limits in how universities consider race. In particular, the Supreme Court sought to guard against two dangers: (i) the risk that the use of race will devolve into "illegitimate . . . stereotyp[ing]" and (ii) the risk that race will be used as a negative to discriminate *against* those racial groups that are not the beneficiaries of the race-based preference. To manage its concerns, *Grutter* imposed a third limit on race-based admissions programs. "At some point," the Supreme Court held, "they must end." *Students*, 600 U.S. at 212.

In *Students for Fair Admissions*, the U.S. Supreme Court held that the defendants' race-conscious admissions systems failed each factor and, therefore, ran afoul of the Equal Protection Clause. As an initial matter, the U.S. Supreme Court found that defendants failed to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]." *Id.* at 214-17. Second, the U.S. Supreme Court held that the race-based admissions systems failed to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype. *Id.* at 218-219. The U.S. Supreme Court explained that "college admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* Third, the U.S. Supreme Court held that the admissions programs lack a "logical end point" as *Grutter* required. *Id.* at 221. As a result, the U.S. Supreme Court determined that the admissions programs "cannot be reconciled with the guarantees of the Equal Protection Clause." *Id.* at 230.

2. The Ruling's Early Impact

On July 19, 2023, in *Ultima Services Corp., et al. v. U.S. Department of Agriculture*, No. 20-CV-00041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), a district court extended *Students for Fair Admissions* to the government contracting context and held that the Small Business Association's use of racial preferences to award government contracts likewise violates the Equal Protection Clause.

Section 8(a) of the Small Business Act instructs the Small Business Administration (the SBA) to contract with other agencies "to furnish articles, equipment, supplies, services, or materials to the Government," 15 U.S.C. § 637(a)(1)(A), and to "arrange for the performance of such procurement contracts by [subcontracting with] socially and economically disadvantaged small business concerns," 15 U.S.C. § 637(a)(1)(B). The SBA adopted a regulation creating a "rebuttable presumption" that "Black Americans; Hispanic Americans; Native Americans; Asian Pacific Americans [; and] Subcontinent Asian Americans" are "socially disadvantaged." 13 C.F.R. § 124.103(b)(1).

The district court held that the § 8(a) program does not satisfy strict scrutiny. First, the Administration did not assert a compelling interest. The district court reasoned that while the government "has a compelling interest in remediating specific, identified instances of past discrimination," the program lacked any such stated goals. *Id.* at *11. Second, the district court held that, even if the SBA had a compelling interest in remediating specific past discrimination, the § 8(a) program was not narrowly tailored to serve that alleged compelling interest. *Id.* at *14. The § 8(a) program had no logical end point or termination date, was both underinclusive and overinclusive relative to its "imprecise" racial categories, and failed to review race-neutral alternatives.

The district court concluded that the defendants' use of the rebuttable presumption violated Ultima's Fifth Amendment right to equal protection, and it enjoined defendants from using the rebuttable presumption of social disadvantage in administering the program. *Id.* at *18.

Although the district court in *Ultima* limited its holding to the use of a "rebuttable presumption" in administration of § 8(a) programs, in addressing the requirement that racially conscious government programs must have a "logical end point," it cited *Students for Fair Admissions* and noted that "its reasoning is not limited to just [college admissions programs]." *Id.* at *15 n.8. Thus, the first opinion considering the impact of *Students for Fair Admissions* extended it beyond college admissions, reflecting the decision's potential to fuel claims asserted under 42 U.S.C. § 1981, Title VII, and other anti-discrimination statutes.

3. Implications For Class Action Litigation

The Supreme Court's decision has also caused private sector employers to question whether the ruling impacts their diversity, equity, and inclusion (DEI) initiatives. While politicians moved quickly to stake out positions on the issue, the plaintiffs' class action bar and advocacy groups moved to take advantage of the uncertainty to line up a deluge of claims.

In the wake of *Students for Fair Admissions*, the Office for Federal Contractor Compliance Programs (OFCCP), the office responsible for overseeing affirmative action programs for federal contractors, promptly updated its website to state that its affirmative action programs are separate from those that educational institutions implemented to increase racial diversity in their student bodies. The OFCCP stated that "[t]here continue to be lawful and appropriate ways to foster equitable and inclusive work environments and recruit qualified workers of all backgrounds."

Likewise, in response to the decision, EEOC Chair Charlotte Burrows, a Democratic appointee, promptly issued a statement declaring that the decision "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

By contrast, Andrea Lucas, a Republican-appointed EEOC Commissioner, emphasized a different sentiment in a Fox News interview regarding the impact of *Students for Fair Admissions*: "I think this [decision] is going to be a wake-up call for employers. . . . Even though many lawyers don't use the word affirmative action, it's rampant today. . . . Pretty much everywhere there is a ton of pressure . . . across corporate America to take race-conscious . . . actions in employment law. That's been illegal and it is still illegal." As to potential challenges, she added: "I have noticed an increasing number of challenges to corporate DEI programs and I would expect that this decision is going to shine even more of a spotlight about how out of alignment some of those programs are. . . I expect that you are going to have a rising amount of challenges."

Consistent with predictions, in the wake of the U.S. Supreme Court's ruling, Republican Attorneys General from 13 states and Senator Tom Common of Arkansas sent a letter to the CEOs of Fortune 100 companies stating: "[T]oday's major companies adopt explicitly . . . discriminatory practices [including], among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement." They urged the companies to cease unlawful hiring practices. In response, 21 Democratic Attorneys General sent a letter condemning the Republican Attorneys General's "attempt at intimidation": "While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences...[w]e write to reassure you that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination."

16

On September 19, 2023, Students for Fair Admissions filed a lawsuit in the U.S. District Court for the Southern District of New York seeking to end race-conscious admissions at the U.S. Military Academy. . *See Students for Fair Admissions v. U.S. Military Academy at West Point, et al.*, No. 7:23 Civ. 08262 (S.D.N.Y.). The group alleged that the admissions program at West Point, which takes race into account in its admissions process for future Army officers, is unconstitutional and unnecessary for a service that relies on soldiers following orders regardless of skin color.

The group filed a similar action against the U.S. Naval Academy on October 5, 2023, in the U.S. District Court for the District of Maryland. *See Students for Fair Admissions v. U.S. Naval Academy, et al.*, No. 23-CV-2699 (D. Md.). The group seeks to prevent the Naval Academy in Annapolis, Maryland from taking race into account in the selection of an entering class of midshipmen. After filing suit, the group promptly sought a preliminary injunction.

On December 20, 2023, a federal judge denied a request to temporarily bar the Naval Academy from using race in its admissions process while the parties litigate the case. *Students for Fair Admissions v. U.S. Naval Academy*, No. 23-CV-2699, 2023 WL 8806668, at *1 (D. Md. Dec. 20, 2023) (noting that plaintiff's requested injunctive relief "would undoubtedly alter the status quo," and, at this stage, the parties have not developed a factual record from which the court can determine whether the Naval Academy's admissions practices will survive strict scrutiny).

On October 4, 2023, another advocacy group, the America First Legal Foundation asked the EEOC to launch an investigation into Salesforce's allegedly "unlawful employment practices" claiming that, through its programs promoting diversity and equality, it engaged in unlawful race-based and sex-based discrimination. The group has lodged similar accusations against than a dozen other companies alleging that they maintain programs that aim to increase workplace representation of women and minorities at the expense of White, heterosexual men. The American Alliance for Equal Rights filed lawsuits against additional companies, including law firms, claiming that their grants and programs excluded individuals based on their race.

Finally, on December 19, 2023, a Wisconsin attorney represented by the Wisconsin Institute for Law & Liberty filed suit alleging that a clerkship program maintained by the Wisconsin State Bar is unconstitutional because its eligibility requirements and selection processes discriminate among students based on various protected traits, primarily race. *See Suhr v. Dietrich, et al.*, Case No. 23-CV-01697 (E.D. Wis.). He claims that members of Bar leadership are violating his First Amendment rights because they are using his mandatory dues as a practicing attorney to fund the program.

As these questions continue to percolate, and courts start to weave a patchwork quilt of rulings, such uncertainty is likely to fuel class action filings and settlements in the workplace class action space at an increasing rate. Companies should expect to see more governmental enforcement activity, litigation focused on alleged "reverse" discrimination, and claims challenging DEI initiatives.

Trend #6 – PAGA Filings Reached An All-Time High

In 2023, employers saw claims filed under the California Private Attorneys General Act (PAGA) reach an all-time high. According to data maintained by the California Department of Industrial Relations, the number of PAGA notices filed with the LWDA has increased exponentially over the past two decades, from 11 in 2006 to 7,780 in 2023.

The PAGA created a scheme to "deputize" private citizens to sue their employers for penalties associated with violations of the California Labor Code on behalf of other "aggrieved employees," as well as the State. A PAGA plaintiff may pursue claims on a representative basis, *i.e.*, on behalf of other allegedly aggrieved employees, but need not satisfy the class action requirements of Rule 23. In other words, the PAGA provides the plaintiffs' class action bar a mechanism to harness the risk and leverage of a representative

proceeding without the threat of removal to federal court under the CAFA and without the burden of meeting the requirements for class certification.

If successful in prosecuting such a case, aggrieved employees receive 25% of any civil penalties and pass the other 75% to the California Labor and Workforce Development Agency (LWDA). The plaintiffs' attorneys who pursue the action may collect their attorneys' fees and costs.

1. The Explosion Of PAGA Notices

According to data maintained by the California Department of Industrial Relations, the number of PAGA notices filed with the LWDA has increased exponentially over the past two decades. The number grew from 11 notices in 2006, to 1,606 in 2013, and then experienced three sizable jumps – to 4,530 in 2014, to 5,732 in 2018, and to 7,780 in 2023, each coinciding with a significant shift in the legal landscape, as discussed below. From 2013 to 2014, employers saw the largest single year increase, from 1,605 notices in 2013 to 4,532 notices in 2014, an increase of 182%.

The most significant drop in the past two decades occurred in 2022, when notices fell from 6,502 in 2021 to 5,817 in 2022, before their resurgence in 2023.

The following chart illustrates this trend.
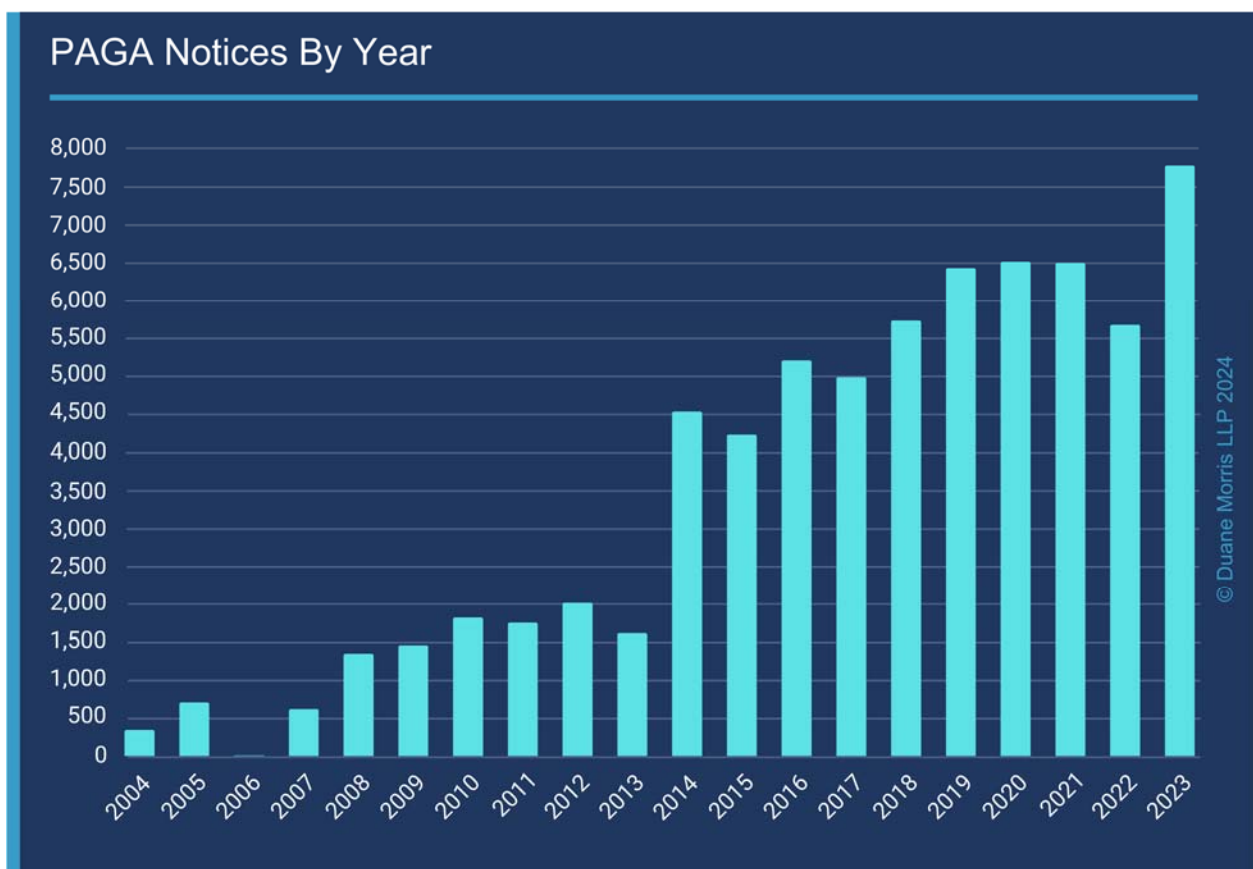
These numbers closely tie to the shifting landscape of workplace arbitration, as each of the major shifts coincides with the timing of a significant expansion or pull back in the law governing the enforcement of arbitration agreements.

Duane Morris Class Action Review – 2024

2. The PAGA As A Work-Around To Arbitration

The proliferation of mandatory arbitration programs started as early as 1991 when the U.S. Supreme Court issued *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The movement did not gain steam, however, until 2011 when the U.S. Supreme Court issued its ruling in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and held that the Federal Arbitration Act (FAA) preempts state rules that stand "as an obstacle to the accomplishment of the FAA's objectives."

In the wake of *AT&T Mobility*, arbitration programs gained a boost in their popularity. Such programs provided companies a mechanism to contract around class and collective actions. Through a form agreement, offered as a condition of an employment relationship or transaction, for instance, a company could require its employees and customers to resolve any disputes on an individual basis through private, binding arbitration.

The growing popularity of such programs led the plaintiffs' class action bar to identify work-arounds. The California Supreme Court cemented the PAGA as the frontrunner for employment-related claims with its decision in *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4th 348 (Cal. 2014). In *Iskanian*, the California Supreme Court seemingly immunized the PAGA from arbitration programs when it held that representative action waivers in arbitration agreements are "contrary to public policy and unenforceable as a matter of state law." *Id.* at 384.

In rendering its decision, the California Supreme Court distinguished *AT&T*, reasoning that, whereas the FAA aims to ensure an efficient forum for the resolution of private disputes, a PAGA action "is a dispute between an employer and the state Labor and Workforce Development Agency." *Id.*

Iskanian cleared the PAGA as a mechanism by which to maintain a representative action unhindered by arbitration agreements or commitments to arbitrate on an individual basis. The decision undoubtedly fueled the filing of PAGA notices in 2014, which catapulted from 1,606 in 2013 to 4,530 in 2014.

The PAGA workaround experienced another boost in October 2018, when the U.S. Supreme Court bolstered the enforceability of class and collective action waivers in arbitration agreements with its decision in *Epic Systems Corp. v. Lewis, et al.*, 138 S.Ct. 1612 (2018), clearing the path to widespread adoption of arbitration programs. In the wake of *Epic Systems*, PAGA notices reached a new level, jumping from 4,984 in 2017, to 6,431 in 2019, reflecting PAGA's expanding popularity as a work-around.

The PAGA-workaround movement suffered its first significant set-back in 2022 with the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana, et al.*, 142 S.Ct. 1906 (2022). In *Viking River*, the U.S. Supreme Court held that, to the extent *Iskanian* precludes division of PAGA actions into individual and non-individual claims, and thereby "prohibit[s] parties from contracting around this joinder device," the FAA preempts such rule. *Id.* Thus, it concluded in the case before it that the lower court should have compelled arbitration of the plaintiff's individual PAGA claims.

The U.S. Supreme Court then addressed the remaining question – what the lower court should have done with Moriana's remaining non-individual or representative claims. The Supreme Court opined that the PAGA provides no mechanism to enable a court to adjudicate non-individual claims once an individual claim has been committed to a separate proceeding. As a result, the U.S. Supreme Court opined that Moriana lacked statutory standing to continue to maintain her non-individual claims in court, and the lower court should have dismissed the PAGA representative claims. *Id.*

Following *Viking River*, the number of PAGA notices suffered the largest single-year drop in two decades, dropping from 6,502 in 2021, to 5,817 in 2022.

3. The PAGA's Resurgence

Although the PAGA workaround suffered its first significant set-back in 2022 with the U.S. Supreme Court's decision in *Viking River*, the set-back was short lived as, in 2023, the California Supreme Court minimized the impact of the *Viking River* decision.

In *Adolph v. Uber Technologies, Inc.*, 14 Cal. 5th 1104 (Cal. 2023), the California Supreme Court took up the issue of whether, under California law, a PAGA plaintiff whose individual claims are compelled to arbitration retains standing to bring representative claims. The California Supreme Court disagreed with the U.S. Supreme Court's interpretation of California law and held that, once a PAGA plaintiff's individual claims are compelled to arbitration, the plaintiff retains standing to maintain non-individual PAGA claims in court so long as he is an "aggrieved employee." *Id.* at 1105.

Adolph, an Uber delivery driver, asserted that Uber misclassified him as an independent contractor. Adolph amended his complaint to allege PAGA claims, and Uber moved to compel arbitration. The trial court denied Uber's motion to compel arbitration, and the California Court of Appeal affirmed, citing the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles*, 59 Cal.4th 348 (2014). Uber filed a petition for review and, while it was pending, the U.S. Supreme Court issued its decision in *Viking River*.

In a unanimous decision, the California Supreme Court disagreed with the U.S. Supreme Court's interpretation of the PAGA. The California Supreme Court held that, so long as an employee alleges that he has been aggrieved by a violation of the Labor Code, he maintains standing under the PAGA. As a result, after a court compels an individual PAGA claims to arbitration, the plaintiff retains standing to pursue his representative PAGA claims in court.

As to logistics, the California Supreme Court clarified several items. First, even though individual PAGA claims may be pending in arbitration and representative PAGA claims pending in court, the claims remain one action, and the court may stay the representative action pending completion of arbitration. Second, if the plaintiff loses in arbitration, at that point, the plaintiff loses standing to maintain representative PAGA claims. Third, if the plaintiff prevails in arbitration or settles his individual claims, he retains standing to return to court to pursue his representative PAGA claims on behalf of others.

By deciding that an individual who signs an arbitration agreement can return to court after arbitration to pursue representative proceedings under the PAGA, the California Supreme Court relegated arbitration agreements to a mere hurdle rather than a bar to PAGA representative actions. Given the technical requirements of California wage & hour law, coupled with the potentially crushing statutory penalties available to successful plaintiffs, we anticipate continued growth of PAGA lawsuits in 2024, with no pull back in site.

4. What's Next For The PAGA?

The California Supreme Court presently is considering two cases that significantly could impact the future popularity of PAGA lawsuits, including the ease with which plaintiffs can succeed in recovering on a representative basis.

On November 8, 2023, the California Supreme Court heard oral argument in *Estrada, et al. v. Royalty Carpet Mills, Inc.* The California Supreme Court is considering whether courts have the power to strike or limit PAGA claims based on unmanageability. In a prior decision, *Wesson, et al. v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021), the California Court of Appeal held that trial courts have inherent authority to strike or limit unmanageable PAGA claims. A few months later, the Court of Appeal in *Estrada, et al. v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022), disagreed and concluded that, while a court may limit the presentation of evidence to ensure a manageable trial, a court does not have

20

authority to strike or limit PAGA claims before trial. The California Supreme Court must issue a decision on this issue by February 2024. The California Supreme Court might hold that trial courts possess inherent authority to safeguard an employer's due process rights, which necessarily encompasses the right to gauge the manageability of and to narrow PAGA claims. Either way, *Estrada* has the potential to significantly impact the prosecution and defense of PAGA actions.

In *Turrieta, et al. v. Lyft, Inc.*, the California Supreme Court will weigh whether a PAGA plaintiff has a right to intervene, object to, or move to vacate a judgment approving a PAGA settlement in a related action. In that case, between May to July 2018, Olson, Seifu, and Turrieta, all Lyft drivers, filed separate PAGA actions alleging improper classification as independent contractors. Turrieta reached a $15 million settlement with Lyft, which included a $5 million payment to her counsel. As part of the settlement, Turrieta amended her complaint to allege all PAGA claims that could have been brought against Lyft. When Olson and Seifu got wind of the settlement, they moved to intervene and to object. The trial court denied the intervention requests, approved the settlement, and then denied motions by Olson and Seifu to vacate the judgment in the *Turrieta* PAGA action. The Court of Appeal affirmed, holding that, as non-parties, Olson and Seifu lacked standing to move to vacate the judgment. The Court of Appeal explained that the real party in interest in a PAGA action is the State, and, thus, neither Olson nor Seifu had a direct interest in the case.

Finally, in November 2024, California voters will pass on a proposed measure to repeal the PAGA and to replace it with a new law known as The Fair Pay and Employer Accountability Act. Under the proposed law, employees could not sue for civil penalties in court on behalf of the state and instead would have to file a complaint directly with the Labor Commissioner who would be a party to any lawsuit filed; all civil penalties would go to affected employees; the State would receive increased funding; and civil penalties would be doubled for "willful" violations. The measure is intended to eliminate the windfall profiteering that the plaintiffs' bar has enjoyed from the PAGA. Although preliminary polling suggests voters support the measure, the plaintiffs' bar surely will mount vociferous opposition.

Trend #7 – Government Enforcement Lawsuit Filings Reflected A Resurgence

In 2023, the EEOC's litigation enforcement activity showed that its previous slowdown in filing activity is well in the rearview mirror, as the total number of lawsuits filed by the EEOC increased from 97 in 2022 to 144 in FY 2023.

In accordance with tradition, the EEOC filed more lawsuits in September 2023, the last month of its fiscal year, than in any other month from October 2022 forward. This past year, the EEOC filed 67 lawsuits in September, up from 39 filed in September 2022.

The EEOC exhibited a renewed focus on systemic discrimination lawsuits.
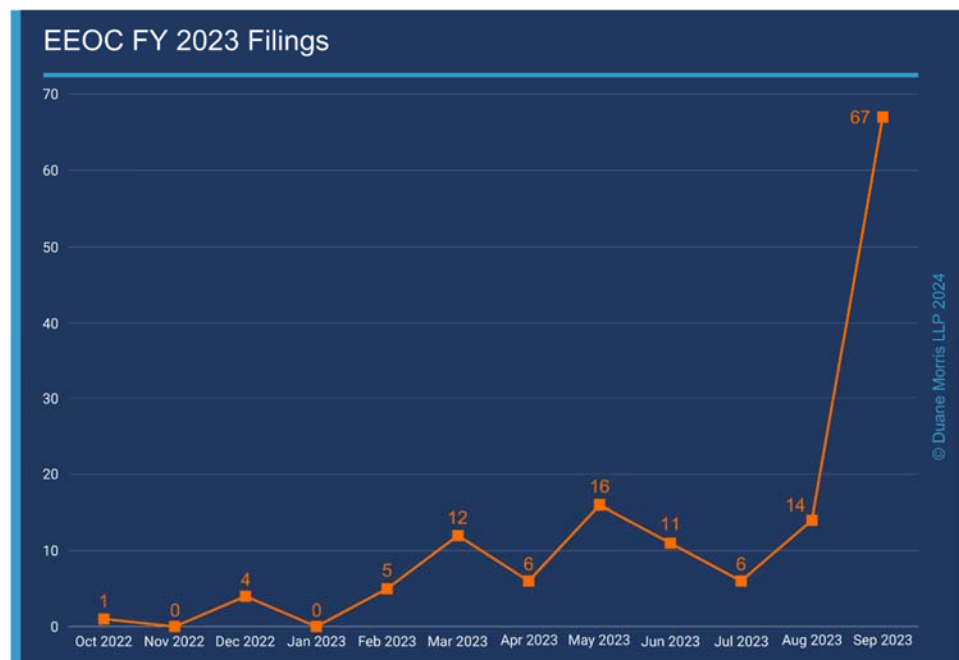
"Systemic" discrimination, according to the EEOC, involves an alleged "pattern or practice, policy and/or class … where the discrimination has broad impact on an industry, profession, company, or geographic location." The EEOC filed 25 systemic lawsuits in FY 2023, nearly double the number it filed in each of the past three years. Overall, the 2023 lawsuit filing data and strategic priorities confirm that aggressive EEOC enforcement activity is back on the menu, and the litigation filing machine is back in full throttle, with no signs of slowing down.

1. Litigation And Settlement Trends

In FY 2023, the EEOC filed 144 lawsuits, including 25 systemic lawsuits. This represents a resurgence from what we observed in FY 2022, during which the EEOC filed 97 lawsuits, including 13 systemic suits. These enforcement numbers reflect a boost over filing numbers from FY 2021, as well, during which the EEOC filed 114 lawsuits including 13 systemic lawsuits. They likewise reflect an increase over FY 2020, during which the COVID-19 pandemic pushed case filings down to 33.

The graphic shows this year-over-year filing trend:
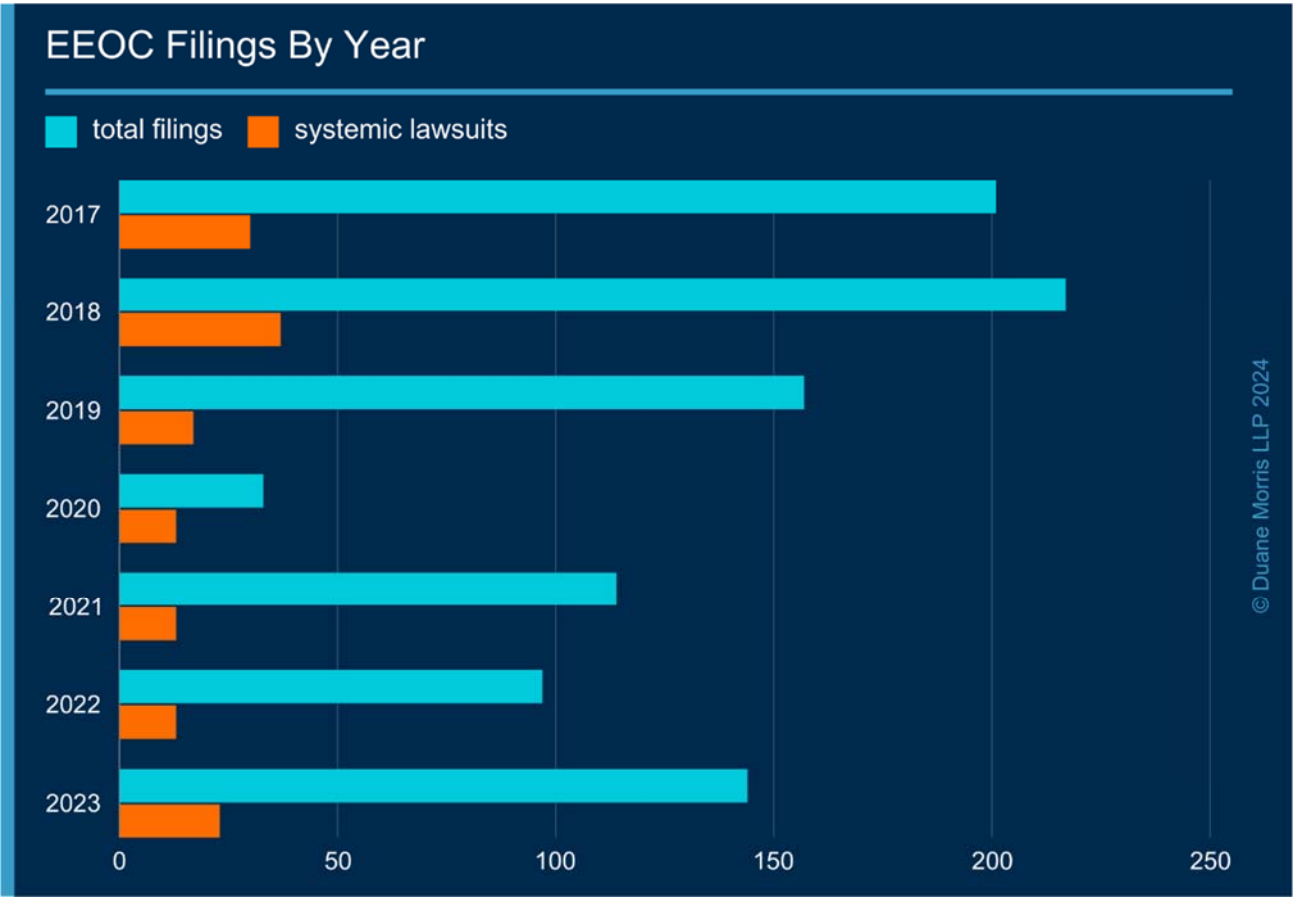
As illustrated, FY 2023 represents the highest number of filings since FY 2019, during which the EEOC filed 157 lawsuits. These numbers remain off the high water marks we observed in prior years, including 217 lawsuits in FY 2018 and 201 lawsuits in FY 2017.

Duane Morris Class Action Review – 2024

Notably, FY 2023 also reflected a resurgence in the filings from historically active district offices. In FY 2023, Philadelphia District Office had by far the most lawsuit filings with 19, followed by Indianapolis and Chicago with 13 filings, and New York and Los Angeles each with 10 filings. Charlotte, Atlanta, Dallas, Phoenix, and Memphis had 9 each, Houston had 8, Miami, Birmingham, and St. Louis had 7 each, and San Francisco had 5 filings.

The following shows the filing numbers in FY 2023 by district office:
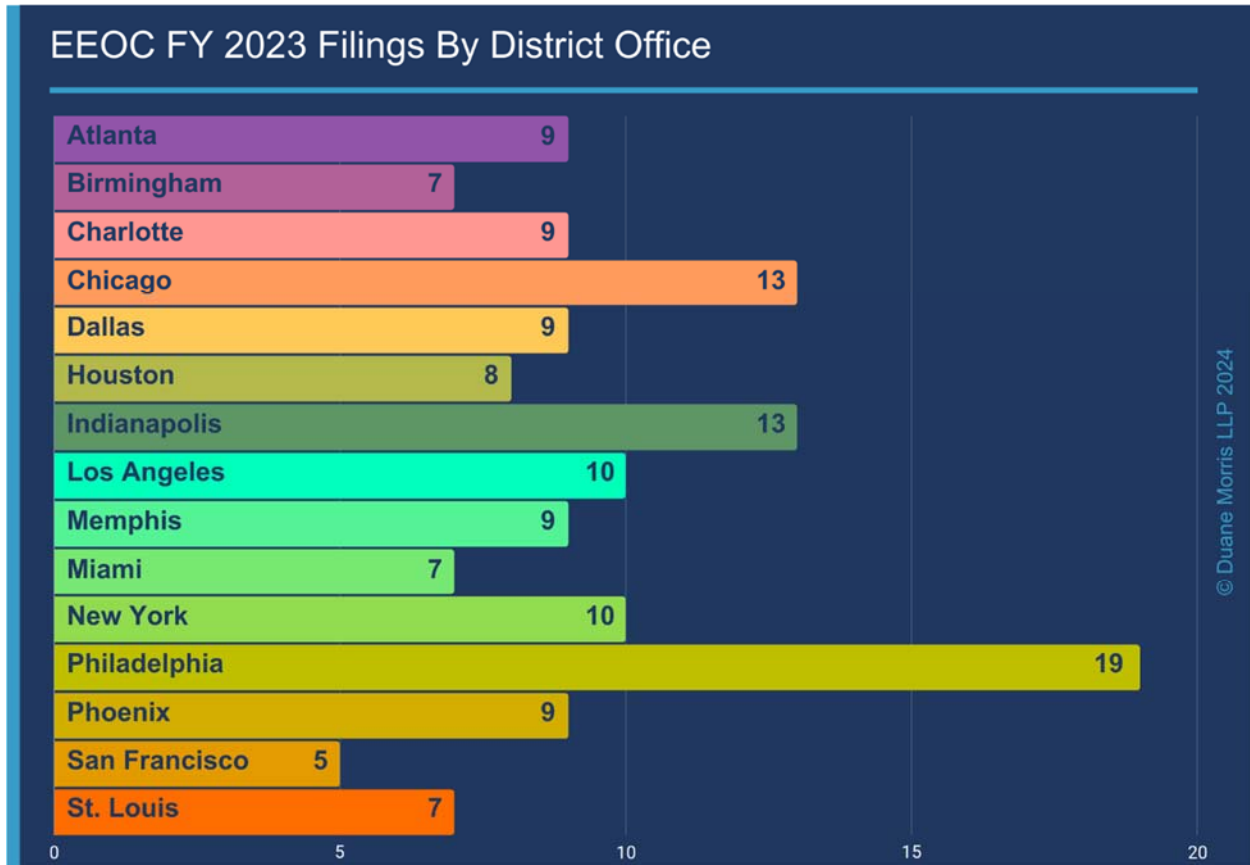
The 19 filings by the Philadelphia District Office reflects a significant increase compared to FY 2022 during which Philadelphia filed 7 lawsuits. Similarly, Indianapolis nearly doubled its filings compared to FY 2022. The number of lawsuit filings by the Chicago District Office remained steady at 13. The filings by the Miami District Office fell slightly to 7, compared to its 8 filings in FY 2022.

The balance across various District Offices throughout the country confirms that the EEOC's aggressiveness is in peak form, both at the national and regional level.

As to systemic filings, the EEOC filed 25 systemic lawsuits in FY 2023, almost double the number it filed in each of the past three fiscal years and the largest number of systemic filings in the past five years.

As to its current docket, in FY 2023, the EEOC reported that it had a total of 32 systemic cases on its docket at the end of fiscal year 2022, accounting for 18% of its active merits suits. During FY 2022, the EEOC reported 29 pending systemic cases, which accounted for 16% of the EEOC's docket.

While these numbers continue to climb, they do not yet reflect the activity that employers observed prior to FY 2018. By the end of FY 2018, the EEOC had 71 systemic cases on its active docket, two of which

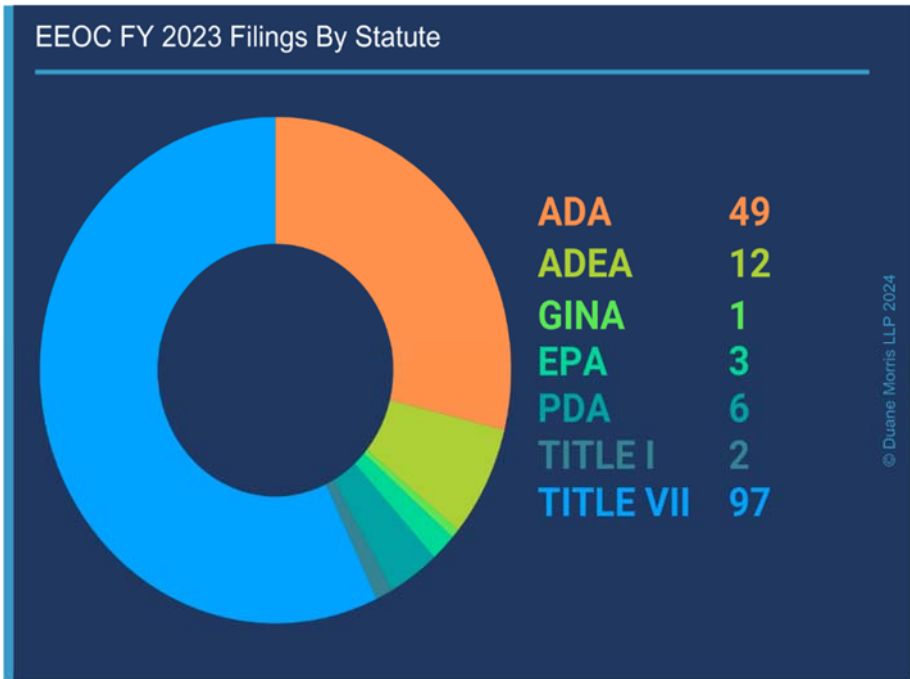included over 1,000 victims, and systemic cases accounted for 23.5% of its active docket in that year.

EEOC Recovery By Year
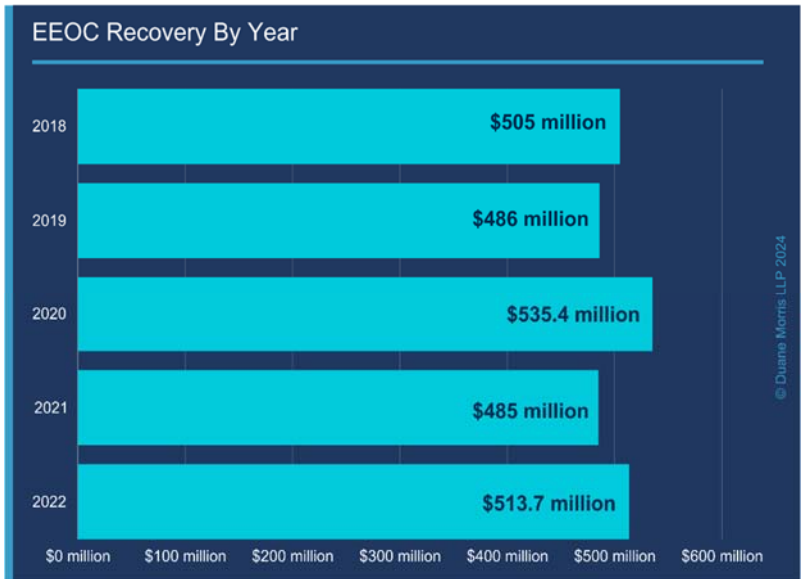
Comparing its monetary recovery to previous years, the EEOC reported that it recovered $513.7 million in all types of cases in FY 2022, an increase over its reported recovery in FY 2021, during which it recovered, $485 million. Comparing the numbers to prior years, the EEOC recovered $535.5 million in all types of cases in FY 2020, $486 million in FY 2019, and $505 million in FY 2018.

The left chart shows the year-over-year change in total recoveries.

In terms of the types of filings, FY 2023 remained generally consistent with prior years in that the EEOC filed the bulk of its lawsuits under Title VII, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA").

Title VII cases once again made up the majority of cases filed. The EEOC filed 97 cases under Title VII, making up 68% of all filings (down from 69% of filings in FY 2022 and above 61% of filings in FY 2021).

The EEOC filed more cases under the ADA this past year with 49 lawsuits, nearly twice the number of ADA lawsuits it filed in FY 2022, and, as a percentage of all filings, ADA lawsuits increased from 29.7% in FY 2022, to 34% of lawsuit filings in FY 2023.

EEOC FY 2023 Filings By Statute

Statute	Count
ADA	49
ADEA	12
GINA	1
EPA	3
PDA	6
TITLE I	2
TITLE VII	97

The EEOC filed 12 ADEA lawsuits in FY 2023, an increase from the 7 ADEA lawsuits it filed in 2022.

The following graphs show the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans with Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act) and, for Title VII cases, the theory of discrimination alleged.

EEOC FY 2023 Filings By Allegation Basis
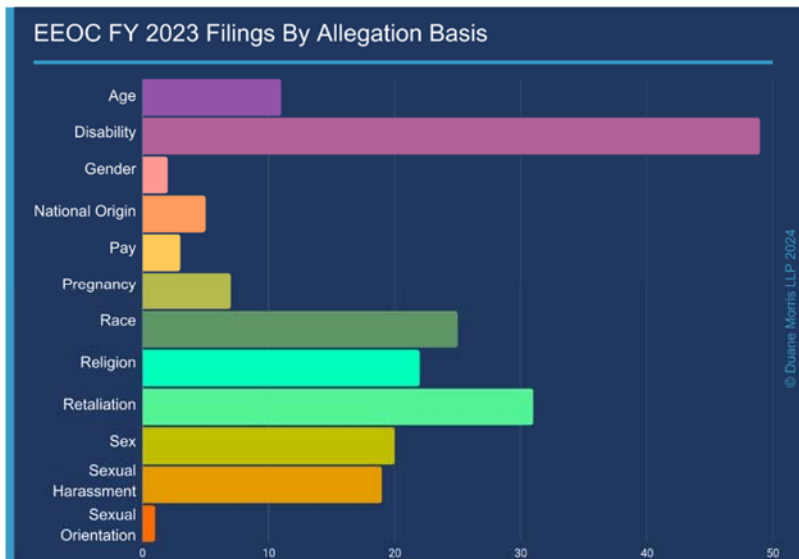
Amplifying its renewed activism, the EEOC issued a press release at the end of the fiscal year touting its increased enforcement litigation activity.

Such a media statement is unprecedented in that 2023 is the first year the EEOC issued a media statement touting its numbers, a signal that its renewed activity reflects a strategic priority.

In July 2023, the Senate confirmed Kalpana Kotagal, President Biden's nominee to fill the fifth Commissioner slot, for a term expiring in July 2027.

Upon her confirmation, Democrats gained a 3 to 2 majority among Commissioners. Employers are apt to see increased litigation enforcement activity in 2024 as the EEOC continues to gain momentum with its full component of Biden appointees and can utilize its majority power to advance its agenda.

2. What's Next For The EEOC?

Now that the EEOC has a majority of Democratic-appointed Commissioners firmly in place, along with a significantly increased proposed budget, we expect that Corporate America will see a continued expansion of enforcement activity in 2024.

Every few years the EEOC prepares a Strategic Enforcement Plan to focus and coordinate the agency's work and identify subject matter priorities. This year, the EEOC released its Strategic Enforcement Plan for Fiscal Years 2024-2028.

In the 2024-2028 Strategic Enforcement Plan, the EEOC identified three guiding principles. First, the Commission states that to maximize the EEOC's effectiveness, it will focus on those activities that have the greatest strategic impact, including systemic investigations, resolutions, and lawsuits. The EEOC thus "reaffirms its commitment to a nationwide, strategic, and coordinated systemic program as one of the EEOC's top priorities."

Second, the EEOC states that it will take an integrated approach at the agency that promotes collaboration, coordination, and information sharing throughout the agency. It explains that "[e]ffective systemic enforcement requires communication and collaboration between the EEOC's legal and enforcement units, between headquarters and the field, and across EEOC districts."

Third, the EEOC states that it will ensure that it achieves results "in accordance with the priorities set forth in the [Strategic Enforcement Plan]." This signals that the Commission will continue to emphasize and prioritize the use of systemic, pattern or practice lawsuits to accomplish its agenda.

As in years past, the Strategic Enforcement Plan also sets out the EEOC's six substantive priorities.

#1 - *Eliminating Barriers In Recruitment and Hiring* – The EEOC will focus on recruiting and hiring practices that discriminate, including, among other things the use of technology, including artificial intelligence and machine learning, to target job advertisements or assist in hiring decisions; job advertisements that exclude or discourage certain protected groups from applying; and the use of screening tools or

Duane Morris Class Action Review – 2024

requirements that disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems.

#2 - *Protecting Vulnerable Workers* – The EEOC will focus on harassment, retaliation, job segregation, discriminatory pay, disparate working conditions, among other things, that impact "particularly vulnerable workers," which include immigrant and migrant workers; people with developmental or intellectual disabilities; individuals with arrest or conviction records; LGBTQI+ individuals; temporary workers; older workers; individuals employed in low wage jobs, including teenage workers; among others.

#3 - *Addressing Selected Emerging And Developing Issues* – The EEOC will continue to prioritize issues that may be emerging or developing, which includes qualification standards and inflexible policies or practices that discriminate against individuals with disabilities; protecting workers affected by pregnancy, childbirth, or related medical conditions; and addressing discrimination influenced by or arising as backlash in response to local, national, or global events.

#4 - *Advancing Equal Pay Protections for All Workers* – The EEOC will continue to focus on combatting pay discrimination in all forms. It notes that, because many workers do not know how their pay compares to their co-workers' pay and, therefore, are less likely to discover and report pay discrimination, the EEOC will continue to use directed investigations and Commissioner Charges to facilitate enforcement.

#5 - *Preserving Access to the Legal System* – The EEOC will focus on policies and practices that discourage or prohibit individuals from exercising their rights or impede the EEOC's enforcement efforts, including, among other things, overly broad waivers, releases, or non-disclosure agreements; and unlawful, unenforceable, or otherwise improper mandatory arbitration provisions.

#6 - *Preventing and Remedying Systemic Harassment* -- The EEOC will continue to focus on combatting systemic harassment in all forms. It notes that, with respect to charges and litigation, a claim by an individual or small group may fall within this priority if it is related to a widespread pattern or practice of harassment.

Some – but certainly not all – of the EEOC's lawsuits initiated over the past year fall into one or more of these six categories. The EEOC's focus on systemic litigation underlies many of these enforcement priorities. Because the EEOC views systemic cases as having a particular strategic impact, insofar as they affect how the law influences a particular community, entity, or industry, companies should brace for the expansion of these cases.

3. Department Of Labor Enforcement Year-End Recoveries

The US Department of Labor's Wage and Hour Division recovered approximately $212.3 million in back wages in FY 2023 and concluded 20,215 compliance actions. These numbers align with the numbers we saw in FY 2022, in which the WHD recovered $213.2 million in back wages and concluded 20,422 compliance actions. The number of compliance actions, and the subsequent back wages recoveries in FY 2022-23 was measurably lower than in FY 2021 and FY 2020. In FY 2021, the WHD concluded 24,746 compliance actions and recovered $232.4 million in back wages and in 2020 it concluded 26,096 compliance actions and recovered $257.8 million in back wages.

Although the WHD back wages recoveries were down, the agency imposed civil money penalties to employers at a 10-year-high of $25.8 million for violations of federal labor laws in FY 2023. This was the highest number in a decade, and was significantly higher than the penalties assessed in 2022 ($21.6 million), 2021 ($20.4 million), and 2020 ($17.9 million).
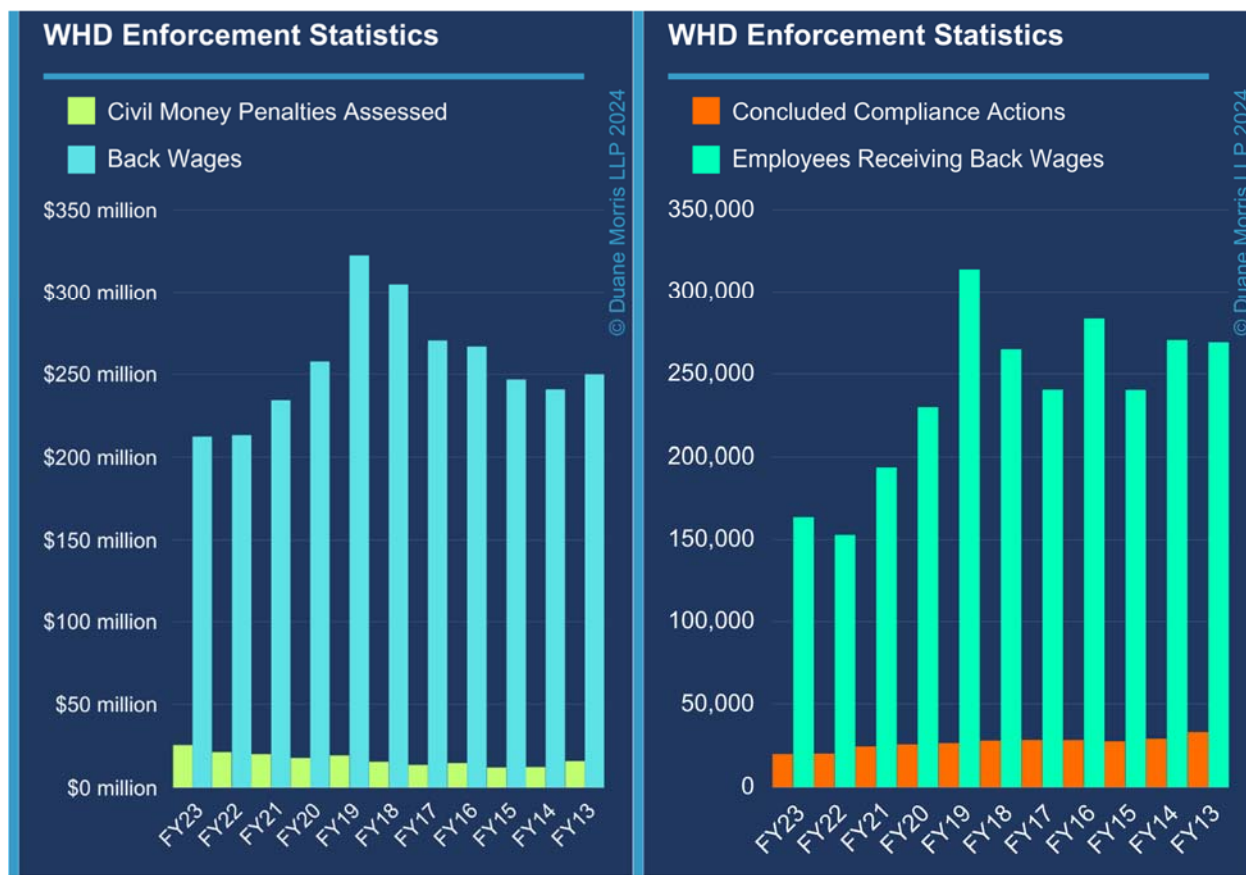
Trend #8 – Generative AI Began Transforming Class Action Litigation

Generative AI hit mainstream in 2023 and quickly become one of the most talked-about and debated subjects among corporate legal counsel across the country, as numerous companies jumped to incorporate AI while attempting to manage its risks. In 2023, we saw the tip of the iceberg relative to the ways that generative AI is poised to transform class action litigation.

1. Opportunities For Enhanced Efficiency

As the COVID 19 pandemic brought video-conferencing tools into the mainstream, such tools enabled more litigants to conduct and to attend more hearings, more depositions, and more mediations in less time. While the debate continues as to their effectiveness, generative AI is poised to enable lawyers to far surpass those gains in efficiency, potentially enabling the plaintiffs' class action bar to do "more with less" like never before, leading to more lawsuits that can be handled by fewer lawyers in less time and a potential surge of class actions on the horizon.

Less than a year into the generative AI movement, we have seen the technology influence various aspects of the legal process, including by assisting legal professionals in analyzing vast amounts of data; automating the review of documents, contracts, and communications; increasing the speed and potentially enhancing the accuracy of e-discovery; and automating and enhancing the dissemination of information in the class action settlement administration process.

27

Legal research, for example, traditionally required a time-consuming undertaking that involved sifting through dozens of decisions and secondary authorities. AI tools are enhancing this process through natural language search capabilities and machine learning algorithms that streamline the process and enhance the results. Document review similarly traditionally required a time-consuming and painstaking process. AI tools are using machine learning and text analytics, for example, to sort and categorize large datasets with increasing accuracy. By quickly analyzing extensive document sets, AI tools can expedite the discovery process, making litigation more efficient and cost-effective.

Likewise, AI has the potential to revolutionize the process of administering class action settlements. The participation in claims-made settlements, for instance, often falls within the range of 15% to 35%, depending upon various factors such as the type and method of notice. AI can be used in a variety of ways, including to find potential class members and thereby raise claim rates, while reducing administrative costs, increasing the amount available for distribution as well as the ultimate settlement payout.

In sum, the legal industry is poised to leverage this transformative technology to make leaps in enhancing the efficiency and effectiveness of the class action litigation process.

2. Risk Of Class Claims

While improving the efficiency with which the plaintiffs' class action bar can litigate class actions, generative AI is providing an ocean of raw material for potential claims. Upon hitting the mainstream, AI promptly became the subject of class claims, which span multiple theories and areas of law.

While generative AI might improve the speed of interactions, for instance, users have the ability to exploit AI to generate massive amounts of false information or to simply inadvertently rely upon errors in AI-generated communications, giving rise to claims. Similarly, the SEC has warned businesses against "AI washing," or making false claims regarding their AI capabilities, likening it to the greenwashing phenomenon that has been the target of an agency crackdown. The plaintiffs' class action bar is using such representations about AI to fuel class claims for consumer fraud based on allegedly misleading or deceptive representations about the efficacy of AI technology. In *Matsko, et al. v. Tesla,* Case No. 22-CV-5240 (N.D. Cal. Sept. 14, 2022), for instance, a plaintiff filed a class action alleging that Tesla exaggerated the capabilities of its software and asserting various causes of action for breach of warranty and violation of California consumer protection laws, among others.

Companies that incorporate AI to streamline their decision-making processes likewise face the prospect of class action suits. Plaintiffs have filed suits against insurers that used algorithms to adjudicate claims, for example, as well as against agencies that used programs to deny or reduce government benefits. In *Kisting-Leung, et al. v. Cigna Corp.*, Case No. 23-CV-01477 (E.D. Cal. 2023), for instance, a group of California consumers filed a class action complaint against a national health insurance company alleging that its use of an algorithm to deny certain medical claims constituted breach of the implied covenant of good faith and fair dealing, unjust enrichment, intentionally interfered with contractual relations, and violated California's Unfair Competition Law.

The developers of generative AI products have not remained immune. Such companies have faced a slew of class action lawsuits alleging privacy violations. In a series of lawsuits beginning in June and July 2023, the plaintiffs' class action bar has alleged that, by collecting publicly-available data to develop and train their software, developers of generative AI products stole private and personal information from millions of individuals. In *P.M., et al. v. OpenAI LP*, No. 3:2023-CV-03199 (N.D. Cal. 2023), a group of plaintiffs filed a class action suit against OpenAI LP and Microsoft, Inc. alleging that by collecting publicly-available information from the internet to develop and train its generative AI tools, including ChatGPT, Dall-E, and Vall-E, OpenAI stole private information from millions of people, violating their privacy and property rights, among other claims. In *J.L., et al. v. Alphabet Inc.*, No. 3:23-CV-03440 (N.D. Cal. 2023), the same plaintiffs' firm filed a class action lawsuit against Google, similarly alleging that, by collecting internet data to train its tools like Bard, Imagen and Gemini, Google infringed privacy rights and violated the Copyright Act.

Developers of generative AI tools similarly have faced claims. Plaintiffs have filed class action lawsuits claiming that, by collecting and using internet data to train generative AI models, developers violated copyright laws. In *Andersen, et al. v. Stability AI, Ltd.*, Case No. 23-CV-00201 (N.D. Cal. Oct. 20, 2023), for example, plaintiffs filed a class action on behalf of artists alleging that Stability AI, Ltd. and Stability AI, Inc. "scraped" billions of copyrighted images from online sources, without permission, to train their models to generate new images without ascribing credit to the original artists. In *Doe v. GitHub, Inc.*, 22-CV-06823 (N.D. Cal. May 11, 2023), the plaintiffs, a group of developers who allegedly published licensed code on GitHub's website, filed a class action lawsuit against GitHub, the online code repository, as well as Microsoft and OpenAI claiming that GitHub improperly used that code to train its AI-powered coding assistant, Copilot, without appropriate attribution in violation of copyright management laws.

As technology continues to grow and change, and the plaintiffs' class action bar continues to flex its creativity, the number and types of claims are likely to expand and evolve during the upcoming year.

Trend #9 – ESG Class Action Litigation Hit Its Stride

During the past year, the label "ESG" became "mainstream," and discussion of its impact became a recurring topic of conversation in boardrooms across the country. ESG refers to broadly to "environmental, social, and governance," which many companies have embraced as part of their business plans and corporate missions.

ESG was not immune to lawsuits, and we saw a steady influx of class action litigation in two particular ESI spheres – (i) product advertising and (ii) employment and DEI-related lawsuits.

The former focused on product advertising and, in particular, on allegations that marketing campaigns touting products as "green" or "sustainable" or "carbon neutral," among other things, are false, misleading, and deceptive. Commonly called "greenwashing," these claims generally refer to false or misleading statements about the environmental benefits or about the performance of particular products or operations and, in particular, tend to target statements touting the "green" or "sustainable" or "eco-friendly" characteristics of such products or operations.

Most often, plaintiffs' class action attorneys file greenwashing lawsuits as class actions. These lawsuits largely focus on claims that defendants marketed products as "environmentally responsible," "sustainably sourced," or "humanely raised," arguing that such misleading claims induce purchasers to pay a premium

for "greener" products.

In *Smith, et al. v. Keurig Green Mountain, Inc.*, No. 4:18-CV-06690 (N.D. Cal.), for example, the plaintiffs filed a class action lawsuit asserting various claims, including breach of warranty, misrepresentation, and violation of the California Unfair Competition Law, targeting Keurig's representations regarding its K-cup coffee pods. In particular, Keurig marketed its K-cups as recyclable with labeling that consumers could "[h]ave [their] cup and recycle it, too." The plaintiffs claimed that, in fact, the K-cups were not recyclable. In 2019, the court denied Keurig's motion to dismiss, and, in 2020, the court granted the plaintiff's motion for class certification. In February 2023, the court granted final approval of class action settlement for $10 million.

In *Dwyer, et al. v. Allbirds*, 598 F. Supp. 3d 137 (S.D.N.Y. 2022), the plaintiff filed a similar greenwashing class action alleging that defendant marketed its shoes, in part, based on their sustainability using statements like "Sustainability Meets Style" and "Environmentally Friendly." The plaintiff brought claims for breach of express warranty, fraud, and unjust enrichment and asserted violations of §§ 349-350 of the New York General Business Law. Allbirds maintained a website showing the carbon footprint associated with its products based on a life-cycle analysis (LCA), and showing the environmental impact of its materials based on the third-party Higg Material Sustainability Index (Higg MSI). The plaintiff attacked the LCA tool and the Higg MSI standard as incomplete measurements of product sustainability. The court granted Allbirds' motion to dismiss for failure to state a claim.

In *Lizama, et al. v. H&M Hennes & Mauritz LP*, No. 4:22-CV-1170 (E.D. Mo. 2023), the plaintiffs filed a class action complaint alleging that the retailer deceptively attempted to "greenwash" its allegedly environmentally damaging practices. H&M's "Conscious Choice" collection included items made from recycled and organic materials that H&M marketed as "more sustainable." The plaintiffs alleged that, in fact, H&M's clothing was not sustainable because the synthetic materials in the collection had a negative environmental impact. The plaintiffs asserted claims for violation of various California and Missouri statutes and sought to certify various sub-classes. On May 12, 2023, the court granted the defendant's motion to dismiss the California claims for lack of personal jurisdiction and dismissed the Missouri claims because it found the alleged statements not misleading as a matter of law.

Relative to employment and DEI-related lawsuits, the plaintiffs' class action bar focused numerous claims based on allegations that companies failed to live up to their representations regarding diversity, equity, and inclusion or breached their DEI commitments.

Plaintiffs anchored many of their class claims on board-related DEI commitments, employment discrimination, and workplace safety issues. In the corporate DEI cases, plaintiffs asserted claims that companies allegedly failed to live up to their DEI commitments or failed to abide by their DEI policies or practices. In many of the ESG-related employment discrimination cases, plaintiffs focused on claims that corporate officers or directors breached their fiduciary duties by failing to address employment discrimination, by adopting policies that discriminate, or by failing to address safety concerns.

In *Bucks County Employees Retirement System v. Norfolk Southern Corp.*, No. 2:23-CV-982 (N.D. Ga. 2023), for instance, the plaintiff filed a securities class action against the defendant and three of its managers alleging that they misrepresented the corporation's worker safety practices prior to a chemical train derailment, leading investors to purchase company stock at inflated levels. The plaintiff alleged that the defendants committed to safety as a "core value" in their public statements and SEC filings but, in reality prioritized more lucrative practices at the expense of safety, such as longer and heavier trains and lower headcounts. The plaintiff asserted that such culture of "increased risk-taking" made the company more vulnerable to derailments.

As companies continue to add statements regarding their environmental impact or social responsibility to enhance their marketing efforts, communicate their company values, and/or attempt to appeal to
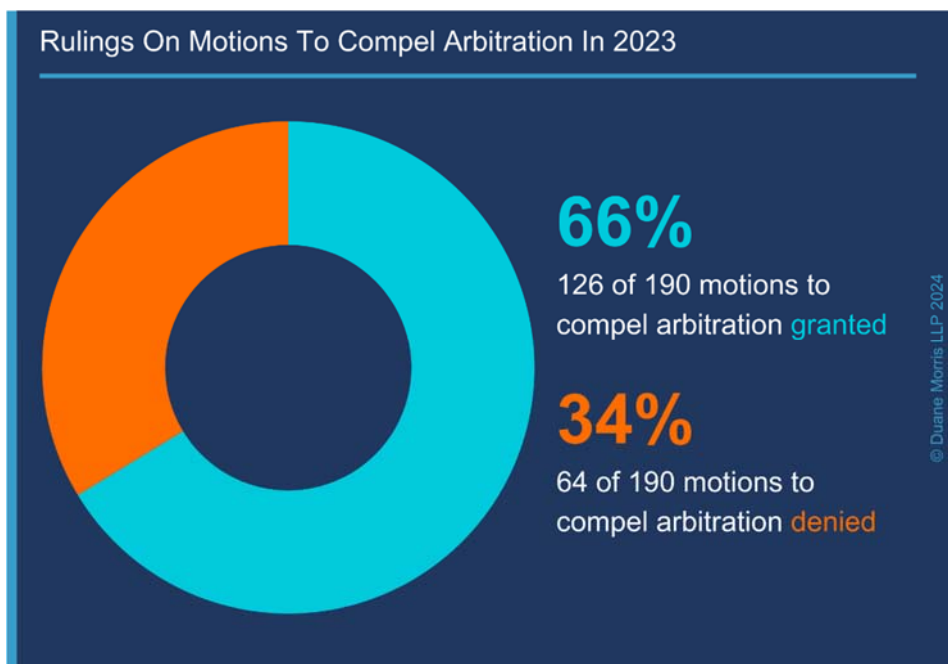
Duane Morris Class Action Review – 2024

consumers and shareholders attuned to ESG considerations, we expect to see ESG class actions continue their growth trajectory.

Trend #10 – Arbitration Agreements Remained An Effective Tool To Cut Off Class Actions

Of all defenses, a defendant's ability to enforce an arbitration agreement containing a class or collective action waiver may have had the single greatest impact in terms of shifting the pendulum of class action litigation.

With its decision in *Epic Systems Corp. v. Lewis, et al.,* 138 S. Ct. 1612 (2018), the U.S. Supreme Court cleared the last hurdle to widespread adoption of such agreements. In response, more companies of all types and sizes updated their onboarding materials, terms of use, and other types of agreements to require that employees and consumers resolve any disputes in arbitration on an individual basis. To date, companies have enjoyed a high rate of success enforcing those agreements and using them to thwart class actions out of the gate.

Statistically, corporate defendants fared well in asserting the defense. Across various areas of class action litigation, the defense won approximately 66% of motions to compel arbitration (approximately 123 motions across 187 cases) over the past year. Such numbers are similar to the numbers we saw in 2022, where defendants succeeded on 67% of motions to compel arbitration (roughly 64 motions granted in 96 cases). The following graph shows this trend:

Rulings On Motions To Compel Arbitration In 2023

66%
126 of 190 motions to compel arbitration granted

34%
64 of 190 motions to compel arbitration denied

© Duane Morris LLP 2024

Despite a tumultuous year in 2022, the arbitration defense in 2023 remained one of the most powerful weapons in the defense toolkit in terms of avoid class and collective actions.

In 2022, the U.S. Supreme Court limited application of the FAA to workers who participate in interstate transportation and, perhaps more significantly, on the legislative front, Congress significantly limited the availability of arbitration for cases alleging sexual harassment or sexual assault. Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the Ending Forced Arbitration Act or EFAA), and President Biden signed the Act into law on March 3, 2022.

The EFAA amended the FAA and provided plaintiffs the discretion to enforce pre-dispute arbitration provisions in cases where they allege conduct constituting "a sexual harassment dispute or a sexual assault dispute" or are the named representatives in "a class or in a collective action alleging such conduct." In other words, the Act did not render such agreements invalid, but allowed the party bringing the sexual assault or sexual harassment claims to elect to enforce them or to avoid them.

It is likely that defendants have not yet felt the impact of either development.

1. The Impact Of The EFAA

Despite this setback for the arbitration defense in 2022, companies continued to enjoy a high rate of success enforcing these agreements and using them to thwart class actions in 2023. Since the EFAA became effective on March 3, 2022, courts have issued only 34 published decisions on plaintiffs' attempts to use the EFAA to avoid arbitration. Plaintiffs succeeded in enforcing the EFAA and keeping claims in court, in whole or in part, in only about 9 of those rulings.

Many of the decisions denying enforcement of the EFAA turned on the fact that the EFAA is not retroactive. Congress provided that the provisions of the Ending Forced Arbitration Act would "apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act [March 3, 2022]." Thus, although courts have disagreed as to when disputes or claims "arise or accrue" for purposes of the EFAA, in many cases, all potential dates pre-dated March 3, 2022, and, therefore, courts concluded that the Act did not apply.

Many courts recognized an exception in cases where plaintiffs were able to allege a "continuing violation" that extended past March 3, 2022, generally finding that the EFAA allowed such claims to remain in court. In *Betancourt, et al. v. Rivian Automotive*, No. 22-CV-1299, 2023 WL 5352892, at *1 (C.D. Ill. Aug. 21, 2023), for example, plaintiff filed a class action lawsuit alleging that she was regularly subjected to unwanted sexual advances during her employment from December 6, 2021, through "about June 1, 2022," and, despite making reports to several supervisory level employees, defendant failed to remedy the conduct. The defendant invoked its arbitration agreement with the plaintiff, which included a class and collective action waiver, and the plaintiff claimed that the agreement was unenforceable due to the EFAA. *Id.* at *2. Acknowledging that the EFFA does not apply retroactively, the court considered whether the action accrued before March 3, 2022, and held that it did not. The court reasoned that the plaintiff alleged a continuing violation, which was ongoing on the date the EFAA was enacted, and, therefore, the arbitration agreement and class action waiver were unenforceable. *Id.* at *5.

Approximately 12 of the decisions turned on court interpretations regarding the scope of the EFAA, and we observed the beginnings of a patchwork quilt of interpretations as to the scope of the claims subject to the EFFA. In *Johnson, et al. v. Everyrealm, Inc.*, 657 F. Supp. 3d 535 (S.D.N.Y. 2023), for instance, the plaintiff brought claims for race discrimination, pay discrimination, sexual harassment, retaliation, and intentional infliction of emotional distress, among other things, and the defendant moved to dismiss the sexual harassment claim and to compel arbitration of the remainder. The court denied the motion. It noted that, in its operative language, the EFAA makes a pre-dispute arbitration agreement invalid and unenforceable "with respect to a *case* which is filed under Federal, Tribal, or State law and relates to the . . . sexual harassment dispute." *Id.* at 558 (quoting 9 U.S.C. § 402(a) (emphasis added)). It found such text "clear, unambiguous, and decisive as to the issue." *Id.* As a result, the district court concluded that plaintiff pled a plausible claim of sexual harassment in violation of New York law and "construe[d] the EFAA to render an arbitration clause unenforceable as to the entire case involving a viably pled sexual harassment dispute, as opposed to merely the claims in the case that pertain to the alleged sexual harassment." *Id.* at 541.

In *Mera, et al. v. SA Hospitality Group, LLC*, No. 1:23 Civ. 03492 (S.D.N.Y. June 3, 2023), by contrast, plaintiff brought claims for unpaid wages under the FLSA and the New York Labor Law (NYLL), as well as claims for sexual orientation discrimination and hostile work environment. The employer moved to compel arbitration, and the court found the agreement unenforceable as to his hostile work environment claims but enforceable as to his FLSA and NYLL claims. The plaintiff argued that, under the EFAA, the arbitration agreement was unenforceable as to his entire "case," including his unrelated wage and hour claims under the FLSA and the NYLL, which he brought on behalf of a broad group of individuals. *Id.* at *3. The court disagreed. It held that, under the EFAA, an arbitration agreement executed by an individual alleging sexual

32

harassment is unenforceable only with respect to the claims in the case that relate to the sexual harassment dispute, since "[t]o hold otherwise would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone." *Id.*

2. The Impact Of The Transportation Worker Exemption

Despite the U.S. Supreme Court's clarification of the transportation worker exemption to the FAA in 2022, lower courts continue to grapple and disagree about its scope, effectively holding a potential wave of workplace litigation against transportation, logistics, and delivery companies in check.

In the first and arguably the largest door-opener to the courthouse for the plaintiffs' class action bar during 2022, the Supreme Court narrowed the application of the Federal Arbitration Act by expanding its so-called "transportation worker exemption" in *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783 (2022). The plaintiff, a ramp supervisor, brought a collective action lawsuit against Southwest for alleged failure to pay overtime. *Id.* at 1787. Southwest moved to enforce its workplace arbitration agreement under the FAA. In response, the plaintiff claimed that she belonged to a class of workers engaged in foreign or interstate commerce and, therefore, fell within §1 of the FAA, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* The Supreme Court granted review and went on to hold that "any class of workers" directly involved in transporting goods across state or international borders falls within the exemption. *Id.* at 1789. It had no problem finding the plaintiff part of such a class: "We have said that it is 'too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it.' . . . We think it equally plan that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods." *Id.* (citation omitted).

Despite this decision clarifying the exemption, lower courts remained steeped in disputes, often generating irreconcilable differences of opinion over which workers signed arbitration agreements enforceable under the FAA and which did not. In *Fraga v. Premium Retail Services, Inc.,* No. 1:21-CV-10751, 2023 WL 8435180 (D. Mass. Dec. 5, 2023), for example, after the parties litigated the enforceability of the arbitration agreement for more than two years, and the dispute resulted in three full scale judicial opinions, a two-day evidentiary hearing with 6 witnesses, and hundreds of pages of exhibits, the court determined that the plaintiff's work, which involved sorting, loading, and transporting materials to retailers located within or outside Massachusetts "was not performed frequently and was not closely related to interstate transportation" so as to bring him within the exemption. *Id*. at *6.

Similarly, in *Nunes, et al. v. LaserShip, Inc.*, No. 1:22-CV-2953, 2023 WL 6326615 (N.D. Ga. Sept. 28, 2023), the plaintiffs opposed a motion to compel arbitration contending that last-mile delivery drivers are engaged in interstate commerce because the goods they transport have traveled interstate and remain in the stream of commerce until delivered. The court disagreed. Whereas it found "no doubt" that the plaintiffs belong to a "class of workers employed in the transportation industry" because they locally transported packages from a warehouse to commercial and residential buildings, it concluded that plaintiffs "do not actually engage in interstate commerce." Rather, their job entailed sorting and loading packages from the local warehouse and delivering the goods locally. Thus, the court determined that the plaintiffs were "too far removed from interstate activity," and did not fall within § 1's exemption.

By contrast, in *Webb, et al. v. Rejoice Delivers*, 2023 WL 8438577 (N.D. Cal. Dec. 5, 2023), the court found the opposite. The plaintiff picked up packages from local Amazon facilities and delivered the packages locally. The court, however, noted that, before reaching the local Amazon facilities, the goods had been ordered from Amazon's website and taken to the local facilities by shipping trucks. As a result, the court held that, because plaintiff "pick[ed] up packages that ha[d] been distributed to Amazon warehouses, certainly across state lines, and transport[ed] them for the last leg of the shipment to their

© Duane Morris LLP 2024   Duane Morris Class Action Review – 2024

destination," his work was "a part of a continuous interstate transportation" of goods, so that he was engaged in interstate commerce for the purposes of the FAA § 1 exemption. *Id.* at *7.

The U.S. Supreme Court is poised to offer more clarity as to this issue in *Bissonnette, et al. v. LePage Bakeries Park St., LLC*, No. 23-51 (U.S. Sept. 29, 2023). On September 29, 2023, the U.S. Supreme Court granted certiorari in to address the exemption. In *Bissonnette*, two workers who delivered breads and cakes sued a bakery claiming that it misclassified them as independent contractors and, therefore, denied them minimum wage and overtime. The workers asserted that the transportation worker exemption applied because they handled goods traveling in interstate commerce, but the Second Circuit affirmed the district court's ruling granting defendant's motion to compel arbitration.

The question presented to the U.S. Supreme Court involves whether, to be exempt from the FAA, a class of workers actively engaged in interstate transportation also must be employed by a company in the transportation industry. Thus, the Supreme Court's ruling could provide additional clarity in narrowing or expanding the scope of the exemption, potentially opening the doors to additional class claims.

Given the impact of the arbitration defense, in 2024, companies are apt face additional hurdles, on the judicial or the legislative front, as the plaintiffs' bar continues to look for workarounds. In particular, as more plaintiffs can assert claims that post-date the EFAA, we expect to see additional litigation and more decisions over the interpretation of the EFAA, including whether the Act's use of the word "case" renders the statute applicable to all claims in the case, including claims other than sexual harassment and sexual assault, and whether the statute, therefore, will allow for a broader shield to the arbitration defense.

That said, the future viability of the arbitration defense remains an open question, as advocacy groups, government regulators, and political figures push for a ban on class action waivers in arbitration.

III. What Should Companies Expect In 2024?

Class action litigation is a staple of the American judicial system. The volume of class action filings has increased each year for the past decade, and 2024 is likely to follow that trend. In this environment, corporate programs designed to ensure compliance with existing laws and strategies to mitigate class action litigation risks are corporate imperatives.

The plaintiffs' bar is nothing if not innovative and resourceful. Given the massive class action settlement figures in 2022 and 2023 (a combined total of $113 billion), coupled with the ever-developing law, corporations can expect more lawsuits, expansive class theories, and an equally if not more aggressive plaintiffs' bar in 2024. These conditions necessitate planning, preparation, and decision-making to position corporations to withstand and defend class action exposures.

Defendants often have very little time to react to the plaintiff's forum choice after a class action is filed, even though it may be one of the most important initial questions in the case. In turn, a cascading number of strategic considerations are typically faced by corporate decision-makers upon receipt of the class action filing. Should the company opt to remove the case from state court to federal court (and are there grounds to do so under the Class Action Fairness Act of 2005)? Is it better to have a federal judge who has the time and expertise to fully vet the parties' briefs and arguments and likely will apply a more rigorous evidentiary standard to expert testimony and class certification requirements? However, will removing the case cause other plaintiff's counsel to track the litigation and lead to more sophisticated counsel becoming involved or more "tag-along" class action filings? Will removing the case make settlement more difficult and potentially affect the structure of the settlement as well as its costs and the exposure in the class action? How will standing issues play out in each forum, and is standing a viable defense to gut the basis of the class theories? Can jurisdictional defenses fracture the class action by invoking *Bristol-Myers Squibb*? Does the company have an arbitration agreement with employees, consumers, or third-parties that would support a motion to compel arbitration of the claims in the lawsuit on an individual, bilateral basis? Is the

potential of a motion to transfer the case to an MDL after removal good or bad for the ultimate defense and handling of the litigation? What are the steps for a full and complete early case assessment, and is the company's relevant electronically-stored information (ESI) available, assessable, and in a format that can be easily and quickly analyzed? Are there ways to resolve the individual complaint, either before filing responsive pleadings or by way of negotiation with plaintiffs' counsel? Could early concessions or a voluntary change to a challenged practice moot the litigation, or lead to an argument by plaintiff's counsel that they are entitled to attorneys' fees if corporate changes are made?

Once the parties are at issue in the litigation, another series of strategic decisions needs to be confronted. Should the company request a stay of discovery while the court is considering a motion to dismiss? Should the defendant agree to broader discovery in the hope of demonstrating the presence of individualized issues to set up its class certification defenses? How broadly should discovery be drafted and what type of agreement on ESI is appropriate? Can the defendant make predominance arguments regarding varying facts without allowing broad discovery on those facts? Is bifurcation of discovery between merits issues and class issues still a viable option after Rule 23 case law has made clear that merits issues can overlap with the elements of class certification? Are communications allowed with class members before and/or after certification and on what terms? Is the list of class members discoverable? Is discovery allowed from absent class members and, if so, in what forms? Can and should a corporate defendant move for summary judgment before class certification (as to the named plaintiffs' claims individually or as to all class claims)? Are there advantages even if the motion will not win the case (for instance, narrowing the case, causing the plaintiff to respond in an individualized way, etc.)?

As to the future opposition to the plaintiffs' motion for class certification, can the class definition be attacked because it includes uninjured class members? Further, it is rare that a motion for class certification is filed without an accompanying expert witness report. Likewise, virtually every opposition brief uses expert testimony. When should a defense expert be retained, on what subjects, and how should they plan their support of the defense efforts to block class certification? The competing expert testimony typically centers on whether the claims can be proven with common evidence although they can be used for many other purposes (e.g., numerosity, feasibility of notice, merits issues, etc.). *Daubert* motions, which test the admissibility of expert testimony, are an essential part of almost every class certification battle, and the U.S. Supreme Court has focused on expert testimony in several of its recent class certification decisions. Does the court apply the same *Daubert* standard at class certification as it does before trial? Does the expert rely upon admissible evidence? Does the testimony "fit" the legal theory and claims? Would the testimony be admissible in an ordinary single plaintiff case? Should the plaintiff or defendant hire a consulting expert to assist in litigating the case? How can an expert use sampling to support claims of class-wide liability or impact?

Finally, corporations must consider settlement from the very beginning of a class action and the desire for a final global resolution can drive decision-making in terms of overall defense strategies. Defendants may decide not to remove or compel arbitration; plaintiffs may avoid issuing press releases to avoid copycat cases. Settlement on a class-wide basis pose myriad strategic issues. When the defense has decided to settle, a corporation will normally want the most expansive class definition and the broadest release, even though it has vociferously opposed any certification earlier in the case. When the terms of a settlement are finally hammered out, the plaintiff's lawyers and defense counsel share a common goal of obtaining approval and will then join forces to this end and against any objectors who oppose the accord. These crucial questions are inevitably posed by any class action litigation. By their very nature, class actions involve decisions on strategy at every turn. The positions of the parties are constantly changing and corporate defendants must always be looking ahead and anticipating issues during every phase of the litigation.

We hope the Duane Morris Class Action Review provides practical insights into complex potential strategies relevant to all aspects of class action litigation and other claims that can cost billions of dollars and require changed business practices in order to resolve.
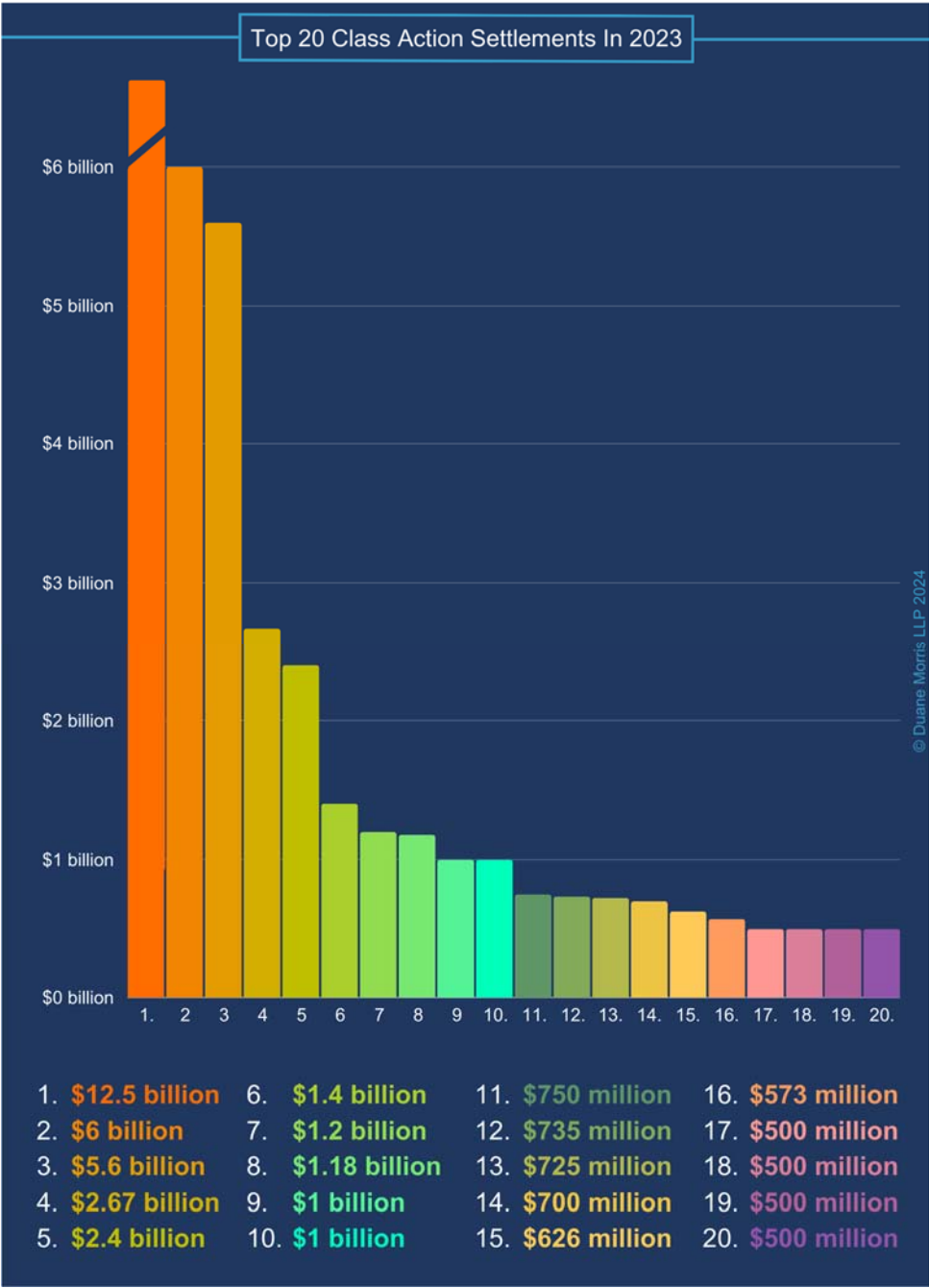
APPENDIX 3
Major Class Action Settlements In 2023

APPENDIX 3

Major Class Action Settlements

I.   Top Settlements In Class Actions In 2023

In 2023, the top 20 settlements for all class action types tracked in the Class Action Review totaled $41.1 billion. This was a decrease as compared to the prior year, when the top twenty class action settlements totaled $66.94 billion.


Top 20 Class Action Settlements In 2023

#	Amount	#	Amount	#	Amount	#	Amount
1.	$12.5 billion	6.	$1.4 billion	11.	$750 million	16.	$573 million
2.	$6 billion	7.	$1.2 billion	12.	$735 million	17.	$500 million
3.	$5.6 billion	8.	$1.18 billion	13.	$725 million	18.	$500 million
4.	$2.67 billion	9.	$1 billion	14.	$700 million	19.	$500 million
5.	$2.4 billion	10.	$1 billion	15.	$626 million	20.	$500 million

Duane Morris Class Action Review – 2024

1. **$12.5 billion –** *In Re Aqueous Film-Forming Foams Products Liability Litigation,* **Case No. 18-MN-2873 (D.S.C. Dec. 14, 2023)** (final settlement approval granted in a class action to resolve claims over contamination from forever chemicals in firefighting foam).

2. **$6 billion –** *In Re 3M Products Liability Litigation,* **Case No. 19-MD-2885 (N.D. Fla. Dec. 11, 2023)** (preliminary settlement approval granted in a class action/MDL to end more than 260,000 claims that the defendant's combat earplugs failed to protect the hearing of service members and veterans).

3. **$5.6 billion –** *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* **Case No. 20-339 (2d Cir. Mar. 15, 2023)** (final settlement approval confirmed on appeal in antitrust class action against Visa and Mastercard over interchange fees).

4. **$2.67 billion -** *In Re Blue Cross Blue Shield Antitrust Litigation,* **Case No. 13-28390 (11th Cir. Oct. 25, 2023)** (final settlement approval confirmed on appeal for resolution of a class action that alleged that the defendants violated antitrust laws by entering into an agreement not to compete with each other and to limit competition among themselves in selling health insurance and administrative services for health insurance).

5. **$2.4 billion –** *In Re Boy Scouts Of America And Delaware BSA LLC,* **Case No. 20-BK-10343 (Del. Bankr. Mar. 23, 2023)** (settlement approval granted by the bankruptcy court to resolve sexual abuse claims against the youth organization).

6. **$1.4 billion –** *In Re National Prescription Opiate Litigation,* **Case No. 17-MD-2804 (N.D. Ohio Sept. 8, 2023)** (settlement reached between Kroger and state and local governments and Native American tribes to resolve allegations that it contributed to the opioid crisis by failing to scrutinize suspicious prescriptions for the pain reliever).

7. **$1.2 billion –** *Securities & Exchange Commission, et al. v. Stanford International Bank Ltd.,* **Case No. 09-CV-298 (N.D. Tex. Aug. 8, 2023)** (final settlement approval granted in a class action brought by investors alleging that the banks aided $7 billion Ponzi scheme).

8. **$1.18 billion –** *In Re Aqueous Film-Forming Foams Products Liability Litigation,* **No. 18-MN-2873 (D.S.C. Aug. 22, 2023)** (preliminary settlement approval granted to resolve class action claims against Chemours, DuPont, and Corteva alleging that their "forever chemicals" contaminated public U.S. water systems).

9. **$1 billion –** *In Re Dell Technologies Inc. Class V Stockholders Litigation,* **Case No. 2018-0816 (Del. Chan. Apr. 25, 2023)** (final settlement approval granted in a class action brought by investors alleging that Dell and controlling investors Silver Lake Group and its affiliates shortchanged shareholders by billions of dollars in a deal that converted Class V stock to common shares).

10. **$1 billion –** *In Re Wells Fargo & Co. Securities Litigation,* **Case No. 20 Civ. 4494 (S.D.N.Y. Sept. 8, 2023)** (final settlement approval granted in a class action brought by investors alleging that the company made misleading statements about its compliance with consent orders following the 2016 scandal involving the opening of unauthorized customer accounts).

11. **$750 million –** *In Re Namenda Direct Purchaser Antitrust Litigation,* **Case No. 15 Civ. 7488 (S.D.N.Y. Mar. 23, 2023)** (final settlement approval granted for a class action alleging that defendants schemed to delay entry of generic versions of an Alzheimer's disease treatment by entering into collusive settlements with various generic drug companies).

12. **$735 million -** *Police & Fire Retirement System Of The City Of Detroit, et al. v. Elon Musk,*

Case No. 2020-0477 (Del. Chan. July 16, 2023) (settlement reached resolving claims that the Tesla board of directors approved overly inflated compensation packages that cost the company hundreds of millions of dollars).

13. **$725 million – *In Re Facebook Inc. Consumer Privacy User Profile Litigation*, Case No. 18-MD-2843 (N.D. Cal. Oct. 10, 2023)** (final settlement approval granted for a class action alleging that a third-party app developer had taken personal data from about 87 million unsuspecting Facebook users and sold it to Cambridge Analytica).

14. **$700 million - *In Re Google Play Store Antitrust Litigation*, Case No. 21-MD-2981 (N.D. Cal. Dec. 18, 2023)** (settlement reached in a class action and government enforcement lawsuit resolving claims that Google overcharged consumers through unlawful restrictions on the distribution of apps on Android devices and unnecessary fees for in-app transactions).

15. **$626 million – *In Re Flint Water Cases*, Case No. 16-CV-10444 (E.D. Mich. Mar. 20, 2023)** (final settlement approval granted in litigation alleging claims of lead contamination in the city's drinking water).

16. **$573 million – *In Re Zetia (Ezetimibe) Antitrust Litigation,* Case No. 18-MD-2836 (E.D. Va. Oct. 18, 2023)** (final settlement approval granted for a class action to resolve allegations that Merck conspired with Glenmark Pharmaceuticals to delay the launch of generic versions of the cholesterol drug Zetia).

17. **$500 million – *State Of New Mexico, et al. v. Purdue Pharma*, Case No. D-101-CV-201702541 (N. Mex. Cir. Ct. Oct. 19, 2023)** (final consent judgment granted following settlement in a class action with Walgreens over the opioid crisis).

18. **$500 million – *Iowa Public Employees' Retirement System, et al. v. Bank Of America Corp.,* Case No. 17 Civ. 6221 (S.D.N.Y. Sept. 1, 2023) (**preliminary settlement approval granted in a class action to resolve claims that major banks colluded to thwart modernization of the trillion-dollar stock loan market).

19. **$500 million – *In Re Apple Inc. Device Performance Litigation*, Case No. 18-MD-2827 (N.D. Cal. Feb. 17, 2023)** (preliminary settlement approval granted for class action alleging claims that software updates slowed the iPhone's performance).

20. **$500 million – *In Re Insulin Pricing Litigation*, Case No. 17-CV-699 (D.N.J. May 26, 2023)** (preliminary approval sought for a class action to resolve claims alleging that the pharmaceutical company schemed to drive up insulin drug prices).

     Duane Morris Class Action Review – 2024

II.   Top Antitrust Class Action Settlements In 2023

In 2023, the top ten antitrust class action settlements totaled over $11.74 billion, and nearly three-fold increase over the prior year. By comparison, the top ten settlements for antitrust class actions in 2022 totaled $3.72 billion.


Top 10 Antitrust Class Action Settlements In 2023

© Duane Morris LLP 2024
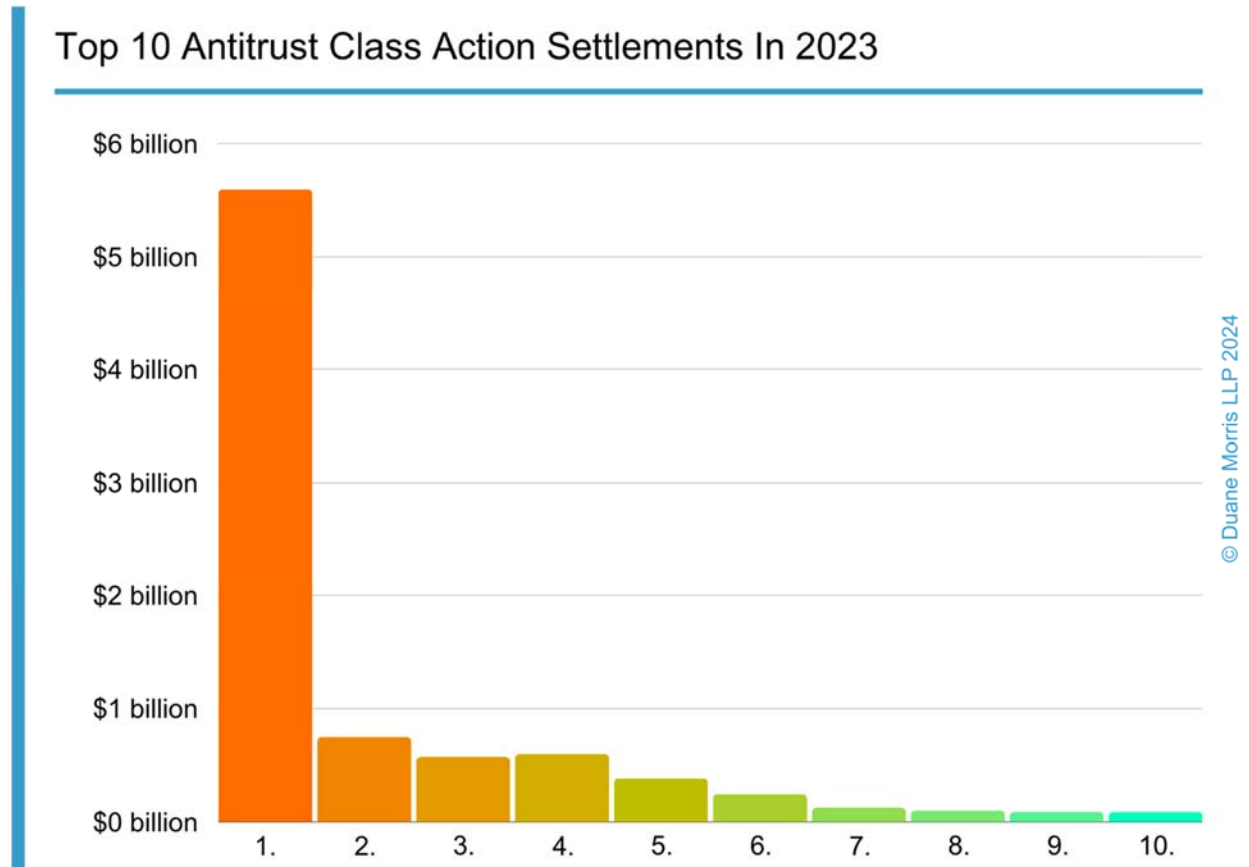
1. **$5.6 billion – *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Case No. 20-339 (2d Cir. Mar. 15, 2023)** (final settlement approval confirmed on appeal in antitrust class action lawsuit against Visa and Mastercard over interchange fees).

2. **$2.67 billion - *In Re Blue Cross Blue Shield Antitrust Litigation,* Case No. 13-28390 (11th Cir. Oct. 25, 2023)** (final settlement approval confirmed on appeal to resolve a class action that alleged that the defendants violated antitrust laws by entering into an agreement not to compete with each other and to limit competition among themselves in selling health insurance and administrative services for health insurance).

3. **$750 million – *In Re Namenda Direct Purchaser Antitrust Litigation,* Case No. 15 Civ. 7488 (S.D.N.Y. Mar. 23, 2023)** (final settlement approval granted for a class action alleging that defendants schemed to delay entry of generic versions of an Alzheimer's disease treatment by entering into collusive settlements with various generic drug companies).

4. **$700 million - *In Re Google Play Store Antitrust Litigation*, Case No. 21-MD-2981 (N.D. Cal. Dec. 18, 2023)** (settlement reached in a class action and government enforcement lawsuit resolving claims that Google overcharged consumers through unlawful restrictions on the distribution of apps on Android devices and unnecessary fees for in-app transactions).

Duane Morris Class Action Review – 2024

5. **$573 million –** *In Re Zetia (Ezetimibe) Antitrust Litigation,* **Case No. 18-MD-2836 (E.D. Va. Oct. 18, 2023)** (final settlement approval granted for a class action to resolve allegations that Merck conspired with Glenmark Pharmaceuticals to delay the launch of generic versions of the cholesterol drug Zetia).

6. **$500 million –** *Iowa Public Employees' Retirement System, et al. v. Bank Of America Corp.,* **Case No. 17 Civ. 6221 (S.D.N.Y. Sept. 1, 2023)** (preliminary settlement approval granted in a class action to resolve claims that major banks colluded to thwart modernization of the trillion-dollar stock loan market).

7. **$385 million –** *In Re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation,* **Case No. 13-MD-2445 (E.D. Penn. Oct. 30, 2023)** (preliminary settlement approval granted in a class action alleging that the company violated certain state antitrust, consumer protection, and unjust enrichment laws in the United States, harming competition and causing class members to overpay for Suboxone).

8. **$246.8 million –** *In Re HIV Antitrust Litigation,* **Case No. 19-CV-2563 (N.D. Cal. Sept. 21, 2023)** (preliminary settlement approval granted in a class action to resolve claims that the pharmaceutical company colluded with Teva to delay generic versions of HIV medications).

9. **$185.9 million –** *Dennis, et al. v. JPMorgan Chase & Co.,* **Case No. 17 Civ. 6946 (S.D.N.Y. May 25, 2023)** (final settlement approval granted for a class action resolving claims brought by a group of investors alleging that banks manipulated the currency benchmark is known as the Australian Bank Bill Swap Reference Rate).

10. **$126.8 million –** *In Re Novartis And Par Antitrust Litigation,* **Case No. 18 Civ. 4361 (S.D.N.Y. Oct. 12, 2023)** (final settlement approval granted for a class action resolving claims brought by a group of direct purchasers accusing the companies of delaying the release of a generic version of the blood pressure drug Exforge).

III.   Top Civil Rights Class Action Settlements In 2023

Settlement numbers in civil rights class actions in 2023 were significant. The top ten settlements totaled $643.15 million. However, this was a decrease from the prior year when the top ten civil rights class action settlements in 2022 topped $1.31 billion.


Top 10 Civil Rights Class Action Settlements In 2023
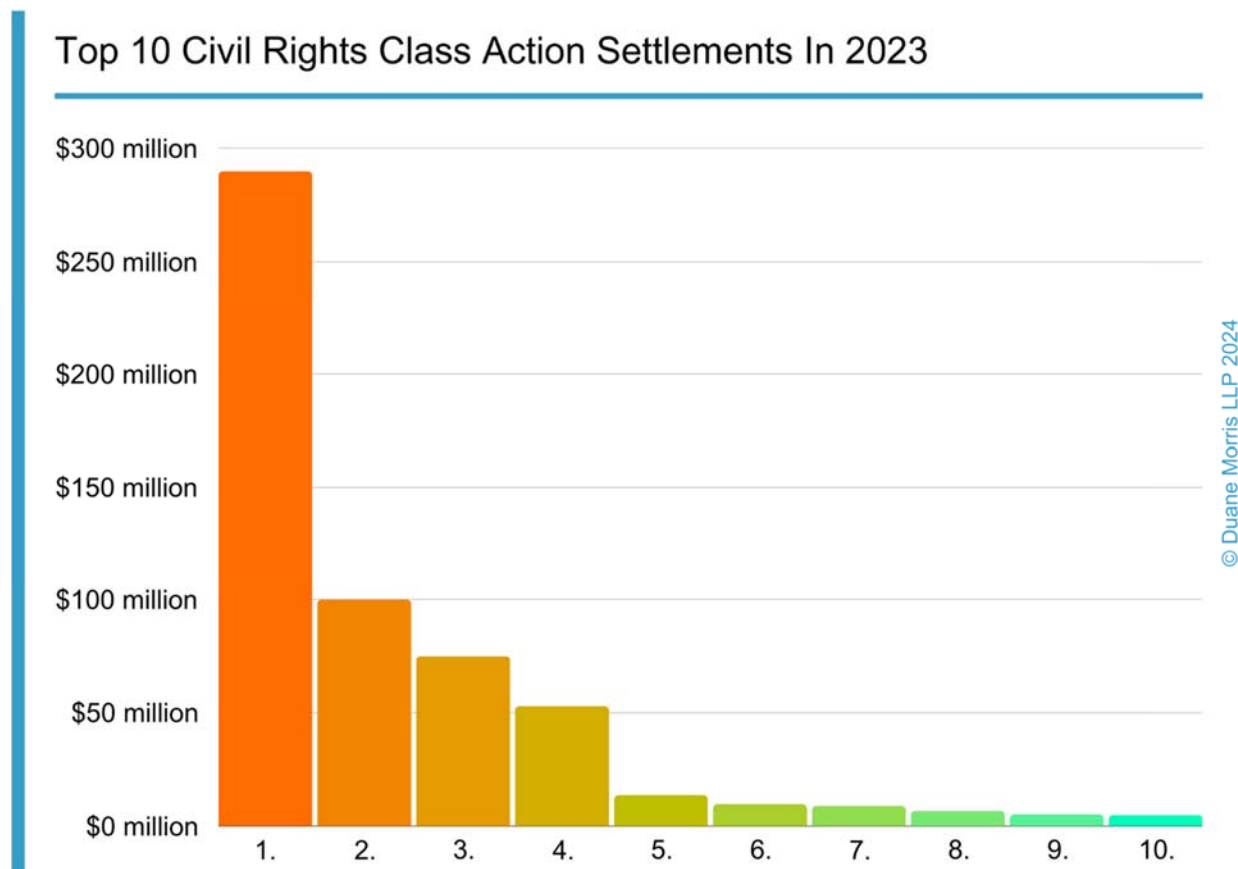
1. **$290 million – *Doe 1, et al. v. JPMorgan Chase Bank, N.A.*, Case No. 22 Civ. 10019 (S.D.N.Y. Nov. 13, 2023)** (final settlment approval granted for a class action alleging that the bank allegedly assisted Jeffrey Epstein by enabling his sex abuse crimes).

2. **$100 million – *Trueblood, et al. v. Washington State Department Of Health And Human Services,* Case No. 14-CV-1178 (W.D. Wash. Nov. 13, 2023)** (final judgment entered following settlement to resolve a class action alleging the Department repeatedly failed to provide timely competency and restoration services for more than eight years, since it was first ordered to shorten wait times for those at city and county jails who must be evaluated for mental fitness to stand trial on criminal charges).

3. **$75 million – *Doe 1, et al. v. Deutsche Bank Aktiengesellschaft*, Case No. 22 Civ. 10018 (S.D.N.Y. Oct. 23, 2023)** (final settlement approval granted in a class action alleging that the bank allegedly assisted Jeffrey Epstein by enabling his sex abuse crimes).

4. **$75 million – *Government Of The U.S. Virgin Islands, et al. v. JPMorgan Chase Bank NA*, Case No. 22-CV-10904 (S.D.N.Y. Sept. 21, 2023)** (preliminary settlement approval sought in a class action to resolve claims brought by the government of the U.S. Virgin Islands that the bank allegedly assisted Jeffrey Epstein by enabling his sex abuse crimes).

513

5. **$53 million -** *Miller, et al. v. New York*, **Case No. 21 Civ. 2616 (S.D.N.Y. May 8, 2023)** (preliminary settlement approval granted for a class action settlement on behalf of a class of pre-trial detainees and parolees who claimed that the New York City Department of Corrections purposefully evaded limitations on the use of solitary confinement by placing inmates in unlawful restrictive housing facilities).

6. **$13.7 million –** *Sow, et al. v. City Of New York*, **Case No. 21 Civ. 533 (S.D.N.Y. July 27, 2023)** (preliminary settlement approval granted in a class action resolving claims from people who alleged police officers used excessive force and arrested them without probable cause during racial justice protests).

7. **$11 million -** *Reichert, et al. v. Keefe Commissary Network LLC,* **Case No. 17-CV-5848 (W.D. Wash. Sept. 8. 2023) (**preliminary settlement approval granted for a class action resolving claims that the defendant charged unreasonable fees on debit release cards which replaced any cash taken from them when they were booked into jails and prisons).

8. **$9.75 million –** *Hough, et al. v. City Of Philadelphia,* **Case No. 20-CV-350 (E.D. Penn. April 12, 2023)** (settlement approval granted and consent decree entered in four consolidated class actions brought by residents and protestors who asserted that they were victims of excessive violence and military-style tactics during racial justice demonstrations).

9. **$9 million –** *Barnes, et al. v. 3 Rivers Telephone Cooperative Inc.,* **Case No. 21-CV-118 (D. Mont. April 6, 2023)** (final settlement approval granted to resolve claims by Blackfeet Nation members alleging that a telecommunications cooperative withheld the revenue from its 2020 sale of certain business assets due to their Native American heritage).

10. **$6.7 million –** *Sierra, et al. v. City Of New York,* **Case No. 20 Civ. 10291 (S.D.N.Y. Oct. 25, 2023)** (final approval granted in a settlement reached with the city and 320 protesters allegedly assaulted by police during the 2020 racial protect demonstrations).

Duane Morris Class Action Review – 2024

IV.   Top Consumer Fraud Class Action Settlements In 2023

Settlement numbers in consumer fraud class actions in 2023 were significant. The top ten settlements totaled $3.29 billion. By comparison, the top ten settlements in consumer fraud class actions in 2022 totaled $8.596 billion.


Top 10 Consumer Fraud Class Action Settlements In 2023
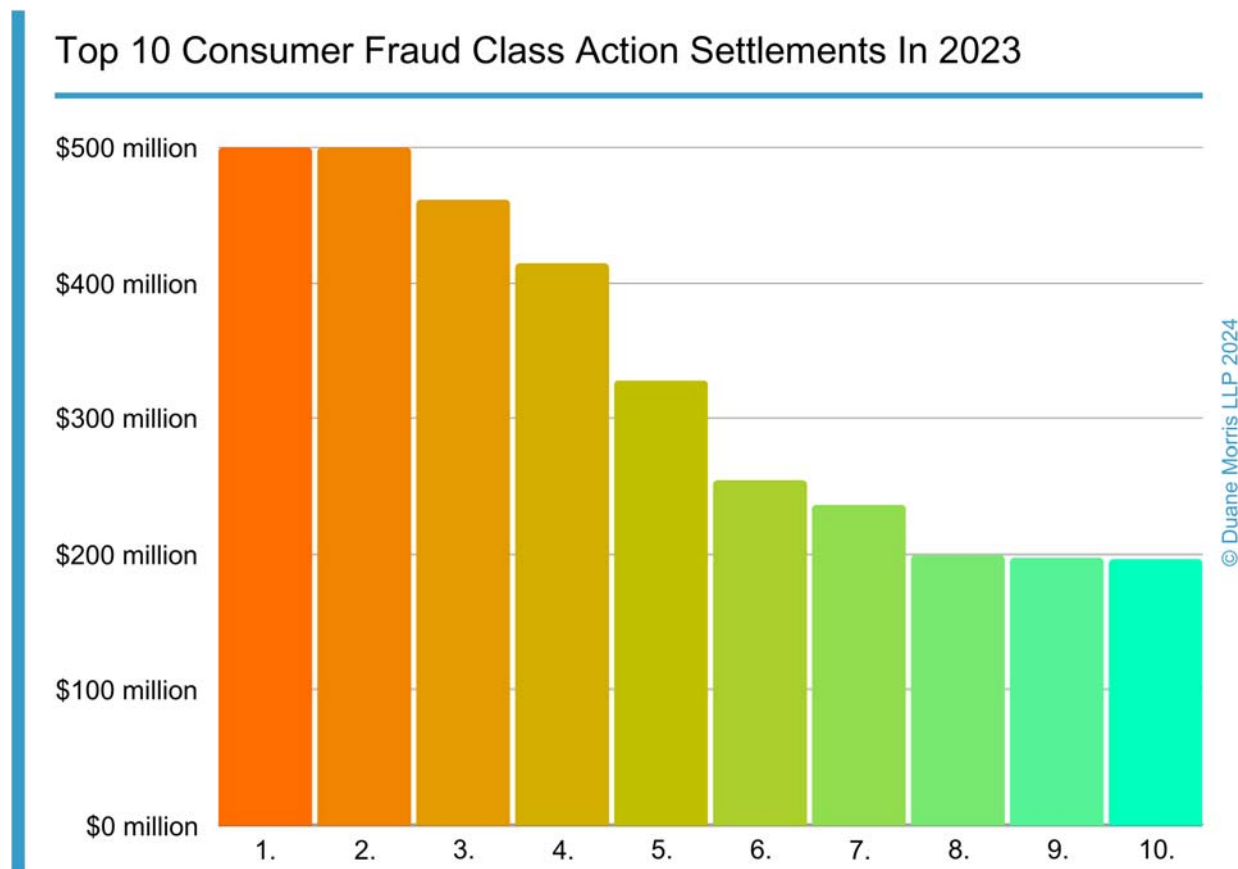
1. **$500 million – *In Re Apple Inc. Device Performance Litigation*, Case No. 18-MD-2827 (N.D. Cal. Feb. 17, 2023)** (preliminary approval granted for settlement of a multidistrict litigation alleging claims that software updates slowed the iPhone's performance).

2. **$500 million – *In Re Insulin Pricing Litigation*, Case No. 17-CV-699 (D.N.J. Nov. 28, 2023)** (preliminary approval granted for a class action to resolve claims alleging that the pharmaceutical company schemed to drive up insulin drug prices).

3. **$462 million – *The People Of The State Of California, et al. v. Juul Labs Inc.,* Case No. RG-19043543 (Cal. Super. Ct. Apr. 17, 2023)** (final judgment entered in a case following settlement regarding claims that the company marketed its vape products to minors to get them hooked on nicotine and ensure future sales).

4. **$415 million – *Benson, et al. v. DoubleDown Interactive*, Case No. 18-CV-575 (W.D. Wash. June 1, 2023)** (final settlement approval granted in a class action resolving claims that the companies violated Washington state gambling laws and consumer protection provisions).

5. **$328 million – *Kalima, et al. v State Of Hawai'i,* Case No. 99-4771-12, (Haw. Cir. Ct. Aug. 1, 2023)** (final settlement approval granted for resolution of a class action alleging that the closure the

515

Hawaiian Claims Office, which reviewed alleged breaches of trust regarding the Hawaiian Home Lands Trust, led to residents having to wait decades with no resolution of their claims when they would be eligible to receive land from the trust).

6. **$255 million – *In Re Juul Labs Inc., Marketing, Sales Practices And Products Liability Litigation*, Case No. 19-MD-2913 (N.D. Cal. Sept. 19, 2023) (**final settlement approval granted for a class action to resolve claims that the company's products were marketed to adolescents, causing school districts, municipalities, and Native American tribes to expend resources to deal with the health issues associated with nicotine).

7. **$237.5 million - *Express Freight International, et al. v. Hino Motors Ltd.,* Case No. 22-CV-22483 (S.D. Fla. Dec. Oct. 30, 2023)** (preliminary settlement approval granted in a class action to resolve claims that the company knew that its trucks delivered worse fuel economy than promised but intentionally concealed this fact from consumers and regulatory bodies).

8. **$200 million – *In Re Kia Hyundai Vehicle Theft Litigation*, Case No. 22-ML-3052 (C.D. Cal. Nov. 1, 2023)** (preliminary settlement approval granted in a set of consolidated class actions to resolve consumer claims in California alleging the companies knowingly sold defective vehicles that were vulnerable to theft).

9. **$198 million – *Youssef, et al. v. Navient Solutions*, Case No. 23-CV-2113 (E.D.N.Y. Aug. 2, 2023)** (preliminary settlement approval granted in a class action to resolve claims with private student loan borrowers who claimed their bills should have been discharged in bankruptcy).

10. **$197 million – *Habberfield, et al. v. Boohoo.com, Inc.,* Case No. 22-CV-3899 (C.D. Cal. Nov. 9, 2023)** (final settlement approval granted for a class action to resolve claims alleging that the online clothing brands falsely advertised substantial discounts on their websites). (Final approval?)

© Duane Morris LLP 2024   Duane Morris Class Action Review – 2024

V. Top Data Breach Class Action Settlements In 2023

Data breach class actions in 2023 were robust. The top 10 settlements totaled $515.75 million. This was a significant decrease over 2022, when the top ten data breach class actions totaled $719.21 million.


Top 10 Data Breach Class Action Settlements In 2023
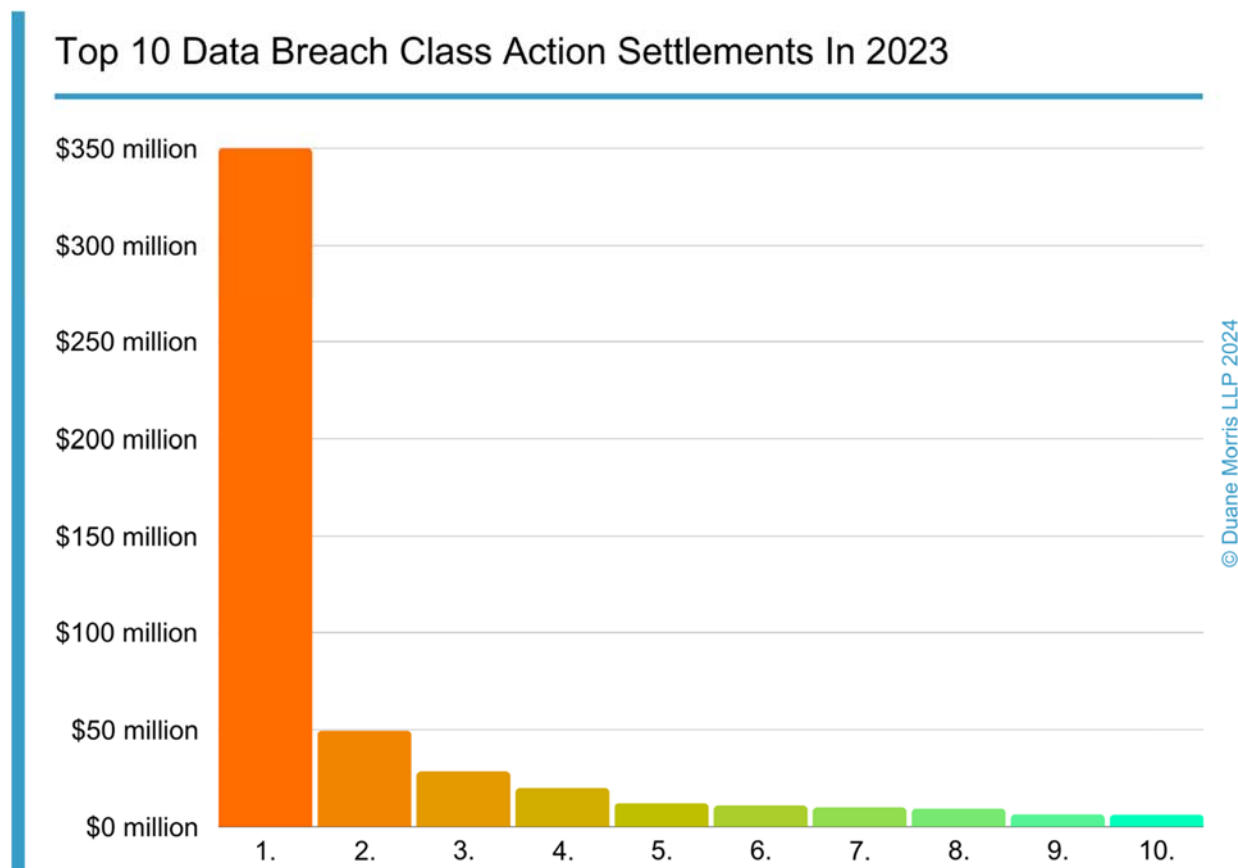
1. **$350 million – *In Re T-Mobile Customer Data Security Breach Litigation*, Case No. 21-MD-03019 (W.D. Mo. June 29, 2023)** (final settlement approval granted in a class action resolving claims that cybercriminals exploited T-Mobile's data security protocols and gained access to internal services containing the personally identifiable information of millions of customers).

2. **$49.5 million – *In Re Blackbaud Inc. Customer Data Security Breach Litigation,* Case No. 20-MN-2972 (D.S.C. Oct. 4, 2023)** (preliminary settlement approval sought in a class action alleging that the software company's security practices and its response to a 2020 ransomware attack affected thousands of its customers).

3. **$28.5 million – *In Re Wawa Inc. Data Security Litigation*, Case No. 19-CV-6019 (E.D. Penn. Oct. 12, 2023)** (preliminary settlement approval granted in a class action alleging that customers were damaged after hackers infiltrated the point-of-sale systems that Wawa used, installing malware on the company's payment terminals and fuel dispensers, and that the hackers later posted Wawa customers' payment card data for sale on the so-called dark web).

4. **$20 million – *Mehta, et al. v. Robinhood Financial LLC*, Case No. 21-CV-1013 (N.D. Cal. May 16, 2023)** (final settlement approval granted in a class action resolving claims that the company failed to protect thousands of accounts from a large data breach).

517

5. **$12.75 million – *Stevens, et al. v. PepsiCo, Inc.,* Case No. 22 Civ. 802 (S.D.N.Y. Apr. 4, 2023)** (final settlement approval granted for a class action settlement alleging claims that the defendant's timekeeping system was subject to a data breach causing an outage that resulted in employees not receiving all wages owed).

6. **$12.25 million – *In Re Ambry Genetics Data Breach Litigation,* Case No. 20- CV-791 (C.D. Cal. Oct. 5, 2022)** (preliminary settlement approval granted for a class action alleging claims that an email security breach compromised the information of hundreds of thousands of patients).

7. **$12.25 million – *John, et al. v. Advocate Aurora*, Case No. 22-CV-1253 (E.D. Wis. Aug. 21, 2023)** (preliminary settlement approval granted for a class action resolving claims that the company was subject to a data breach resulting from its use of tracking pixels on its website for tracking website visitor activity).

8. **$11 million – *Heath, et al. v. Insurance Technologies Corp.,* Case No. 21-CV-1444 (N.D. Tex. Jan. 4, 2023)** (final settlement approval granted for a class action resolving claims insurance software provider Zywave Inc. failed to protect customers' personal information during a security breach in February 2021).

9. **$10 million - *Harbour, et al. v. California Health and Wellness,* Case No. 21-CV-3322 (N.D. Cal. Aug. 24, 2023)** (preliminary settlement approval granted relating to a data breach in which an unauthorized user may have accessed certain Health Net defendants' members' information including addresses, dates of birth, Social Security numbers, insurance identification numbers, and health information).

10. **$9.5 million – *Pratt, et al. v. KSE Sportsman Media, Inc.,* Case No. 21-CV-11404 (E.D. Mich. Aug. 25, 2023)** (preliminary settlement approval granted for a class action resolving claims by subscribers to gun magazines who alleged the publisher allowed their personal information to be obtained data aggregators without their consent).

VI. Top Discrimination Class Action Settlements In 2023

In 2023, the top ten settlements were $762.2 million. This was a significant increase over 2022, when the top ten discrimination class action settlements totaled $597 million.


Top 10 Discrimination Class Action Settlements In 2023
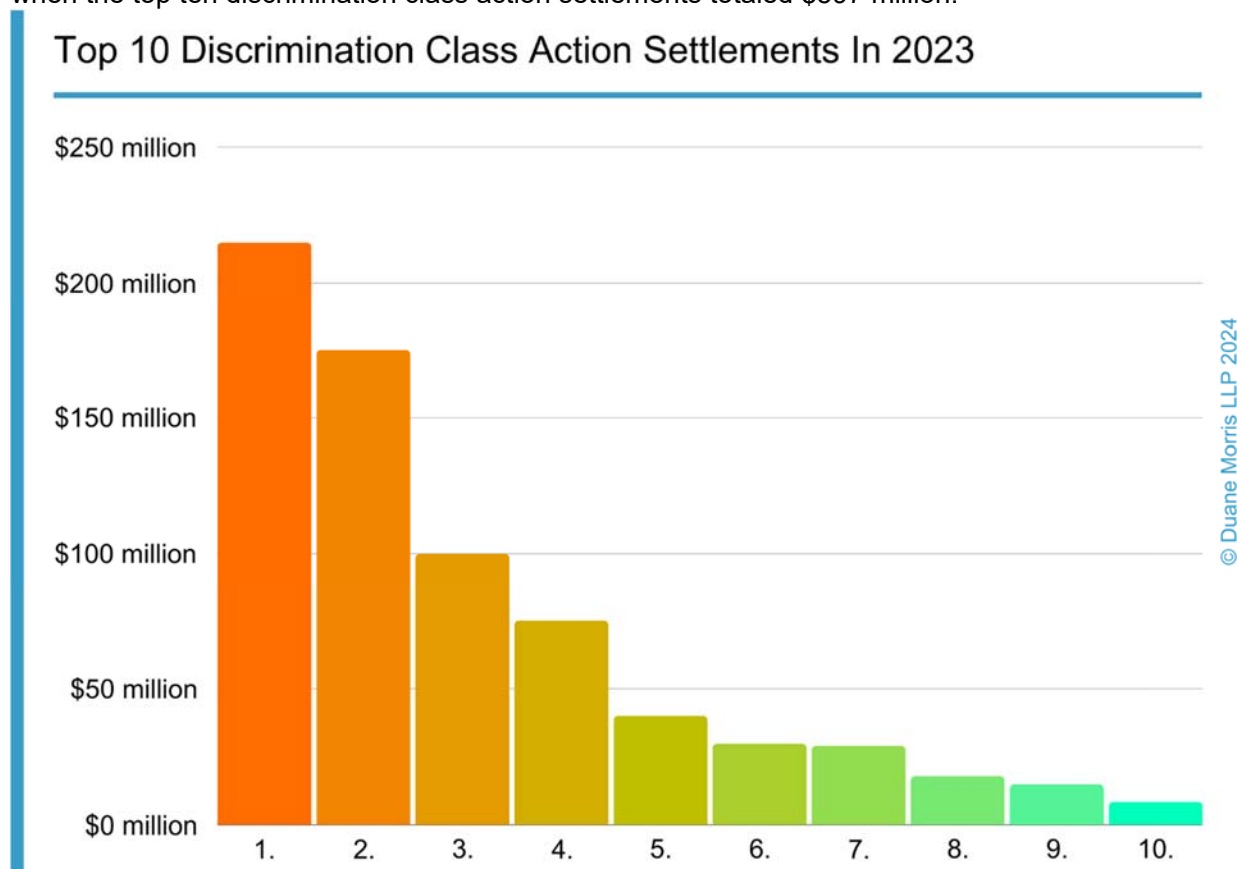
1. **$215 million – *Chen-Oster, et al. v. Goldman, Sachs & Co.,* Case No. 10 Civ. 6950 (S.D.N.Y Nov. 7, 2023)** (final settlement approval granted in a class action alleging intentional discrimination, disparate impact discrimination, retaliation, and pregnancy bias).

2. **$175 million – *Jock, et al. v. Sterling Jewelers, Inc.,* Case No. 08 Civ. 2875 (S.D.N.Y. Mar. 14, 2023)** (final settlement approval granted in a class action alleging gender discrimination in pay and promotions).

3. **100 million – *McCracken, et al. v. Riot Games*, Case No. 18-STCV-03957 (Cal. Super. Ct. May 16, 2023)** (final settlement approval granted in a class action alleging claims that the company subjected female workers to systemic sex discrimination and harassment).

4. **$100 million – *Doe 16, et al. v. Columbia University*, Case No. 20 Civ. 1791 (S.D.N.Y. Nov. 13, 2023)** (settlement approval sought for university to establish a "survivors' settlement fund" for victims of a former university obstetrician-gynecologist convicted of sexual abuse and discrimination).

5. **$40 million – *Tatum, et al. v. Commonwealth Of Massachusetts*, Case No. 0984-CV-00576 (Mass. Super. Ct. May 11, 2023**) (final settlement approval granted in a class action alleging that Black and Hispanic police officers throughout Massachusetts were subjected to racially biased promotional exams).

519

6. **$31 million – *Howard, et al. v. Cook County Sheriff's Office*, Case No. 17- CV-8146 (N.D. Ill. Jan. 7, 2023)** (final settlement approval granted for class action claims alleging sex discrimination).

7. **$30 million – *Employees' Retirement System Of Rhode Island, et al. v. Marciano*, Case No. 2022-0839 (Del. Chan. Sept. 29, 2023)** (settlement reached in a class action alleging that employees were subjected to sexual harassment from the company's co-founder for more than four decades, which harmed the company and its shareholders through their continued inaction).

8. **$29.2 million – *Chalmers, et al. v. City Of New York*, Case No. 20 Civ. 2289 (S.D.N.Y. Aug. 29, 2023)** (settlement reached in a class action alleging that white fire protection inspectors were subjected to the same racist pay disparities their non-white colleagues alleged they faced).

9. **$24 million – *Morgan, et al. v. U.S. Soccer Federation, Inc.,* Case No. 19-CV- 1717 (C.D. Cal. Jan. 4, 2023)** (final settlement approval granted for class action claims of gender pay discrimination against female soccer players).

10. **$18 million – *Forsyth, et al. v. HP Inc.,* Case No. 16-CV-4775 (N.D. Cal. Oct. 26, 2023)** (preliminary approval granted in a class action to resolve a claims alleging that the company discriminated against employees on the basis of their age).

VII. Top EEOC / Government Enforcement Class Action Settlements In 2023

The top ten settlements in government enforcement lawsuits totaled $263.58 million in 2023. This constituted a near 50% drop in settlements as compared to the previous year when the ten government enforcement lawsuits totaled $404.5 million.


Top 10 EEOC / Government Enforcement Settlements In 2023
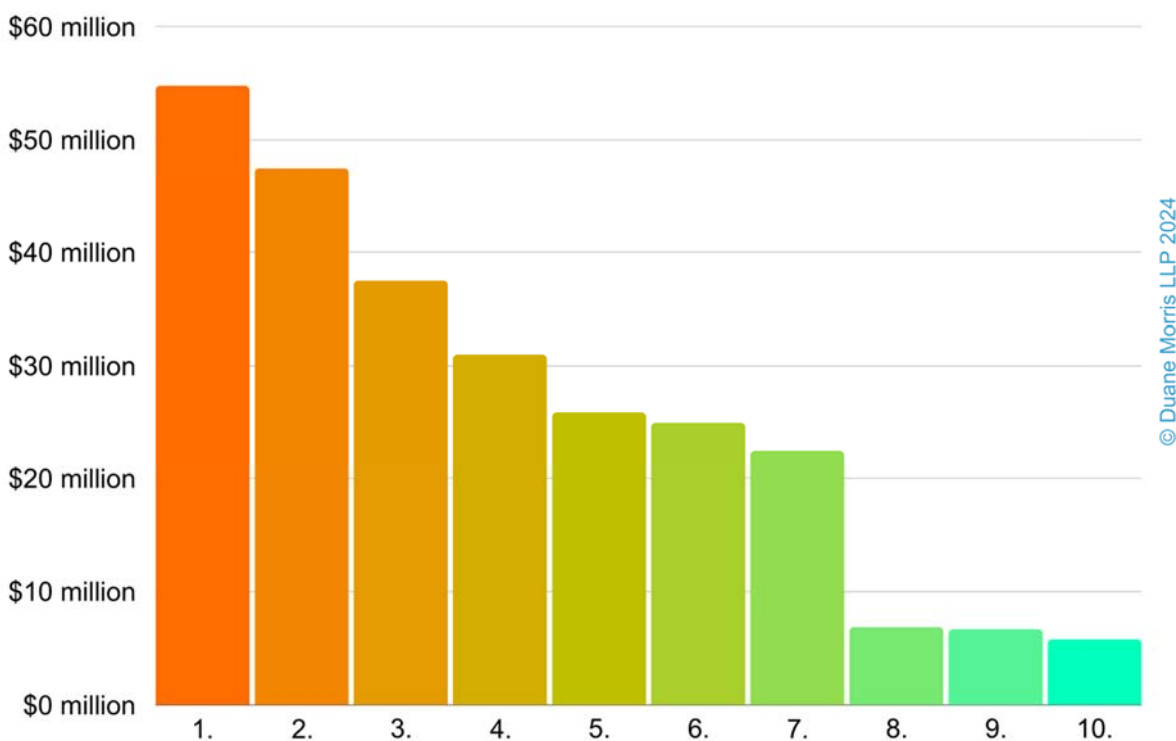
1. **$54.8 million - *California Civil Rights Department v. Activision Blizzard Inc.,* Case No. 21-STCV-26571 (Cal. Super. Ct. Dec. 15, 2023)** (preliminary settlement approval sought in a government enforcement action to resolve claims that the company denied women promotion opportunities and paid them less than men for doing similar work).

2. **$47.5 million – *McCollum, et al. v. Buttigieg,* Case No. 450-2023-00004X (EEOC Apr. 6, 2023)** (following an agency investigation, the parties' settlement was approved to resolve allegations that air traffic control specialists in the U.S. Department of Transportation were discriminated against based on their age).

3. **$37.5 million – *Meyer, et al. v. U.S. Department Of State*, Case No. 531-2015-00092X (EEOC Mar. 17, 2023)** (final settlement approval granted resolving claims by foreign service officers with disabilities over the U.S. Department of State's requirement that all applicants get a medical clearance saying they can serve anywhere in the world).

4. **$31 million – *United States v. City National Bank*, Case No. 23-CV-204 (C.D. Cal. Jan. 30, 2023)** (consent order entered resolving a lawsuit alleging the bank discriminated against borrowers in Los Angeles County on the basis of race).

521

5. **$25.9 million – *In The Matter Of Citibank, N.A.*, Case No. 2023-CFPB-0013 (Con. Fin. Pro. Bur. Nov. 8, 2023)** (consent order entered resolving allegations that the bank discriminated against Armenian borrowers based on their national origin).

6. **$25 million – *U.S. Department Of Labor v. Apple, Inc.* (DOL Nov. 2, 2023)** (following an agency investigation, the company agreed to a settlement resolving claims that it engaged in discriminatory conduct in the hiring of workers eligible for a permanent labor certification program).

7. **$22.5 million – *U.S. Department Of Labor v. Reliance Trust Co.*, Case No. 19-CV-3178 (D. Ariz. Aug. 31, 2023)** (consent judgment entered resolving claims accusing a company and the trustee of establishing an employee stock ownership plan in which the workers overpaid for their employer's stock).

8. **$6.88 million – *EEOC v. Scripps Clinical Medical Group* (EEOC Dec. 19, 2023)** (following an agency investigation, the company agreed to a settlement resolving claims that it discriminated against doctors on the basis of their age in violation of the Age Discrimination in Employment Act).

9. **$6.7 million – *U.S. Department Of Labor v. AEU Benefits LLC* (DOL May 1, 2023)** (following an agency investigation, the company agreed to a settlement resolving claims that its benefit administrator failed to pay millions of dollars in health claims).

10. **$5.8 million – *U.S. Department Of Labor v. Cargill Meat Solutions Corp.,* Case No. 22-CV-1821 (D. Md. May 17, 2023)** (settlement agreement reached and consent decree approved that resolved a lawsuit alleging that the company conspired with other poultry processors to suppress wages).

VIII. Top ERISA Class Action Settlements In 2022

In 2023, the top ten ERISA class action settlements totaled $580.5 million. This constituted a significant jump from 2022 when the top ten ERISA class action settlements were $399.6 million.


Top 10 ERISA Class Action Settlements In 2023
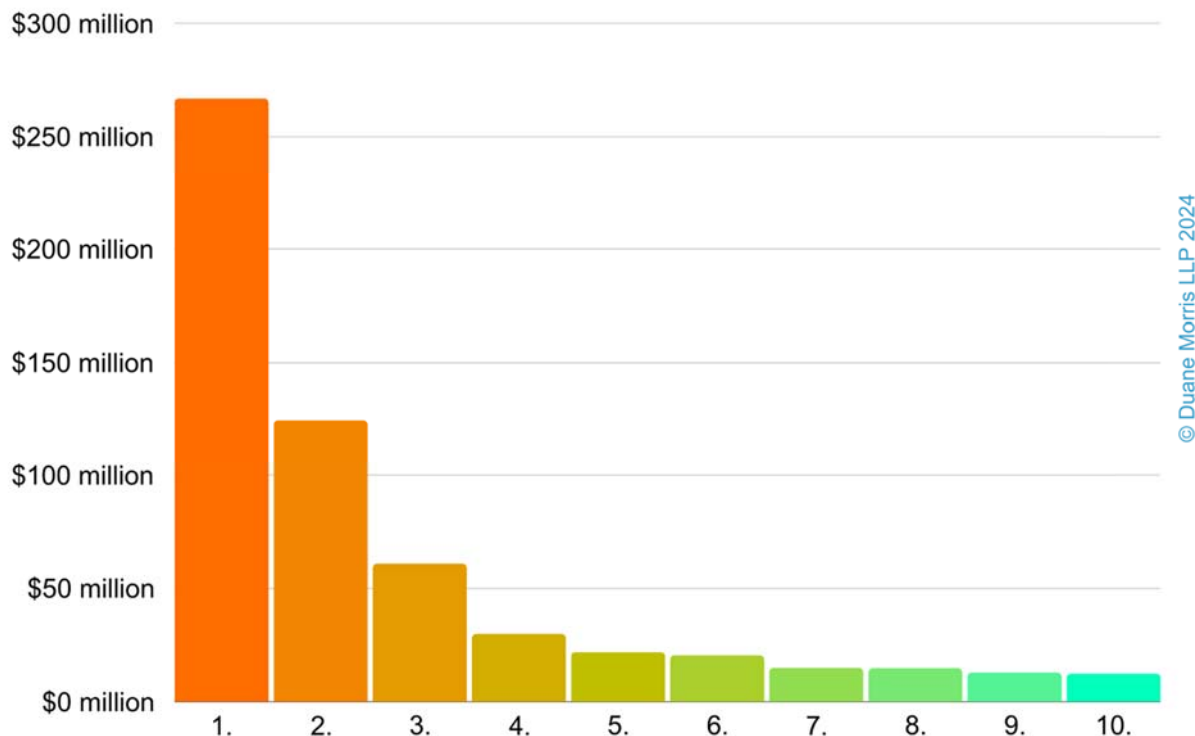
1. **$267 million – *Laurent, et al. v. PricewaterhouseCoopers LLP*, Case No. 06 Civ. 2280 (S.D.N.Y. Jan. 27, 2023)** (final settlement approval granted in a class action alleging that the company shorted retiree benefits in violation of the ERISA).

2. **$124.6 million – *Ferguson, et al. v. Ruane Cunniff & Goldfarb Inc.*, Case No. 17 Civ. 6685 & *Su, et al. v. Ruane Cunniff & Goldfarb Inc.*, Case No. 19 Civ. 9302 (S.D.N.Y. July 14, 2023)** (final settlement approval granted for consolidated class actions filed by former employees alleging that DST Systems Inc., its investment manager, and others mismanaged a 401(k) plan).

3. **$61 million – *In Re GE ERISA Litigation*, Case No. 17-CV-12123 (D. Mass. Oct. 17, 2023)** (preliminary settlement approval granted to resolve claims that GE steered employee retirement savings into costlier and lower-performing GE Asset Management funds to boost the subsidiary's bottom line before selling it off in 2016).

4. **$30 million – *Jacobs, et al. v. Verizon Communications Inc.*, Case No. 16 Civ. 1082 (S.D.N.Y. Nov. 21, 2023)** (final settlement approval granted in a class action to resolve claims that 160,000 current and former workers who participated in Verizon's 401(k) plan lost retirement savings through a
n underperforming hedge fund).

5. **$22 million – *Ford, et al. v. Takeda Pharmaceuticals USA, Inc.,* Case No. 21-CV-10090 (D. Mass. Mar. 24, 2023)** (final settlement approval granted in a class action alleging that the company and directors breached their fiduciary duties with respect to the 401(k) plan in violation of the ERISA).

6. **$20.6 million – *Asner, et al. v. SAG-AFTRA Health Fund,* Case No. 20-CV-10914 (C.D. Cal. Oct. 19, 2023)** (final settlement approval granted in a class action alleging claims that plan administrators breached their fiduciary duty under the ERISA and unfairly burdened older plan participants).

7. **$15 million – *Garthwait, et al. v. Eversource Energy Service Co.,* Case No. 20-CV-902 (D. Conn. Sept. 26, 2023)** (final settlement approval granted for a class action alleging that the company mismanaged its employees' 401(k) plan by charging high costs and securing poorly performing investments).

8. **$14.8 million – *Smith, et al. v. GreatBanc Trust Co.,* Case No. 20-CV-2350 (N.D. Ill. Aug. 23, 2023)** (final settlement approval granted for a class action alleging that the company overcharged participants for ESOP stock shares).

9. **$13 million – *Munro, et al. v. University Of Southern California,* Case No. 16-CV-6191 (C.D. Cal. Aug. 25, 2023)** (final settlement approval granted in a class action alleging that the university violated the ERISA by mismanaging a § 403(b) defined contribution retirement plan as well as a tax-deferred annuity plan).

10. **$12.5 million – *Boley, et al. v. Universal Health Services, Inc.,* Case No. 20-CV-2644 (E.D. Penn. Feb. 15, 2023)** (final settlement approval granted in a class action alleging breach of fiduciary duty, failure to monitor fiduciaries and co-fiduciary breaches and liability for knowing breach of trust in violation of the ERISA).

IX.   Top FCRA, FDPCA, And FACTA Class Action Settlements In 2023

In 2023, the top ten FCRA, FDPCA, and FACTA settlements totaled $100.15 million. This was a significant decrease from the prior year when the top ten class action settlements totaled $210.11 million.


Top 10 FCRA, FDPCA, And FACTA Class Action Settlements In 2023
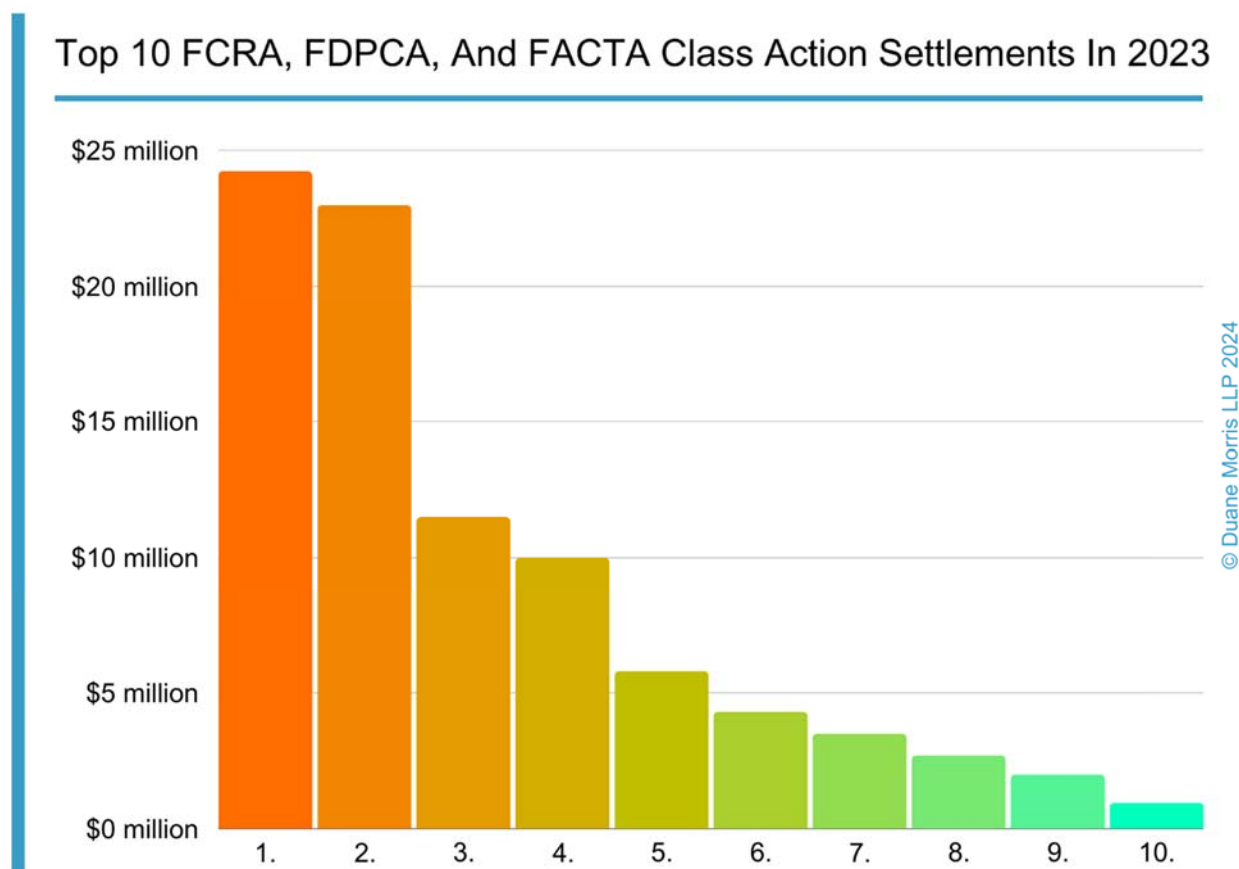
1. **$24.25 million – *Richardson, et al. v. IKEA North America Services LLC*, Case No. 19-STCV-37280 (Cal. Super. Ct. Aug. 3, 2023)** (final settlement approval granted in a class action to resolve claims that the company printed the first six and last four digits of the customers' credit card numbers on receipts in violation of the FACTA).

2. **$23 million – *Consumer Financial Protection Bureau v. TransUnion*, Case No. 22-CV-1880 (N.D. Ill. Oct. 18, 2023)** (final judgment in a class-wide settlement entered following a complaint from the CFPB alleging that the company and officers engaged in deceptive acts and practices under the FCRA, providing substantial assistance in legal violations, and violating federal regulations).

3. **$11.5 million – *In Re TransUnion Rental Screening Solutions Inc. FCRA Litigation,* Case No. 20-MD-2933 (N.D. Ga. Sept. 21, 2023)** (final settlement approval granted in a class action to resolve claims that the company included inaccurate information on its consumer reports in violation of the FCRA).

4. **$10 million – *Fischer, et al. v. Instant Checkmate LLC*, Case No. 19-CV-4892 (N.D. Ill. Sept. 8, 2023)** (preliminary settlement granted in a class action to resolve claims accusing the company of violating peoples' privacy rights by publishing their information gathered from free trial versions of their services under the FCRA).

5. **$8.75 million –** *Commonwealth Of Massachusetts, et al. v. Rent-A-Center Inc.*, **Case No. 2384-CV-2703 (Mass. Super. Ct. Nov. 28, 2023)** (following an investigation by the state Attorney General, the company agreed to a settlement resolving allegations that it engaged in unlawful debt collection practices, including filing criminal theft reports against customers who missed rental payments).

6. **$5.8 million –** *FTC, et al. v. Instant Checkmate LLC*, **Case No. 23-CV-1674 (S.D. Cal. Oct. 11, 2023)** (final judgment entered granting approval in a class action to resolve claims the company violated the FCRA in marketing their reports to landlords and prospective employers).

7. **$5.695 million –** *Steinberg, et al. v. CoreLogic Credco LLC,* **Case No. 22-CV-498 (S.D. Cal. Oct. 10, 2023)** (preliminary settlement approval granted in a class action to resolve claims that the company violated the FCRA by listing consumers as deceased on credit reports when they were actually alive).

8. **$4.3 million –** *Sanders, et al. v. Kaiser Foundation Hospitals*, **Case No. CGC-21-594659 (Cal. Super. Ct. Sept. 21, 2023)** (final settlement approval granted in a class action to resolve claims that the company failed to obtain authorization for background checks through the disclosures required by the FCRA).

9. **$3.5 million –** *Raymond, et al. v. Avectus Healthcare Solutions LLC*, **Case No. 15-CV-559 (S.D. Ohio Nov. 2, 2023)** (preliminary settlement approval granted in a class action to resolve claims of breach of contract and violation of the FDPCA in connection with the defendants seeking health insurance payments directly from patients even if they provided health insurance information).

10. **$3.35 million -** *Aguilera, et al. v. Uber Technologies Inc. d/b/a Uber Eats*, **Case No. 509275/2023 (N.Y. Super. Ct. Oct. 20, 2023)** (preliminary settlement approval granted in a class action to resolve clams that Uber violated the rights of prospective drivers in New York City through a flawed criminal background check process).

X. Top FLSA / Wage & Hour Class And Collective Settlements In 2023

In 2023, the top ten wage & hour settlements totaled $742.5 million, and nine of the ten settlement emanated from litigation in California. This was a significant increase over 2022, when the top ten wage & hour settlements totaled $574.55 million.


Top 10 FLSA / Wage & Hour Class And Collective Settlements In 2023
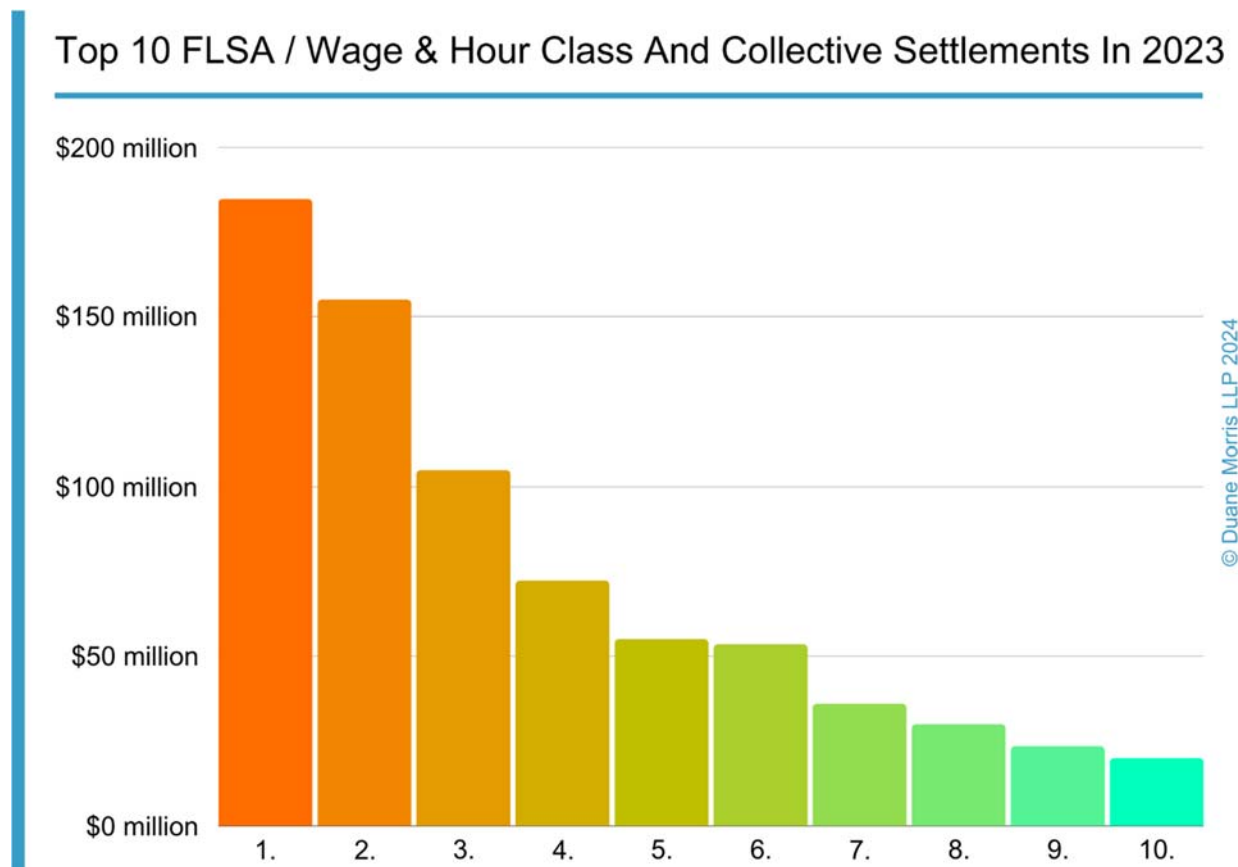
1. **$185 million –** *Senne, et al. v. Kansas City Royals Baseball Corp.,* **Case No. 14-CV-608 (N.D. Cal. Mar. 29, 2023)** (final settlement approval granted in a class action resolving claims alleging failure to pay minimum wage and overtime compensation).

2. **$155 million –** *California Correctional Employees Wage & Hour Cases***, Case No. CJC-11-004661 (Cal. Super. Ct. Oct. 20, 2023)** (final settlement approval granted for a class action to settlement claims of over 10,000 California correctional system supervisors alleging they were shortchanged on overtime pay).

3. **$105 million –** *Ludlow, et al. v. Flowers Foods Inc***., Case No. 18-CV-1190 (S.D. Cal. Nov. 29, 2023)** (preliminary settlement approval granted in an FLSA collective action to resolve claims alleging that delivery drivers were misclassified as independent contractors rather than employees).

4. **$72.5 million –** *Utne, et al. v. Home Depot USA Inc.,* **Case No. 16-CV-1854 (N.D. Cal. July 28, 2023)** (preliminary settlement approval granted in a class action resolving claims of unpaid off-the-clock work).

5. **$55 million – *Walden, et al. v. State Of Nevada*, Case No. 14-CV-320 (D. Nev. Mar. 20, 2023)** (final settlement approval granted in a class and collective action resolving claims brought by correctional workers alleging the state failed to pay for off-the-clock work).

6. **$53.5 million – *Vidrio, et al. v. United Airlines Inc.*, Case No. 15-CV-7985 (C.D. Cal. June 29, 2023)** (final settlement approval granted in a class action resolving claims that the company issued insufficiently detailed wage statements).

7. **$36 million – *Fodera Jr., et al. v. Equinox Holdings Inc. et al.*, Case No. 19-CV-5072 (N.D. Cal. Sept. 22, 2023)** (final settlement approval granted for a class action resolving claims that the company failed to pay for all hours worked and failed to provide meal and rest breaks).

8. **$30 million – *Depianti, et al. v. Jan-Pro Franchising International Inc.*, Case No. 16-CV-5961 (N.D. Cal. Nov. 30, 2023)** (preliminary settlement approval granted in a class action alleging that the company misclassified workers as independent contractors and thereby failed to pay overtime compensation in violation of state wage & hour laws).

9. **$27 million – *Doe, et al. v. Google LLC*, Case No. CGC-16-556034 (Cal. Super. Ct. Dec. 4, 2023)** (preliminary settlement approval granted in a hybrid class action and PAGA representative action resolving claims that the company adopted illegal confidentiality policies in order to prevent trade secrets leaks, which in practice prevent its employees from reporting wrongdoing and discussing wages and working conditions in violation of California labor statutes and the PAGA).

10. **$23.5 million – *Sportsman, et al. v. A Place For Rover, Inc.,* Case No. 19-CV-3053 (N.D. Cal. July 21, 2023)** (final settlement approval granted in a class action resolving claims that the company misclassified pet care workers as independent contractors rather than employees).

Duane Morris Class Action Review – 2024

XI.   Top Labor Class Action Settlements In 2023

In 2023, the top ten labor settlements totaled $139.67 million.

Top 10 Labor Class Action Settlements In 2023
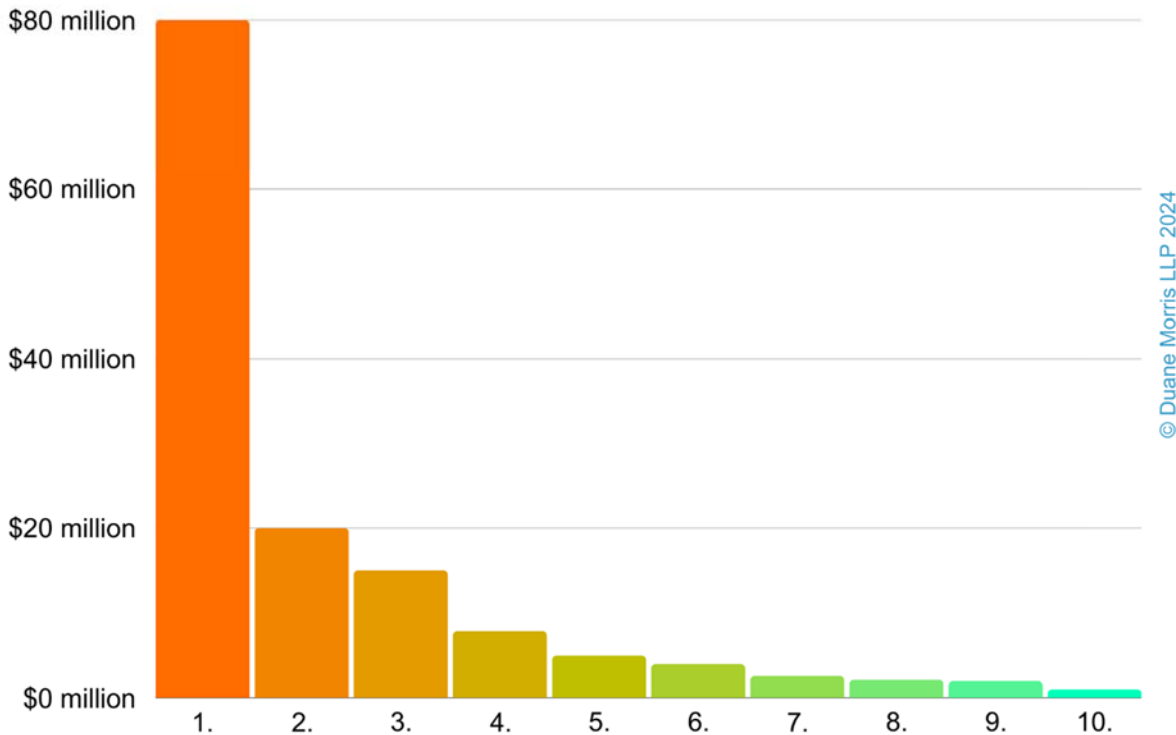
1. **$80 million – *Williams, et al. v. Retirement Plan For Chicago Transit Authority Employees,* Case No. 11-CH-15446 (Ill. Cir. Ct. Oct. 24, 2023)** (the Chicago Transit Authority agreed to pay employees $80 million to resolve class-wide claims it violated Illinois law by making retirees pay health insurance premiums).

2. **$20 million – *Peng, et al. v. Mastroianni,* Case No. 20-CV-80102 (S.D. Fla. Aug. 3, 2023)** (final settlement approval granted in a class action to resolve claims that a mall development misappropriated funds from worker accounts).

3. **$15 million – *Asner, et al. v. The SAG-AFTRA Health Fund,* Case No. 20-CV-10914 (C.D. Cal. Oct. 19, 2023)** (preliminary settlement approval granted in a class action to resolve claims that changes made to the health care fund in August 2020 heightened eligibility standards for health coverage).

4. **$7.9 million – *Aldapa, et al. v. Fowler Packing Co.,* Case No. 15-CV-420 (E.D. Cal. June 6, 2023)** (final settlement approval granted in a class action alleging violations of the Migrant and Seasonal Agricultural Worker Protection Act).

5. **$5 million – *City Of Birmingham Firemen's & Policemen's Supplemental Pension System, et al. v. Ryanair Holdings PLC,* Case No. 18 Civ. 10330 (S.D.N.Y. Oct. 20, 2023)** (final settlement approval granted in a class action to resolve claims that the airline and its CEO falsely claimed the

company would never unionize, which artificially inflated share prices, which dropped when unionization did occur).

6. **$4 million – *Smith, et al. v. Strom Engineering Corp.,* Case No. 19-CV-147 (W.D. Penn. Nov. 9, 2023)** (preliminary settlement approval granted in a class action to resolve claims that the company failed to pay for time spent crossing picket lines during a lockout and worker strike).

7. **$2.6 million – *Jones, et al. v. City Of Boston*, Case No. 05-CV-11832 (D. Mass. Nov. 15, 2023)** (the city of Boston and a group of Black police officers reached a $2.6 million settlement to resolve claims that the city's hair follicle workplace drug tests were biased).

8. **$2.17 million – *Wright, et al. v. City Of Charlotte,* Case No. 21-CV-4063 (N.C. Super. Ct. Apr. 3, 2023)** (final settlement approval granted in a class action resolving claims that the city wrongfully deducted funds from weekly salaries to support an unauthorized pledge fund).

9. **$2 million – *Sarmiento, et al. v. Fresh Harvest Inc.,* Case No. 20-CV-7974 (N.D. Cal. Oct. 30, 2023)** (final settlement approval granted in a class action to resolve claims that the company illegally paid truck drivers at the lower rates of agricultural field workers).

10. **$1 million – *Blessinger, et al. v. Wells Fargo & Co.*, Case No. 22-CV-1029 (M.D. Fla. Dec. 5, 2023)** (preliminary settlement approval granted for a class action resolving claims that the company sent defective COBRA notices to ex-employees that dissuaded them from electing continued coverage under the company's health plan).

XII. Top Privacy Class Action Settlements In 2023

In 2023, the top ten privacy settlements totaled $1.32 billion. This was a significant increase over 2022, when the top ten privacy class action settlements totaled $896.7 million.

Top 10 Privacy Class Action Settlements In 2023

© Duane Morris LLP 2024
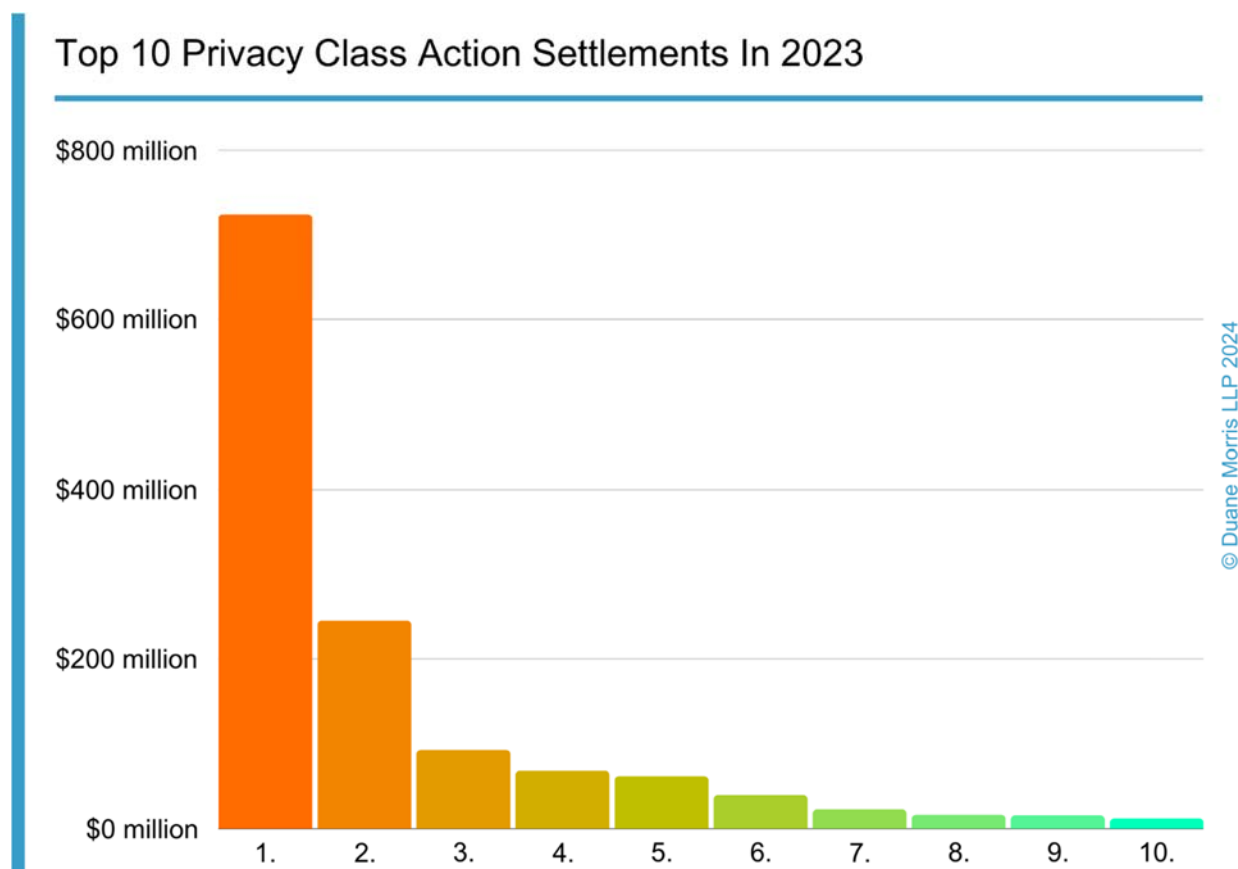
1. **$725 million – *In Re Facebook Inc. Consumer Privacy User Profile Litigation*, Case No. 18-MD-2843 (N.D. Cal. Oct. 10, 2023)** (final settlement approval granted for a class action alleging that a third-party app developer had taken personal data from about 87 million Facebook users and sold it to Cambridge Analytica).

2. **$245 million – *United States, et al. v. Epic Games*, Case No. 22-CV-518 (E.D.N.C. Feb. 7, 2023)** (preliminary injunction entered and the court approved a class-wide settlement that stipulated to resolve claims that Epic subjected consumers to dark web patterns and billing practices).

3. **$93 million – *People Of The State Of California, et al. v. Google LLC*, Case No. 23-CV-422424 (Cal. Super. Ct. Sept. 18, 2023)** (final settlement approval granted to resolve claims that the company deceptively collected and stored users' location data despite telling them they could turn off those settings).

4. **$68.5 million – *Parris, et al. v. Meta Platforms*, Case No. 2023-LA-672 (Ill. Cir. Ct. Oct. 11, 2023)** (final settlement approval granted in a class action alleging that the company violated the Illinois Biometric Information Privacy Act).

531

5. **$62 million – *In Re Google Location History Litigation*, Case No. 18-CV-5062 (N.D. Cal. Oct. 26, 2023)** (preliminary approval granted for a class action resolving claims that the company illegally tracked and stored users' private location information).

6. **$39.9 million – *State Of Washington, et al. v. Google, LLC,* Case No. 22-2-01103-3 (Wash. Super. Ct. June 1, 2023)** (consent decree entered following settlement to resolve claims that the company used "deceptive" and "misleading" location tracking of users).

7. **$28.5 million – *Sosa, et al. v. Onfido, Inc.,* Case No. 20-CV-4247 (N.D. Ill. May 5, 2023)** (preliminary settlement approval granted for class-wide claims that an identification verification service provider violated the Illinois Biometric Information Privacy Act).

8. **$23 million – *In Re Google Referrer Header Privacy Litigation*, Case No. 10-CV-4809 (N.D. Cal. Oct. 24, 2023)** (final settlement approval granted for a class action alleging claims that the company violated privacy statutes by sharing nearly 200 million users' search terms with third parties).

9. **$20 million – *State Of Indiana, et al. v. Google LLC*, Case No. 49-D01-2201-PL-2399 (Ind. Cir. Ct. Jan. 4, 2023)** (final settlement approval granted and case dismissed in a government enforcement action alleging that Google breached Indiana law by collecting user location data and targeting them with advertisements).

10. **$16.7 million – *Vaughan, et al. v. Biomat USA Inc*., Case No. 20-CV-4241 (N.D. Ill. Sept. 19, 2023)** (final settlement approval granted for a class action alleging claims that three blood donation centers unlawfully collected and stored plasma donors' biometric fingerprint information without first obtaining their informed consent in violation of the Illinois Biometric Information Privacy Act).

XIII.   Top Products Liability And Mass Tort Class Action Settlements In 2023

The plaintiffs' class action bar was enormously successfully in obtaining class-wide settlements in this area in 2023. The top ten products liability and mass tort class-wide settlements totaled $25.83 billion in the past year. In context, 2022 saw a series of opioid settlements that fueled a total of $50.32 billion in the top ten products liability and mass tort class-wide settlements.
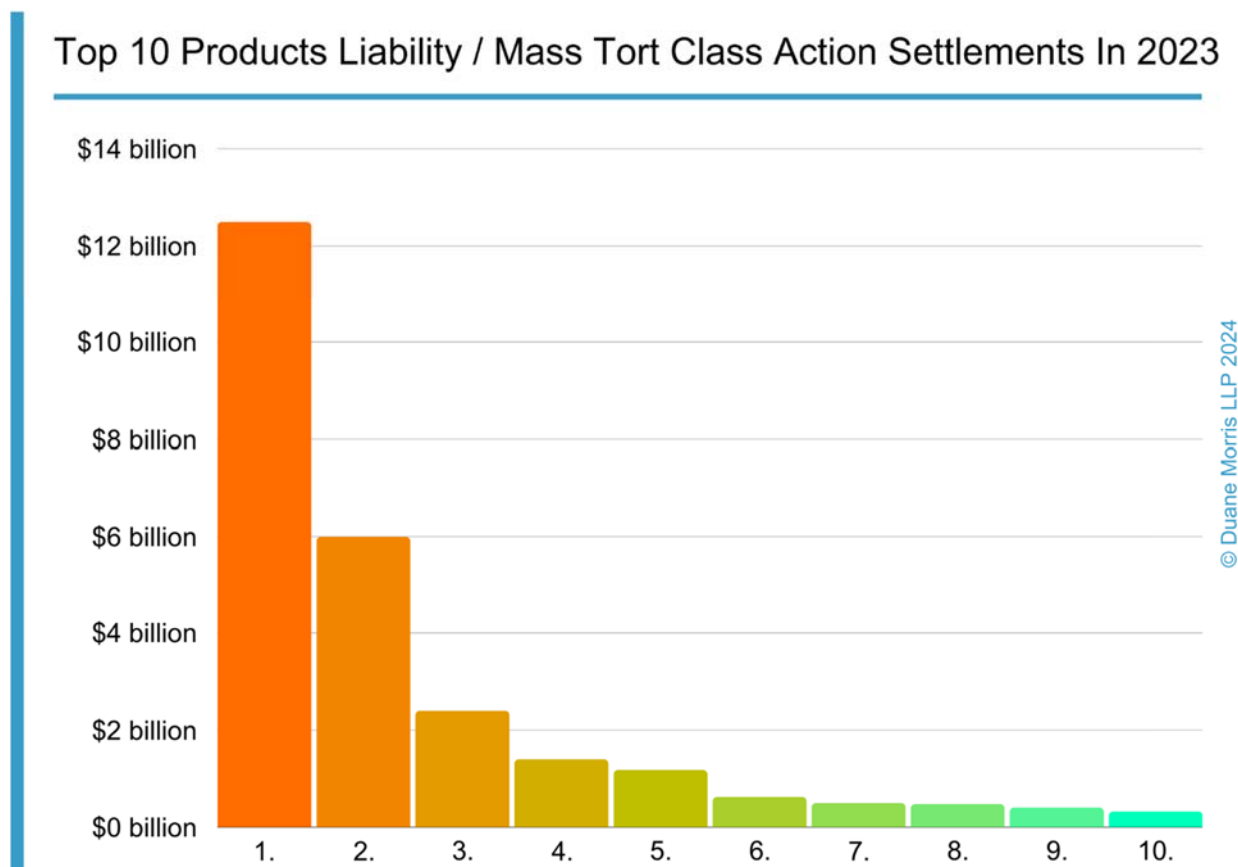

Top 10 Products Liability / Mass Tort Class Action Settlements In 2023

1. **$12.5 billion –** *In Re Aqueous Film-Forming Foams Products Liability Litigation*, **Case No. 18-MN-2873 (D.S.C. Aug. 28, 2023)** (preliminary settlement approval granted in a class action to end claims over contamination from forever chemicals in firefighting foam).

2. **$6 billion –** *In Re 3M Products Liability Litigation*, **Case No. 19-MD-2885 (N.D. Fla. Dec. 11, 2023)** (preliminary settlement approval granted in a class action/MDL to end more than 260,000 claims that the defendant's combat earplugs failed to protect the hearing of service members and veterans).

3. **$2.4 billion –** *In Re Boy Scouts Of America And Delaware BSA LLC*, **Case No. 20-BK-10343 (Del. Bankr. Mar. 23, 2023)** (settlement approval granted by the bankruptcy court to resolve sexual abuse claims against the youth organization).

4. **$1.4 billion –** *In Re National Prescription Opiate Litigation*, **Case No. 17-MD-2804 (N.D. Ohio Sept. 8, 2023)** (settlement reached between Kroger and state and local governments and Native American tribes to resolve allegations that it contributed to the opioid crisis by failing to scrutinize suspicious prescriptions for the pain reliever).

533

5. **$1.18 billion – *In Re Aqueous Film-Forming Foams Products Liability Litigation*, No. 18-MN-2873 (D.S.C. Aug. 22, 2023)** (preliminary settlement approval granted to resolve claims against Chemours, DuPont and Corteva alleging that their "forever chemicals" contaminated public U.S. water systems).

6. **$626 million – *In Re Flint Water Cases*, Case No. 16-CV-10444 (E.D. Mich. Mar. 20, 2023)** (final settlement approval granted in class actions alleging claims of lead contamination in the city's drinking water).

7. **$500 million – *State Of New Mexico, et al. v. Purdue Pharma*, Case No. D-101-CV-201702541 (N. Mex. Cir. Ct. Oct. 19, 2023)** (final consent judgment granted following a settlement in a class action with Walgreens over the opioid crisis).

8. **$494 million – *In Re Philips Recalled CPAP, Bilevel PAP & Mechanical Ventilator Products Liability Litigation*, Case No. 21-MC-1230 (W.D. Penn. Oct. 10, 2023)** (preliminary settlement approval granted in a class action brought by customers affected by the recall of 10.8 million CPAP, BiPAP and ventilator machines over the breakdown of sound-insulating foam).

9. **$408 million – *In Re Willowbrook Ethylene Oxide Litigation*, Case No. 2018-L-010475 (Ill. Cir. Ct. Aug. 17, 2023)** (final settlement approval granted in case resolving more than 870 mass tort lawsuits over claims that the company polluted a community for decades with ethylene oxide emissions).

10. **$326 million – *Zakikhani, et al. v. Hyundai Motor Co.*, Case No. 20-CV-1584 (C.D. Cal. May 5, 2023)** (final settlement approval granted in consolidated class actions that Hyundai and Kia sold vehicles with faulty anti-lock brake modules that could spark fires).

Duane Morris Class Action Review – 2024

XIV. Top Securities Fraud Class Action Settlements In 2023

The plaintiffs' class action bar successfully converted class certification rulings into class-wide settlements at a brisk pace in securities fraud litigation. The top ten securities fraud class action settlements totaled nearly $5.4 billion in the past year. By comparison, the top ten securities fraud class action settlements totaled $3.25 billion in 2022.


Top 10 Securities Fraud Class Action Settlements In 2023
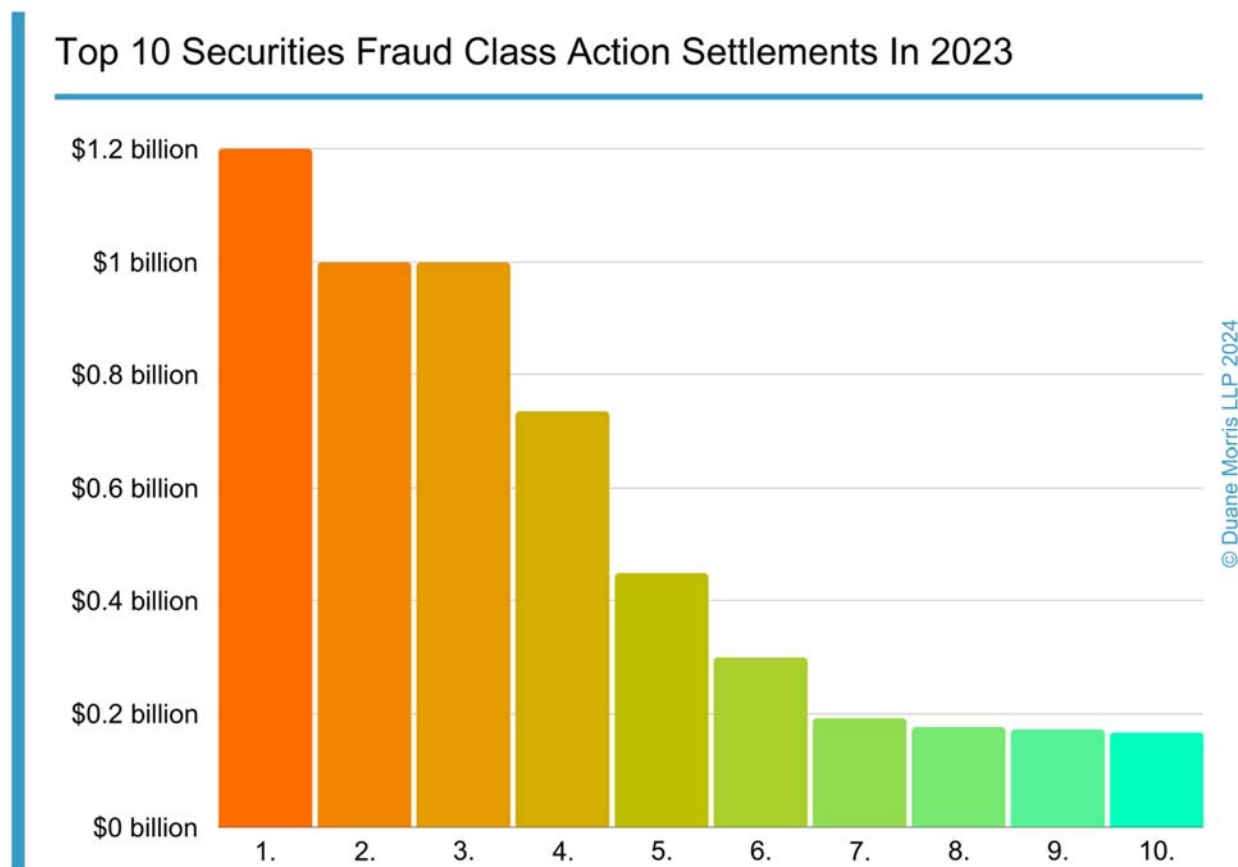
1. **$1.2 billion – *Securities & Exchange Commission, et al. v. Stanford International Bank Ltd.,* Case No. 09-CV-298 (N.D. Tex. Aug. 8, 2023)** (final settlement approval granted in a class action brought by investors alleging that the banks aided Robert Allen Stanford's $7 billion Ponzi scheme).

2. **$1 billion – *In Re Dell Technologies Inc. Class V Stockholders Litigation*, Case No. 2018-0816 (Del. Chan. Apr. 14, 2023)** (preliminary settlement approval granted in a class action brought by investors alleging that Dell and controlling investors Silver Lake Group and its affiliates shortchanged shareholders by billions in a deal that converted Class V stock to common shares).

3. **$1 billion – *In Re Wells Fargo & Co. Securities Litigation*, Case No. 20 Civ. 4494 (S.D.N.Y. Sept. 8, 2023)** (final settlement approval granted in a class action brought by investors alleging that the company made misleading statements about its compliance with federal consent orders following the 2016 scandal involving the opening of unauthorized customer accounts).

4. **$735 million - *Police And Fire Retirement System Of The City Of Detroit, et al. v. Elon Musk,* Case No. 2020-0477 (Del. Chan. July 19, 2023)** (preliminary settlement approval granted resolving claims that the Tesla board of directors obtained overly inflated compensation packages that cost the company hundreds of millions of dollars).

5. **$450 million – *Hedick, et al. v. Kraft Heinz Co.,* Case No. 19-CV-1339 (N.D. Ill. Sept. 12, 2023)** (final settlement approval granted in a class action brought by investors claiming that the Kraft Heinz Co. hid post-merger cost-cutting measures that led to a $15.4 billion goodwill impairment).

6. **$300 million - *Purple Mountain Trust, et al. v. Wells Fargo & Co.,* Case No. 18-CV-3948 (N.D. Cal. Aug. 17, 2023)** (final settlement approval granted in a class action case resolving investor claims that they were harmed when Wells Fargo allegedly hid misconduct in its auto insurance practices).

7. **$192.5 million – *Chabot, et al. v. Walgreens Boots Alliance Inc.,* Case No. 18-CV-2118 (M.D. Penn. Oct. 23, 2023)** (preliminary settlement approval granted in a class action to resolve claims that Walgreens' executives made false representations about the merger with Rite Aid).

8. **$177.5 million – *In Re Envision Healthcare Corp. Securities Litigation*, Case No. 17-CV-1112 (M.D. Tenn. Nov. 20, 2023)** (preliminary settlement approval granted in a class action to resolve claims a health care services provider and its directors misled them about its allegedly improper billing practices).

9. **$173 million – *Flynn, et al. v. Exelon*, Case No. 19-CV-8209 (N.D. Ill. Sept. 7, 2023)** (final settlement approval granted in a securities fraud litigation claiming the company unlawfully misled investors about federal bribery accusations against ComEd).

10. **$167.5 million – *In Re Viacom Inc. Stockholder Litigation*, Case No. 2019-0948 (Del. Chan. Sept. 6, 2023)** (final settlement approval granted in a class action challenging the terms and fairness of CBS Corp.'s $30 billion acquisition of Viacom Inc. in late 2019).

XV.   Top TCPA Class Action Settlements In 2023

There were several multi-million class-wide TCPA settlements in 2023. The top 10 settlements totaled $103.45 million. In 2022, the top 10 settlements totaled 134.13 million.

Top 10 TCPA Class Action Settlements In 2023
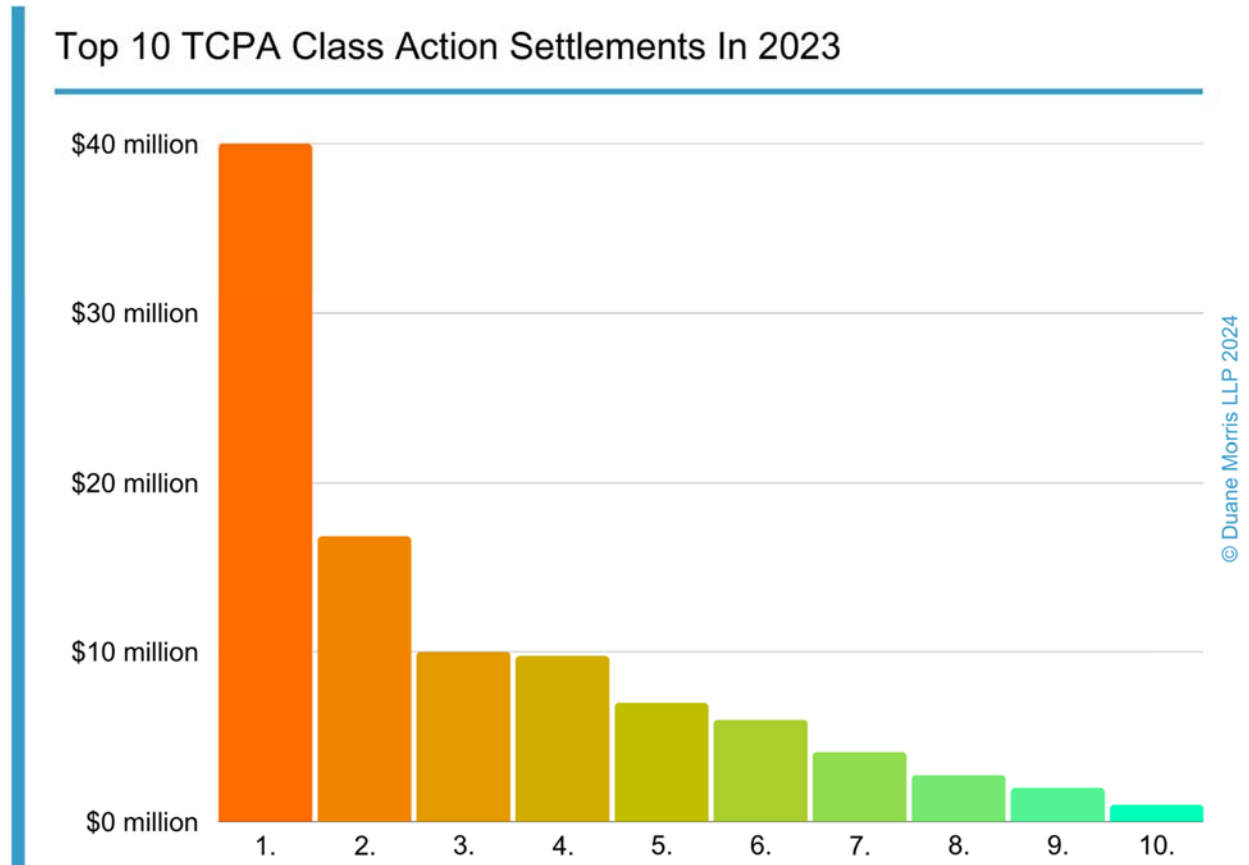
1. **$40 million – *Deshay, et al. v. Keller Williams Realty Inc.,* Case No. 312022-CA-000457 (Fla. Cir. Ct. Mar. 31, 2023)** (final settlement approval granted for a class action alleging that the company placed unsolicited calls to customers in violation of the TCPA).

2. **$16.85 million – *Vance, et al. v. DirecTV*, Case No. 17-CV-179 (N.D. W. Va. Aug. 24, 2023)** (final settlement approval granted for a class action alleging that the company made unsolicited calls to customers on the national do-not-call list in violation of the TCPA).

3. **$10 million – *Gaudreau, et al. v. Frank Speech LLC,* Case No. 16-3249760 (Cal. Super. Ct. April 27, 2023)** (final settlement approval granted for a class action alleging that the company violated the Florida Telephone Solicitation Act by sending unsolicited text messages without first getting consumer consent).

4. **$9.75 million – *Berman, et al. v. Freedom Financial Network LLC*, Case No. 18-CV-1060 (N.D. Cal. July 28, 2023)** (preliminary settlement approval granted in a class action resolving claims that the company made telemarketing calls using artificial or pre-recorded voices in violation of the TCPA trying to sell the companies' products).

537

5. **$7 million – *Taylor, et al. v. Cardinal Financial Co. LP,* Case No. 21-CV-02744 (M.D. Fla. June 26, 2023)** (final settlement approval granted in a class action alleging that the company made telemarketing calls to customers without obtaining their express consent in violation of the TCPA).

6. **$6 million – *Krakauer, et al. v. DishNetwork LLC,* Case No. 14-CV-333 (M.D.N.C. Aug. 15, 2023)** (final settlement approval granted in a class action alleging violations of the TCPA).

7. **$5 million – *Wesley, et al. v. Snap Finance LLC,* Case No. 20-CV-148 (D. Utah Sept. 28, 2022)** (preliminary settlement approval granted in a class action alleging that defendant routinely violated the TCPA by using an automatic telephone dialing system to call people who did not give consent).

8. **$4.1 million – *Ruby, et al. v. Build-A-Bear Workshop Inc.,* Case No. 21-CV-1152 (E.D. Mo. Sept. 6, 2023)** (final settlement approval granted for a class action alleging that the company made unsolicited calls in violation of the TCPA).

9. **$2.75 million – *Boger, et al. v. Citrix Systems Inc.,* Case No. 19-CV-1234 (D. Md. June 1, 2023)** (final settlement approval granted for a class action alleging that the company made unsolicited calls in violation of the TCPA).

10. **$2 million – *Silva, et al. v. Connected Investors Inc.,* Case No. 21-CV-74 (E.D.N.C. June 2, 2023)** (final settlement approval granted for a class action alleging that the company made unsolicited calls in violation of the TCPA).

Duane Morris Class Action Review – 2024

DuaneMorris®

Follow the Class Action Defense Blog: https://blogs.duanemorris.com/classactiondefense/
Subscribe to the Class Action Weekly Wire podcast on your preferred platform