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Welcome



November 15, 2006 : 12:00 p.m. ET : 9:00 a.m. PT

webcast

Consumer Class-Actions

- Morgan Lewis' Retail Initiative
- Definition of "Consumer class-action"
- Increase in Consumer class-actions
- Broader Array of Challenged Conduct

Presenters



J. Gordon Cooney

Moderator



Joseph B.G. Fay

Developments in
constraining judicial
discretion, and CAFA



John F. Schultz

Arbitration, choice-of-law
and class-action waiver
clauses



Gregory T. Parks

Data privacy

Morgan Lewis

Arbitration, Choice-of-Law, and Class- Action Waiver Provisions

Presentation by
John F. Schultz

Contract Terms Intended To Limit Class-Action Risk

- Arbitration clauses with a waiver of class-action litigation rights.
- Choice-of-law clauses establishing law of the consumer's home state or place of purchase as the governing law.

Arbitration Clause With Class-Action Waiver

- You are waiving your right to serve as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants, in any lawsuit filed against us and/or related third parties.
- The arbitrator shall not conduct class arbitration; that is, the arbitrator shall not allow you to serve as a representative, as a private attorney general, or in any other representative capacity for others in the arbitration.

State of the Law – Class-Action Waivers

- On challenge, typically, only unenforceable if procedurally and substantively unconscionable.
- Procedural - addresses the process of making the contract.
 - *bargaining power of the parties*
 - *conspicuousness and comprehensibility of the contract language*
 - *Presence or absence of a meaningful choice*
- Substantive – addresses the contract terms themselves.
 - *commercial reasonableness of the contract terms*
 - *purpose and effect of the terms*
 - *allocation of the risks between the parties*
 - *public policy concerns*

State of the Law – Class-Action Waivers

- Most of the recent court decisions hold that class-action waivers are unconscionable.
- Courts typically strike the waiver, but enforce the remainder of the arbitration clause.
- The result is a class-action arbitration.

Class-Action Waivers – California

- Supreme Court found class arbitration waiver unconscionable
 - *Discover Bank v. Boehr*, 113 P.3d 1100 (Cal. 2005)
- Determinative factors were:
 - *Clause in a consumer contract of adhesion;*
 - *Dispute between parties predictably involved small amounts of damage; and*
 - *Party with the superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.*

Class-Action Waivers – New Jersey

- Supreme Court struck down class arbitration waiver.
 - *Muhammad v. County Bank of Rehoboth Beach, Delaware, 2006 WL 2273448 (NJ 2006).*
- Court found “[i]t was unconscionable for defendants to deprive Muhammad of the mechanism of a class-wide action, whether in arbitration or in court litigation.”
- Waiver severable so action still arbitrable.

Class-Action Waivers – Illinois

- Supreme Court found class arbitration waiver unenforceable.
 - *Kinkel v. Cingular Wireless LLC*, 2006 WL 2828664 (Ill. 2006).
- Arbitration clause held to be substantively unconscionable.
- Waiver severable so that remainder of arbitration clause enforceable.

Class-Action Waivers – Florida

- Court of Appeals rejected arbitration clause with class waiver in cell phone contract.
 - *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Ct. App., 1st Dist. 1999).
- Court found contract:
 - *Procedurally unconscionable due to contract of adhesion and imposition of arbitration clause after dispute arose.*
 - *Substantively unconscionable due to, inter alia, limitation on damages and class-action waiver.*

State of the Law – Class-Action Waivers

- Some courts continue to enforce class-action waivers.
- Favorable decisions are more dependent upon state policy than contract or waiver language.
- Number of favorable vs. unfavorable states is about equal.
- Most favorable states are not class-action hot spots.

Class-Action Waivers – Georgia/South Dakota

- 11th Circuit enforced class waiver in a pay-day loan agreement.
 - *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005).
- Circuit Court cited several federal court decisions holding that class-action waivers are not unconscionable.

Class-Action Waivers – Louisiana

- 5th Circuit, applying Louisiana law, enforced arbitration clause barring class-actions or consolidation of cases.
 - *Iberia Credit Bureau, Inc., Etc. et al., v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004).
- Court found significant State AG's ability to pursue class relief and the lack of a class-action device in state consumer fraud act.

Class-Action Waivers – Maryland

- Court of Appeals enforced class arbitration waiver.
 - *Walther v. Sovereign Bank*, 386 Md. 412 (Md. App. Ct. 2005).
- Court held that:
 - *Arbitration provision not procedurally unconscionable for lack of conspicuous disclosure in the agreement; and*
 - *Arbitration provision for prohibition on class-action proceedings not unconscionable.*

Class-Action Waivers – North Carolina

- Court of Appeals upheld class-action waiver clause in mortgage document.
 - *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865 (N.C. App. Ct. 2006).
- Court said majority of state and federal courts have upheld class-action waivers.

Class-Action Waivers - Utah

- Tennessee Court of Appeals enforced class waiver clause under Utah law.
 - *Spann v. Amer. Ex. Travel Related Serv. Co., Inc.*, 2006 WL 2516431 (Tenn. Ct. App. 2006).
- Court found clause was neither procedurally nor substantively unconscionable.

Class-Action Waivers – Choice-of-law Clauses

- One strategy for dealing with uncertainty on class-action waivers is to specify the governing law.
- Courts have enforced choice-of-law clauses specifying the law of a state that enforces class-action waivers.

Class-Action Waivers – California

- Jones v. Citigroup Inc. (Cal. Ct. App.) – class-action waiver enforced under South Dakota choice-of-law provision.
- Discover Bank v. Boehr (Cal. Ct. App.) – class-action waiver enforced under Delaware choice-of-law provision.
- Cardenas v. Chase Manhattan Bank USA, N.A. (Cal. Ct. App.) – class-action waiver enforced under Delaware choice-of-law provision.
 - *But see Aral v. EarthLink Inc. (Cal. Ct. App.) – class-action waiver and Georgia choice-of-law provision rejected.*

Nationwide Class-Actions – Choice-of-law Clauses

- Certifying a nationwide class remains prime threat.
- Plaintiffs' lawyers less interested in certifying statewide classes.
 - *Defendants more willing to try statewide class-actions.*
 - *Less return on investment.*
- Statewide class-actions typically filed in just a few large states.

Nationwide Class-Actions – Choice-of-law Clauses

- CAFA has not eliminated nationwide consumer class threat.
- Federal courts apply choice-of-law principles of forum state.
- Several states willing to apply one state's law to all consumers nationally, including Oklahoma, New Jersey, Illinois, and Minnesota.

Nationwide Class-Actions – Oklahoma

- Supreme Court certified a nationwide class in a breach of warranty action.
 - *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (OK 2003).
- Court applied Michigan law to all consumers:
 - “[T]he relative interest of each buyer's home state in applying its version of the UCC is more or less equal. By contrast, Michigan's interest in having its regulatory scheme applied to the conduct of a Michigan manufacturer is most significant.”

Nationwide Class-Actions – New Jersey

- Appellate Court certified nationwide class of third-party payors under NJ CFA.
 - *Int'l Union of Oper. Eng. Local #68 Welfare Fund v. Merck & Co., Inc.*, 894 A.2d 1136 (App. Div. 2006).
- Defendant's headquarters in NJ.
- Drug developed and tested in NJ.
- Fraud allegedly conceived of and executed in NJ.
- NJ has one of strongest CFA's in country.

Nationwide Class-Actions – Florida

- Court certified nationwide deceptive trade practices class under Florida law.
 - *Renaissance Cruises, Inc., v. Glassman,*
738 So. 2d 436 (Ct. App., 4th Dist. 1999).
- Cruiseline's principal place of business in Florida.
- Many plaintiffs were Florida residents.
- Payment made and overages kept in Florida.
- Tickets said Florida courts had jurisdiction.

Nationwide Class-Actions – Florida

- Court rejected certification of nationwide contract class under Florida law.
 - *Stone v. CompuServe Interactive Services, Inc.*, 804 So.2d 383 (Ct. App., 4th Dist. 2001).
- FL had insufficient contacts to justify application of FL contract law to out-of-state residents.
- Court distinguished Renaissance and the extensive FL contacts in that case.

Nationwide Class-Actions – Minnesota

- District Court certified a nationwide class under Minnesota law.
 - *In re St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation*, MDL No. 01-1396 (JRT/FLN) (D. Minn. Oct. 13, 2006).
- Defendant incorporated, headquartered, and had principal place of business in MN.
- Most relevant corporate acts occurred in MN.
- Product created/manufactured in MN.
- Consumers invited to solicit product information using MN contact information.

Nationwide Class-Actions – Illinois

- Appellate Court reversed trial court's denial of breach of warranty nationwide class.
 - *Barbara's Sales, Inc. v. Intel Corp.*, 2006 WL 2105656 (App. Ct., 5th Dist. 2006).
- California consumer fraud laws governed all consumers' claims.
- California was manufacturer's principal place of business and location of marketing and PR group.
- Product testing performed, and nationwide marketing campaign devised and launched, in CA.

Nationwide Class-Actions – Florida

- Supreme Court rejected applying Illinois CFA to non-Illinois consumer transactions.
 - *Avery v. State Farm (Ill. Sup. Ct. 2006)*
- Decertified nationwide class of insureds claiming fraud in auto repairs.
- Supreme Court found:
 - *Contracts across 48 states not subject to uniform interpretation;*
 - *Non-residents protected by IL CFA only if disputed transaction occurs primarily and substantially in Illinois.*

Nationwide Class-Actions – Choice-of-law Clauses

- Insert governing law provision in contract or on website to specify that law of consumer's home state governs any dispute.
- Provides less certainty, but reduces risk of nationwide class certification.
- Subject to unconscionability challenge similar to class-action waiver clauses.

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Mechanisms to Curtail Class-Actions

Presentation by
Joseph B.G. Fay

Typical Class Certification Pattern for Damages Claims Under Fed. R. Civ. P. 23(b)(3)

- Plaintiffs file *pro forma* class certification motion, stressing “commonality” of questions: (1) whether defendant(s) engaged in conduct alleged, and (2) whether that conduct violates some statutory/common law/contractual duty of broad applicability
- Defendants oppose based on individualized nature of, *inter alia*, causation and damage issues
- Claims may also present individual issues regarding statute of limitations, standing, etc.
- Courts granting certification often do so on the expressed assumption that methods to resolve individual issues will be developed at some later stage of litigation

2003 Amendments to Rule 23

- Fed. R. Civ. P. 23(c)(1)(B):
- An order certifying a class must define the class and the class claims, issues, or defenses
- Fed. R. Civ. P. 23(c)(2)(B):
- . . . The notice must concisely and clearly state in plain, easily understood language:

“the class claims, issues, or defenses”

Limited Issue Certification Under Rule 23

- Fed. R. Civ. P. 23(c)(4):

When appropriate (A) an action may be brought or maintained as a class-action with respect to particular issues . . .

- Advisory Committee Note, 1966 Amendments to Rule 23, regarding Rule 23(c)(4)(A):

For example, in a fraud or similar case, the action may retain its “class” character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Chiang

- Rule 23(c)(4)(A):

“Both imposes a duty on the court to insure that only those questions which are appropriate for class adjudication be certified, and ... gives ample power to treat common things in common and distinguish the distinguishable.”

Chiang v. Veneman, 385 F.3d 256 (3d Cir. 2004).

McCoy

. . . The proper substantive inquiry for an appellate tribunal reviewing a certification order for Rule 23(c)(1)(B) compliance is whether the precise parameters defining the class and a complete list of the claims, issues or defenses to be treated on a class basis are readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion.

Wachtel v. Guardian Life Ins. Co., 453 F.3d 179, 185 (3d Cir. 2006).

CAFA “Local Controversy”

- On CAFA’s “local controversy” exception to federal jurisdiction under 28 U.S.C. § 1332(d)(4)(A)(i)(III):

“[I]f the [CAFA] defendants engaged in conduct that could be alleged to have injured consumers throughout the country or broadly throughout several states, the case would not qualify for this exception, even if it were brought only as a single-state class-action ...

Kearn v. Ford Motor Co., 2005 WL 3967998 (C.D. Cal.), quoting S. Rep. No. 109-14 at 40-41.

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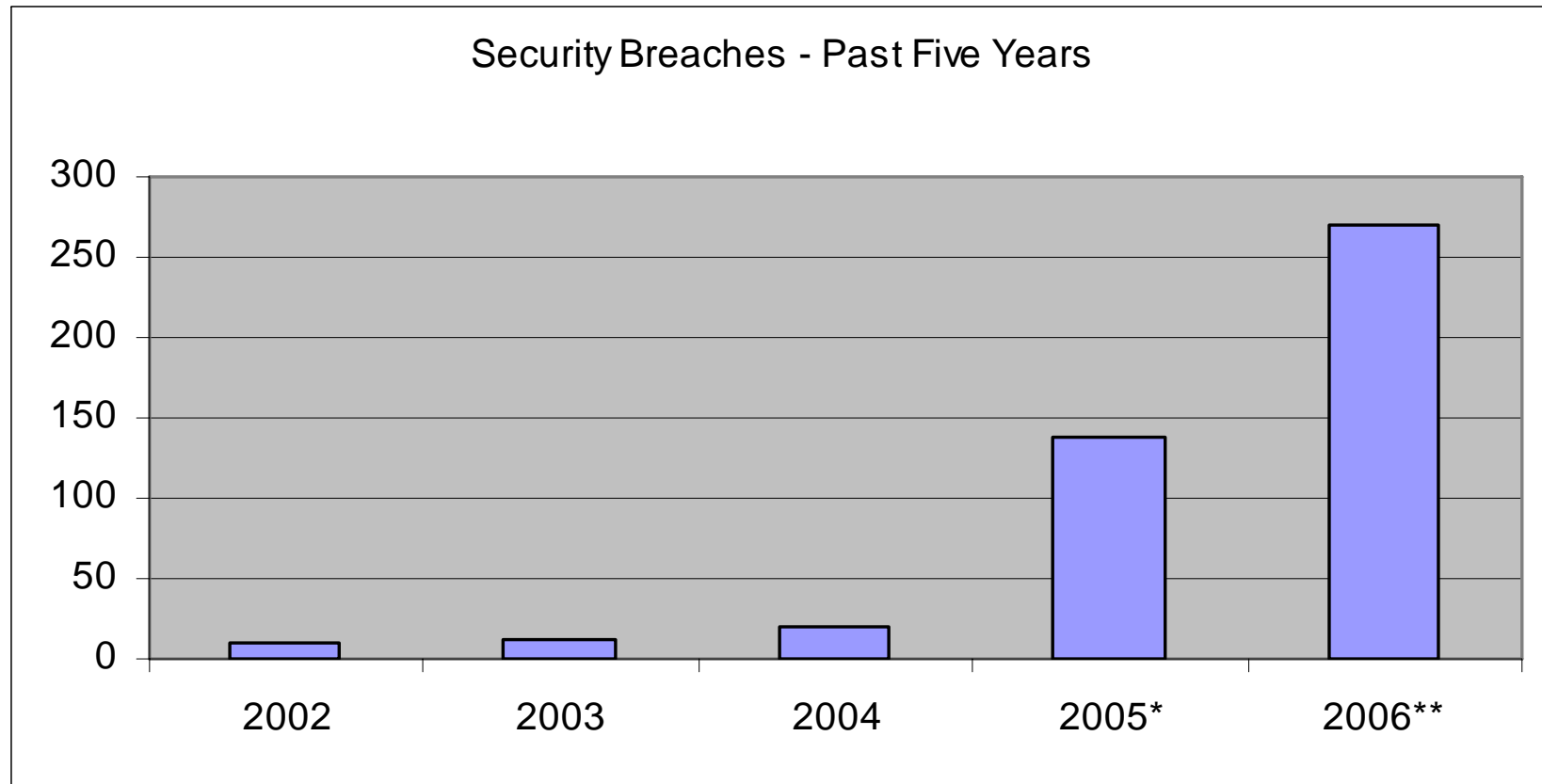
Data Privacy Class-Actions

Presentation by
Gregory T. Parks

Introduction: The Problem

- Increased ability to store personal data
- Gathered from websites and POS
- Benefits for retailers and consumers
- Vulnerable to attack at network or physical level
- High profile security breaches

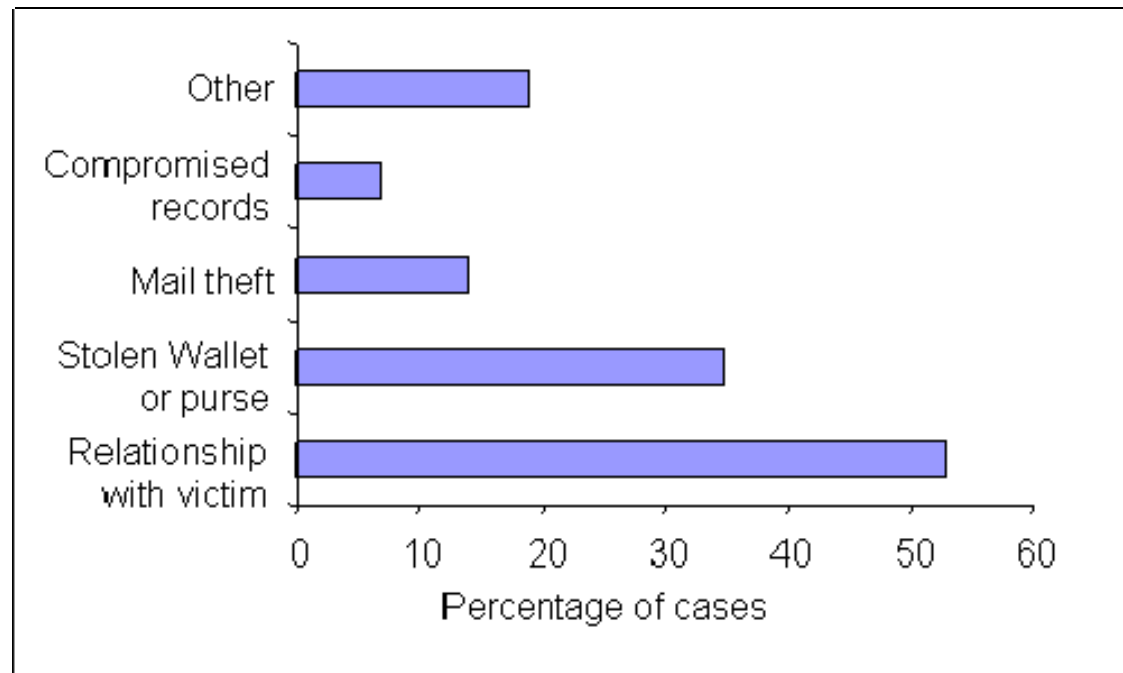
Reported Data Security Breaches



* Notification laws go into effect in 2005

** 2006 data is through 11/3/2006

Sources of Identity Theft



Source: U.S. General Accounting Office (GAO)

The Legal Question

- Can a retailer that maintains personal information about consumers be held liable for a third party's theft of that information in a class-action or similar procedure?

Sources of Potential Liability

- Federal Trade Commission (FTC)
- Collective actions by state Attorneys General
- Traditional Consumer class-actions

FTC Action 2000 - 2004

- First enforcement actions in 2000
- Targeted at privacy policies under FTC Act
- Consent decrees
 - *Some fines*
 - *Mostly remedial measures*

FTC Action Since 2004

- Now going beyond privacy policies
- Requires “reasonable measures” to protect data
- Many settlements; few FTC Decisions
- Using both FTC Act and Fair Credit Reporting Act
- No reported legal challenges

State Attorneys General

- Individual state laws
- Collective actions by attorney general
- Fines, injunctive relief, and attorneys' fees

Laws Enforceable by State AGs

- Breach notification laws in 31 states
- Some states *require* privacy policy
- State law on unfair or deceptive trade practices

Consumer Class-Actions

- Follow-on to government action
- Many actions filed, most settled
- Little established law

Defenses to Class Certification

- No federal law with private right of action
- State laws vary, few have private right of action
- No class wide damages
- Individual reliance issues

U.S. Congressional Efforts

- Federal laws introduced for past three years.
 - *Notification laws with private right of action*
 - *“Privacy Bill of Rights”*
 - *Privacy Rights and Oversight for Electronic and Commercial Transactions (PROTECT)*
- PROTECT bill, if passed in current form, would provide:
 - *Private right of action for damages*
 - *Statutory damages*
 - *Attorneys’ fees for prevailing plaintiffs*

Answer to the Legal Question

- Can a retailer that maintains personal information be held liable for the theft of that information by a third party?

Answer: The law is far from settled, but will likely continue to evolve given the public pressure for political answers. Government enforcement mechanisms have imposed some liability.

Consumer class-actions face many obstacles, but some have forced expensive settlements.

What Can You Do?

- Develop and follow privacy policy
- Technical best practices
- Crisis management for breaches

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What We Can Do

San Francisco
Palo Alto

Chicago

Boston

New York

Pittsburgh

Princeton

Los Angeles
Irvine

Harrisburg

Philadelphia

Washington

Dallas

Miami

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