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Sleepless in California

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When asked what keeps them awake at night, US based general counsel often cite worries over the potential for class, mass and collective action lawsuits – particularly employment based actions. These lawsuits are the stuff of nightmares for business nationwide, but particularly so in California – the de facto headquarters for such claims. California presents a unique combination of a large population of employers and employees, an aggressive plaintiffs' bar, employee-friendly legislation that encourages 'stackable' claims upon claims, and a liberal court system. These factors combine to yield a litigation haven with an atypically large number of labour and employment class action lawsuits, more success and greater jury verdicts for plaintiffs, and large fee awards for prevailing plaintiff's attorneys.

The class litigation threat presented by entrepreneurial (and repeat player) plaintiff attorneys to corporate business interests in California is acute. The United States Chamber of Commerce has for years ranked California's legal climate as at or near the bottom of all states for treatment of class action lawsuits, punitive damages, and jury predictability. Los Angeles County – by far the most populous county in the United States – has been profiled in every 'Judicial Hellholes' report issued by The American Tort Reform Foundation. Many deem California's judicial system to be no longer fair, and elect to settle class lawsuits rather than risk trial, regardless of the merits of the underlying claims. Statistics compiled by the California Administrative Office of the Court's Office of Court Research recently documented that almost one-half of the California labour and employment class actions filed between 2000 and 2006 were settled, while a scant 0.5 percent were adjudicated by trial verdict.

While the threat of California class litigation poses challenges to companies doing business in California, such challenges are manageable (i) at the pre-litigation stage, through proactive measures developed in consultation with class counsel who understand the interplay between the various California procedural and substantive laws, and (ii) at the litigation stage, by class counsel who understand the unique risks that class litigation presents and who have the requisite class trial experience necessary to formulate effective case strategy and to take such a case to trial verdict.

The theory behind class actions is efficiency for everyone by permitting multiple similar claims to be efficiently adjudicated in one large class lawsuit. However, given the much publicised, and oftentimes abusive, applications of the American contingency fee system, many view class litigation as benefiting primarily lawyers, as opposed to the class members themselves. And this is true now more than ever in California.

In recent years, Californians have seen more than $500bn in punitive damages sought in *Dukes v. Wal-Mart*, the largest certified civil rights class action lawsuit in the nation's history, a recently overturned $100m-plus bench trial verdict in *Chao v. Starbucks* (the coffee barista tip pooling case), and an $87m settlement for delivery driver meal and rest claims in *Cornn v. United Parcel Service*. The projected fee awards for these and other cases are staggering. And there are few indications that things are expected to slow down anytime soon. The Wall Street Journal recently reported on settlement results in the *Ford Explorer Cases* litigation, where, as part of a settlement reached last year, nearly one million class members each received rights to claim coupons worth $500 toward the purchase of a new Ford vehicle, plus attorney's fees. As of June 2009, the total value of coupons Ford distributed was $37,500 (approximately 75 coupons). The plaintiff class lawyers, however, received $25m in attorney's fees.

California's plaintiff-favouring legal structure

Plaintiff class action attorneys long considered California to be an attractive forum for class lawsuits because of its relatively relaxed procedural rules. For example, unlike federal courts, California has no procedure for automatically appealing a class certification decision before trial. California's substantive laws, especially its wage and hour laws, are attractive as well. California is one of only four states that does not conform its wage laws to the national Fair Labour Standards Act – rather, California imposes heightened standards, for example to determine exemption from overtime, in ways that many modern employers believe do not correlate (or do not correlate well) with changes to the modern workforce, including the shift in the focus of the economy from manufacturing to services, the need for more employee schedule flexibility, and other things.

California's wage and hour laws are made even more attractive for plaintiff class action attorneys due to their 'stackable' interplay with each other. For example, a company defending against claims that certain employees were improperly classified as exempt must not only consider damages exposure for unpaid overtime compensation allegedly owed to the class members, but also premium pay for meal periods and breaks owed to non-exempt employees (but not exempt employees), and 'waiting time penalties' owed to non-exempt employee class members who were not paid these additional monies allegedly owed to them within 30 days of the termination of their employment. The meal period, rest break, and waiting time liabilities 'stack' on the predicate alleged wrong of misclassifying the employee as exempt from overtime.

As a result of California's pro-plaintiff legal environment, there have been steady increases in the already-high rate of class action filings for several years. Moreover, new decisions by the California Supreme Court have further relaxed the procedural standards required to assert and maintain certain types of class and mass actions. For example, on 29 June 2009, in *Arias v. Superior Court (Angelo Dairy)*, the California Supreme Court determined that an individual purporting to bring a 'representative' action under California's Private Attorneys General Act (PAGA) may pursue a mass representative claim for penalties without satisfying statutory class action requirements. Within two weeks of the decision, mass representative PAGA lawsuits were filed against major retailers Wal-Mart and Target Corp., respectively, for allegedly failing to provide adequate seating to a proposed class of cashiers. Class damages are not even sought. The lawsuits merely seek to recover statutory penalties and, of course, attorney's fees.

How to mitigate the California class litigation threat

California is rightly considered a bellwether state for various types of class litigation, including employment class litigation claims, trends, and strategies. Understanding how to mitigate the risks of California labour and employment class litigation is thus important

to understanding how to mitigate the risks of labour and employment class litigation elsewhere in the United States.

Mitigating labour and employment class litigation risks in California requires companies to engage in sophisticated, proactive planning with experienced class action counsel. Specifically, labour audits once considered optional luxuries are now deemed essential to discover and correct any deficiencies. Vigilant, proactive evaluations of the legal landscape for new legal developments and new legal theories must be made regularly. For example, the case of *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, currently pending before the California Supreme Court, will not only decide the class action status of a meal period and rest break lawsuit affecting more than 60,000 current and former employees, but is expected to provide much needed guidance on many important class issues.

When faced with class litigation, comprehensive class defence strategies must be developed with analytical rigour and implemented by experienced class counsel. A disciplined litigation plan addressing remediation, litigation, and settlement strategy, consistent with the business objectives, should be pursued with clear and frequent communication between the client and outside counsel. Many times, corporate defendants will have a tactical advantage early if they understand the class and liability risks and have taken appropriate remedial steps. Even sophisticated plaintiffs' attorneys will not always have a complete understanding of the defendant's strengths and vulnerabilities at early stages of a lawsuit. As the litigation proceeds, cases may become easier to settle as plaintiffs recognise the strengths of the defence. Conversely, cases may become more difficult to settle if the plaintiffs become more aware of previously unknown risks to the defendant or their counsel become more heavily 'invested' in the matter.

Lastly, the advantage of having experienced class litigation counsel cannot be overstated. Very few attorneys in the United States have tried complex class actions to jury verdict. That experience can provide significant value and factor very favourably into settlement negotiations. ■

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