CLASS ACTION ROUNDTABLE: CUTTING EDGE ISSUES AROUND MASS ARBITRATION

September 21, 2021

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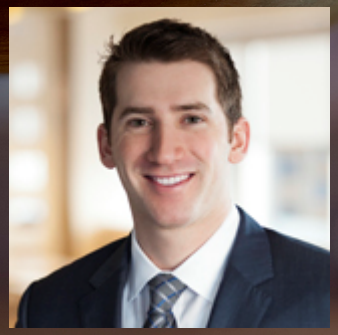
Presenters



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OVERVIEW AND AGENDA

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- The Use of Class Action Waivers To Mitigate Risk
- The Rise of the Mass Arbitration Strategy
- Strategies for Handling Mass Arbitrations
- Strategies to Mitigate Prospective Mass Arbitration Risk
- Q&A

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THE USE OF CLASS ACTION WAIVERS TO MITIGATE RISK

Use of Class Action Waivers to Mitigate Risk

- In 1925, the Federal Arbitration Act (FAA) was enacted in response to judicial hostility to arbitration agreements.
  - Created a presumption in favor of enforcing arbitration agreements. 9 U.S.C. § 2.
  - But, arbitration provisions were enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*.

Use of Class Action Waivers to Mitigate Risk

- In response to rising volume of high-exposure and expensive-to-defend class actions, companies aggressively used arbitration provisions with class action waivers to mitigate risk.
- This resulted in threshold litigation issues over whether the class action waivers were enforceable.
- Prior to 2011, some state courts held that waivers of a customer's right to participate in a collective arbitration were unconscionable under state contract law and therefore unenforceable.
  - *E.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

Enforceability of Arbitration Agreements

- In 2011, the Supreme Court in *AT&T Mobility LLC v. Concepcion* held that the FAA preempts state laws that condition enforceability of arbitration agreements on the availability of class-wide relief.
- *Concepcion* turned in part on a finding that the arbitration provision at issue protected consumers:
  - AT&T Mobility would pay the entire cost of arbitration (unless the claim was determined to be frivolous).
  - The arbitration would take place in the county where the consumer was located, by telephone, or through document submission, and forms for the arbitration were made available on AT&T Mobility's website.
  - The arbitrator was not limited in the damages it could award to a consumer, and if the consumer received an award greater than AT&T Mobility's last written settlement offer, the award would be increased to $7,500, and the consumer would be entitled to double the attorney's fees.

 Source: *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Post-*Concepcion*

- After *Concepcion*, many consumer arbitration provisions were amended to follow the "gold standard" terms used by AT&T Mobility.
  - At minimum, revised arbitration provisions require the company to pay arbitration costs.
  - American Arbitration Association's Consumer Arbitration Rules were typically used.
- In 2018, the Supreme Court in *Epic Systems v. Lewis* held that class action waivers in arbitration agreements between employers and employees are enforceable under the FAA.
- **SUM:** The plaintiffs' bar was significantly stymied by the class action waiver strategy.

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THE RISE OF MASS ARBITRATIONS

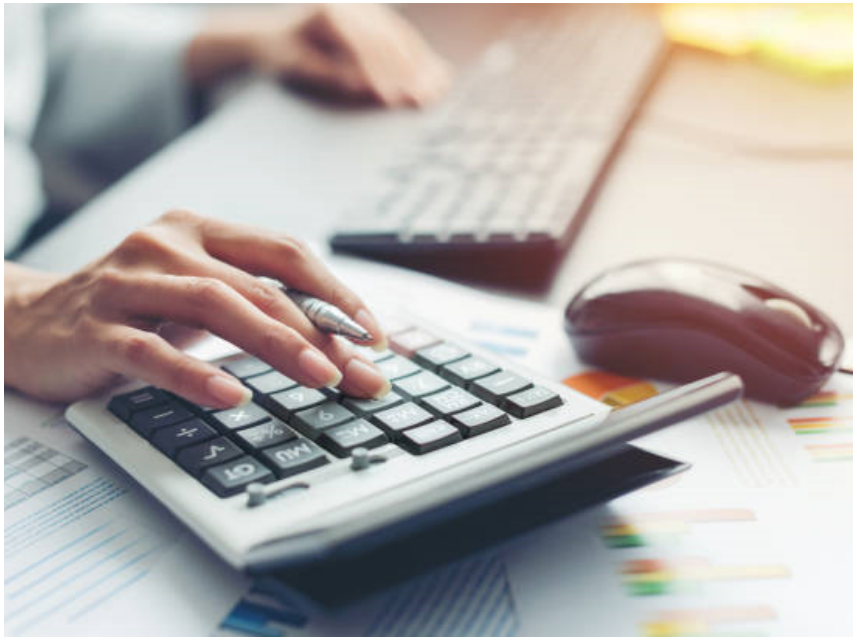
The Rise of Mass Arbitrations

- As a result of the enforcement of class action waivers, some plaintiff firms began employing a new strategy of harnessing technology and social media to litigate small value claims in arbitration at massive scale.
- Claimants took advantage of arbitration provisions that required defendants to pay arbitration fees up front, or used litigation funding resources to pay claimants' share of arbitration fees.
- Areas of focus:
  - Independent contractor/worker misclassification claims.
  - Quickly spread to consumer claims.

The Reality of Mass Arbitrations

- In 2015, class action lawsuits were brought against a large transportation network company alleging that it misclassified its workers as independent contractors and did not pay overtime
  - While an appeal on a motion to compel arbitration was pending, **12,501** individual arbitration claims were filed against the company
  - The company paid the initial filing fee in **296** claims, appointed arbitrators in **47** claims, and paid the retainer in **6** claims
  - Eventually, Plaintiffs filed suit to compel arbitration on all claims

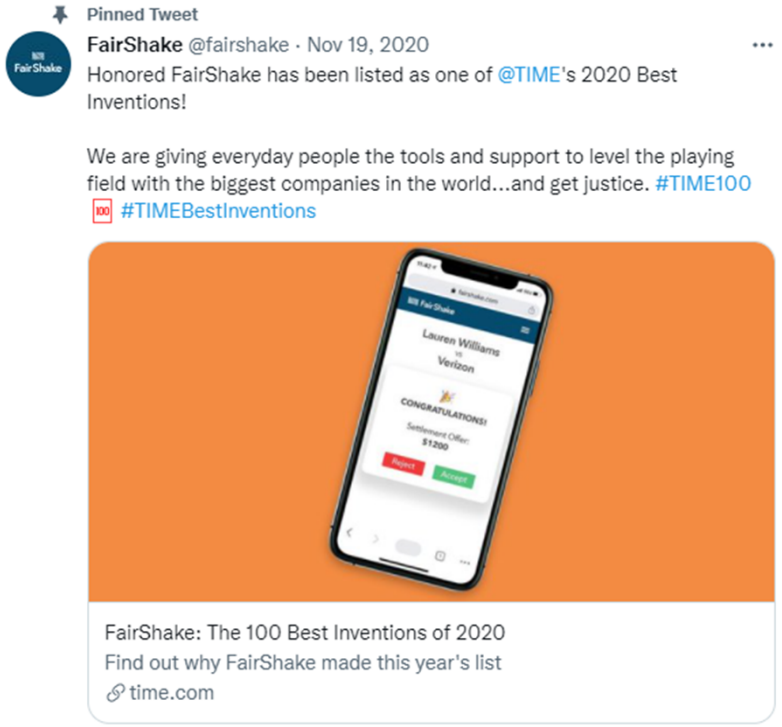
Doing the Math



- AAA Consumer Rules:
  - Initial filing fee of between $75 and $300 per case.
  - Case management fee of $1,400 per case.
  - Arbitration compensation of between $1,500 and $2,500 per case, depending on whether the arbitrations are decided through documents alone or a live hearing.
- Potential administrative cost to defendants: **~$900,000 per 200** cases filed.

Settlement Pressures

- One leading plaintiffs' firm claims to have secured more than **$375 million** in settlements for more than **100,000** individual arbitration clients over **two years**.
- Plaintiffs' firms aided by social media harvesting and online recruiting.



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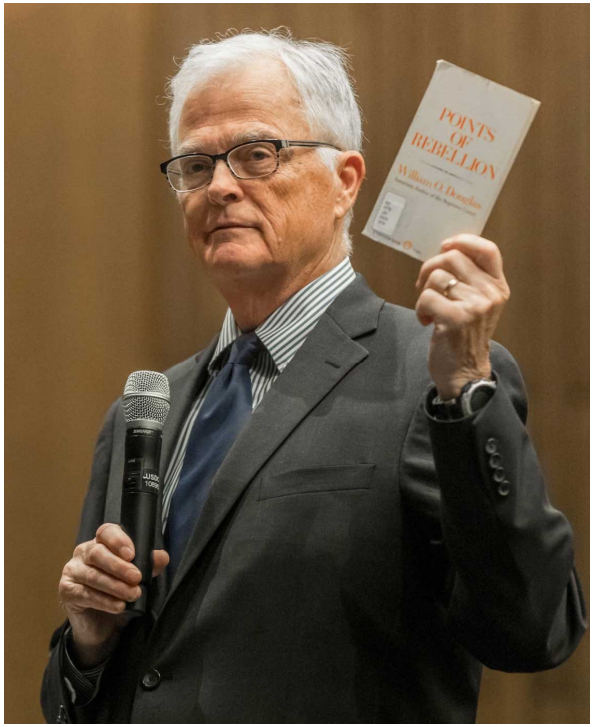
Source: Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, Wall St. J. (June 1, 2021), *available at* https://on.wsj.com/2YPxN7f

Defendants' Initial Response

- Some defendants sought relief from the same courts that enforced the class action waivers – and those courts have not been receptive.
- Judge Alsup in *Abernathy v. DoorDash* commented that there was "poetic justice" in 6,000-plus Dashers commencing arbitration:

> "The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order."



Source: Feb, 10, 2020 Order on Motion to Compel in *Abernathy, et al. v. DoorDash, Inc.*, No. 10-cv-7545 (N.D. Cal.); *Boyd, et al. v . DoorDash, Inc.*, 19-cv-7646 (N.D. Cal.)

Defendants' Initial Response

- Some companies refused to pay the up-front arbitration fees.
- California has passed a statute to shut down this strategy (SB707):
  - "In an employment or consumer arbitration that requires … the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration…."
  - If the company does not pay, a consumer or employee may:
    - Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction;
    - Compel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration.
  - If there is a material breach, the court shall order the drafting party to pay attorneys' fees and costs. Could also include evidentiary sanctions, terminating sanctions, and contempt.
  - Statute is being challenged on appeal as violating the FAA.

Defendants' Initial Response

- Argue that mass arbitrations violate arbitration provisions against mass claims.
  - No traction on this theory yet.
  - Issue as to whether court or arbitrator decides.
- Try to settle through a class settlement.
  - New strategy with limited success unless attorneys in mass arbitrations sign off.
  - How do you agree to a class action settlement where class actions are prohibited?
  - Strong opposition by mass arbitration counsel (and potential for high number of opt-outs).
- Be strategic in deciding when to compel arbitration.
- Remove the class action waiver and defend future class actions.

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STRATEGIES FOR HANDLING MASS ARBITRATIONS

Intake Procedure

- Establish a service email address (include in contracts) and assign point person(s) (internal and external).
- Set up a uniform procedure to do due diligence on each claimant at the outset:
  - Current or former employee/contractor.
  - Duration of service.
  - Interview manager/co-workers.
  - Damages.
  - Unique facts.
- Use pre-dispute informal meeting requirement (if you have one) to gather valuable information.
- Tell AAA (or JAMS, etc.) which counsel to copy on case correspondence.
- Strategic staffing.

Know the Rules

- On August 1, 2021, AAA published a new set of rules for the handling of "Multiple Case Filings" (as defined under the Rules).
- "Multiple Case Filings" defined as:
  - 25 or more similar Demands for Arbitration filed against or on behalf of the same party or related parties; and
  - representation of the parties is consistent or coordinated across the cases.
- Changes include:
  - Requirement for filing party to submit "Filings Intake Data Spreadsheet."
  - Parties may serve/submit one answer/amended complaint that applies to multiple (or all) cases.
  - 45 days to Answer (rather than 14).
  - AAA may appoint a "Process Arbitrator" for procedural matters.
  - New fee schedule (but not published on AAA website yet).

Set the Rules

- Rules can be set by agreement/contract.
- Consider whether to include rules in customer/employee/contractor agreements or agree upon rules with opposing counsel at outset of cases.
- Template case management order.
- Discovery:
  - Automatic disclosures.
  - Use of discovery across cases.
  - Depositions (consider agreeing to use videotaped depositions across cases).
  - Informal dispute resolution procedure.
  - Require reasoned opinions for discovery disputes?
- Motion practice:
  - Prohibit dispositive motions?
  - Page limits?
  - Require reasoned opinions?
- May arbitrator's opinions be cited/disclosed outside of that arbitration?

Consider Alternatives to AAA and JAMS

- In 2019, the International Institute for Conflict Prevention & Resolution ("CPR") created the Employment-Related Mass-Claims Protocol.
- Applies when more than 30 individual employment-related claims of a "nearly identical nature" are filed against the same Respondent
  - "Nearly Identical" means the claims "arise out of a factual scenario and raise legal issues so similar one to another that application of the Protocol . . . will reasonably result in an efficient and fair adjudication of the cases."
- Bellwether process:
  - Random set of ten cases are deemed "Test Cases" and proceed to arbitration; remaining cases "stand by."
  - Claimants select arbitrators for Test Cases.
  - Once the Test Cases are resolved, a mediation process is initiated as to the remaining Claimants (Mediator receives Test Case awards).
  - Mediator and parties then have 90 days to agree on approach to globally resolve remaining claims.
  - If agreement is not reached after 90 days, any party may "opt out" of arbitration process and proceed in court.
  - Absent an opt-out (i.e., an election to proceed in court), remaining claims proceed to arbitration in a sequence determined by CPR.
- Challenged in *Abernathy v. DoorDash* (CPR represented by Morgan Lewis).
- Blessed by court in *McGrath v. DoorDash.*

Arbitrator Selection

- Research arbitrators in advance and assign ratings.
- If opposing counsel has brought similar mass arbitrations against other companies, try to gather intelligence on arbitrators' decisions in those arbitrations (e.g., do you have same counsel?).
- Do you want to limit each arbitrator to one case?
  - Pro: forces plaintiffs' attorneys to do extra leg work; mitigates damage that one "bad" arbitrator can do.
  - Con: increases your costs/fees; mitigates positive impact of favorable arbitrators.

Hearing Prep and Hearing

- Mock arbitration study (can be very valuable but be careful not to disqualify "good" arbitrators).
- Remote or in person.
- Evidence of "happy campers."
- If in front of same arbitrator multiple times, consider whether and how to vary presentation.
- Communication among teams is key to identifying trends in arbitrators' reasoning.

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STRATEGIES TO MITIGATE PROSPECTIVE MASS ARBITRATION RISK

Strategies for Modifying Arbitration Agreements

- Arbitration provisions can be modified to change the incentives for and ability of plaintiffs' attorneys to create mass arbitrations.
- Each of the following approaches has pros/cons and the arbitration agreement should be tailored to the particular entity and accounting for where it sees the litigation risk coming from.
- When modifying arbitration provisions to be less consumer-friendly, there is a risk that courts will not enforce the arbitration provision.

Strategies for Modifying Arbitration Agreements

1. **Pre-Demand Requirement:** Require claimants to provide information or speak with a lawyer at the company before filing a claim, e.g., a 30, 60, 90 day waiting periods and/or claim forms that require a description of the issue.
2. **Informal Dispute Resolution First:** Require mediation or other informal dispute procedure first before arbitration can be initiated.
3. **Select Arbitration Provider That Can Facilitate Mass Arbitrations:** Arbitration providers can change timing and structure of filing and other fees and can consider including a provision that allows either side to negotiate lower filing feels with the provider.
4. **Re-evaluate Arbitrator Authority:** Specify whether the court decides arbitrability as opposed to the arbitrator.

Strategies for Modifying Arbitration Agreements

5. **Fee Shifting/Penalties:** Allow arbitrator to award fees and costs to the prevailing party and/or where there is a frivolous claim.
6. **Cost-Splitting Provisions:** Require claimants to pay some portion of the arbitration and/or the initiation fee.
   - Can be tied to the value of the potential claim, e.g., claims >$10,000 require a certain splitting of costs or each side bears their own costs.
7. **Offer of Judgment:** Can consider in a mass arbitration scenario whether to make offers of judgment at the outset to shift risk. While some jurisdictions enforce this concept in arbitration, arbitration provisions should be drafted to expressly address it.

Strategies for Modifying Arbitration Agreements

8. **Establish Specific Protocol for Mass Arbitration:** Can consider provisions that will hold in abeyance certain claims if large numbers are filed.
   - This may be practically difficult to craft and could run afoul of arbitration provider requirements.
   - California's SB707 requires companies to pay arbitration fees within 30 days (if fees are required to initiate arbitration), and failure to do so can lead to default judgments and liability for plaintiffs' attorneys' fees.
9. **Reserve Right to Settle on Class-wide Basis:** When faced with mass arbitration risk, companies may want to preserve ability to obtain global peace.

Strategies for Modifying Arbitration Agreements

10. **Carve Out Claims for Small Claims Court:** Can have claimants file small claims, generally <$500, in small claims court either located near the claimant or convenient to the company.
    - Some small claims courts prohibit lawyer involvement.
    - Permitting claimants to file in jurisdiction convenient to them may prove burdensome to companies that do not have a national presence.
11. **Discovery Limits:** Modify scope of discovery in arbitration for certain claims under a certain value, e.g., only allow deposition of consumer or limit amount of document requests.

Other Considerations

- Federal and state legislators are focusing on perceived abuses of arbitration.
  - Congress considering banning pre-dispute requirements and class action waivers in employment, consumer, antitrust, and civil rights disputes (Forced Arbitration Injustice Repeal Act, or FAIR Act, H.R. 963).
- Annually review arbitration provisions.
- Be mindful of what happens to claims that accrue pre-modification.

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

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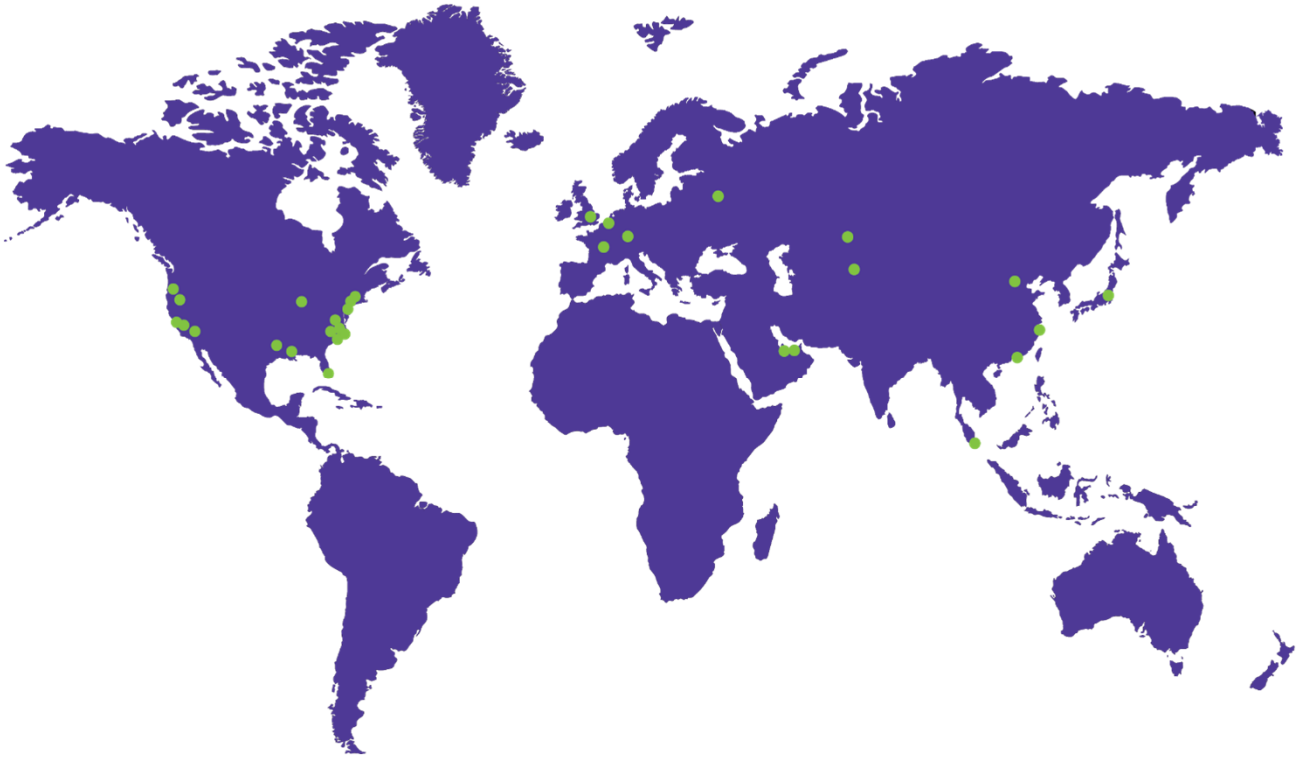

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Scott Schutte represents companies and individuals in commercial and civil litigation, with an emphasis on the defense of consumer class actions in US state and federal courts. He regularly defends consumer service providers, financial services companies, and product manufacturers against high-exposure claims both in the class action and commercial litigation settings. Scott serves as managing partner of the firm's Chicago office, a deputy chair of Morgan Lewis's global litigation practice, and co-chair of the Class Action Working Group.

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Zachary M. Johns represents US and international clients in a variety of high-stakes complex commercial matters with a focus on civil and criminal antitrust and class action litigation. Zak also counsels businesses on antitrust and litigation risks and advises on risk management strategies. Zak represents companies across a broad range of industries, including financial services, pharmaceutical, healthcare, technology, and consumer products. Zak has experience handling complex single plaintiff and class actions from inception through trial and appeal. As part of his litigation practice, Zak recently co-chaired an eleven-day trial in which he delivered the opening statement and conducted multiday examinations of two key witnesses.

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Megan A. Suehiro's practice focuses on complex business litigation and class action defense. She has experience in all phases of litigation, including fact investigation, discovery, motions practice, and trial. Megan has appeared before state and federal courts, and has second-chaired three bench trials, securing complete judgment on behalf of the client in all three. Megan is a member of the firm's Class Action Working Group, and has experience representing clients in products liability, financial services, and consumer class actions.

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