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# TECHNOLOGY MARATHON

**Collective Action: A UK and EU  
Perspective for US Companies**

Pulina Whitaker, Chris Warren-Smith, Alexandre Bailly, and Ezra Church

**Tuesday, June 20 | 11:30 am-12:30 pm ET**



# Presenters



**Ezra D. Church**



**Pulina Whitaker**



**Chris Warren-Smith**



**Alexandre Bailly**

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# Overview

- US Privacy class actions
- Collective Privacy Actions in UK
- New Collective Actions Law in EU
- Procedural Position
- Third Party Funding
- Current US and European Trends



# US Privacy Class Actions



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# US Class Actions--Basics

- Class actions are a procedural tool allowing one or more “named plaintiffs” and “class representatives” to file and pursue a lawsuit on behalf of a larger group or “class.”
- Outcome of the case applies to all members of the case, except in limited circumstances.
- Purpose of class actions:
  - Allows for the efficient management of a dispute that would otherwise be unmanageable if each class member were required to bring their own case or be joined as a separate plaintiff.
  - Protect a defendant from inconsistent obligations, protect the interests of absentees, and spreading of litigation costs on behalf of lots of plaintiffs.
- The modern US class action is relatively new, arising with changes to the Federal Rules of Civil Procedure in 1966.

# US Class Actions—Basics (cont.)

- Under Federal Rule of Civil Procedure 23, the court must “certify” that a particular case meets the requirements for a class action, by making the following findings:
  - Numerosity: the number of class members renders it impracticable to join them in the action
  - Commonality: Class claims share common questions of law or fact
  - Typicality: The claims or defenses of the proposed class representatives are typical of those of the rest of the class
  - Adequacy: The proposed class representatives will adequately protect the interests of the entire class.
- For damages cases, the Court must find that common questions of law and fact predominate over specific questions so that the class action is “superior to other methods” for resolving the dispute.
- All class members are bound unless they opt-out after receiving the “best notice practicable.”



# US Class Actions--Big \$

- According to recent analysis in Forbes, in 2022, class action lawsuits in product liability, consumer fraud, antitrust and other cases resulted in recover of \$63 billion.
- In 2022, there were 15 class actions resolved for \$1 billion or more in settlements.
- Hundreds of privacy class actions:
  - Data Breach Class Actions
  - Wiretap Class Actions
  - Biometric Privacy
  - Video Privacy Protection Act
  - Telephone Consumer Protection Act (and mini-TCPA)

# US Privacy Laws--Patchwork

- US does not have a comprehensive consumer privacy law—unlike EU, China, Brazil and most other developed countries.
- Instead, we have a patchwork:

|  |   |   |   |
|--|---|---|---|
| <p style="text-align: center;"><b>Money</b></p> <ul style="list-style-type: none"> <li>• Gramm-Leach Bliley Act (GLBA)</li> <li>• Fair Credit Reporting Act ✓</li> </ul>       | <p style="text-align: center;"><b>Health</b></p> <ul style="list-style-type: none"> <li>• Health Insurance Portability &amp; Accountability Act (HIPAA)</li> <li>• California Medical Information Act (CMIA) ✓</li> </ul> | <p style="text-align: center;"><b>Kids</b></p> <ul style="list-style-type: none"> <li>• Children’s Online Privacy Protection Act (COPPA)</li> <li>• Family Educational Rights &amp; Privacy Act (FERPA)</li> </ul>      | <p style="text-align: center;"><b>Biometrics</b></p> <p>Illinois, Texas, Washington, NYC, Baltimore, Portland, etc. ✓</p>   |
| <p style="text-align: center;"><b>Telemarketing</b></p> <ul style="list-style-type: none"> <li>• Telephone Consumer Protection Act (TCPA) ✓</li> <li>• State laws ✓</li> </ul> | <p style="text-align: center;"><b>Video</b></p> <p>Video Privacy Protection Act ✓</p>   | <p style="text-align: center;"><b>State Consumer Privacy</b></p> <ul style="list-style-type: none"> <li>• California Consumer Privacy Act (CCPA) ✓</li> <li>• Also, Connecticut, Colorado, Virginia and Utah</li> </ul> | <p style="text-align: center;"><b>Wiretapping</b></p> <ul style="list-style-type: none"> <li>• CA Invasion of Privacy Act (CIPA) ✓</li> <li>• PA Wiretapping &amp; Electronic Surveillance Act (WESCA) ✓</li> <li>• Plus, ten other states require two-party consent</li> </ul> |

# Key Issues

- Is there “actual injury” sufficient for standing under Art. III?
- Is there standing under the relevant statute?
- What is a protectable privacy interest?
- What is required for consent?
- What is a “violation”?
- Can injury / damages be shown through class wide proof?



# Overview of Class and Collective Actions and Current Trends, in UK, France and EU

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# Collective Privacy Actions in UK



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# UK privacy claims

- *Vidal-Hall v. Google* established that compensation for distress for privacy breach was allowed (and pecuniary loss was not required for compensation claims)
- *Gulati and others v Mirror Group Newspapers* –claims by a group of individuals for misuse of privacy information (phone hacking) and distress resulted in damages of £85,000 to £260,250 awarded for loss of control/intrusion into private life of claimants (£1.25 million awarded to 8 claimants)
- *Lloyd v. Google*:
  - Mr. Lloyd sought to bring a representative action (an opt-out class action) under old DPA 1998 on behalf of 4 million individuals re: Safari. He argued that everyone in the group had suffered a “loss of control” of data belonging to them (meaning they had all suffered the same loss). Claim was for £750 per head. The Supreme Court unanimously dismissed the claim
  - Loss-of-control damages were not available under the DPA 1998 without proof of damage or distress (and determining the damage suffered would require an assessment on an individual-by-individual basis). Need proof of damage and non-trivial loss/threshold of seriousness which must be crossed
  - Confirmation that there is a minimum threshold of seriousness applicable to data privacy damages claims, below which claims should not succeed



# UK privacy claims (cont'd)

- *Rolfe and others v Veale Wasbrough Vizards LLP* – a one-off breach could not reasonably have caused the claimants distress (email for school fees sent to the wrong recipients)
- *Bennett and Others v. Equifax Ltd*:
  - GLO claim for compensation following the large Equifax breach under old DPA 1998
  - ICO found that Equifax breached 5 of 8 data protection principles and imposed maximum fine of £500,000
  - 1,000 claimants (with the most serious of claims) issued claims giving rise to the GLO issues – the GLO could enable a register to identify which claims fell into the court's collective management and allow for cost sharing and enable advertisement on the Government website for the claim for other claimants
  - Master dismissed the application in June 2022 – deferred decision to a later CMC

# UK privacy claims (cont'd)

- *Weaver and Others v. BA*:
  - GLO claim brought for breach of GDPR following cyberattack compromising customers and payment card data
  - Opt-in – claim was advertised
  - Settlement of class action
  - Demonstrates that a huge class poses a real risk for organizations facing claims from customers under GDPR
- *Various v. Morrisons*:
  - Representative claim - class of employees brought claims following rogue employee's publishing/posting on dark web of payroll details and breach of old DPA 1998
  - Vicarious liability issue – Supreme Court found he was a rogue employee and Morrisons were not vicariously liable for his actions (he did not commit breach in course of his employment duties)

# GDPR – Scope for Class Actions

- GDPR allows for material and non-material losses to be compensated
- GDPR recitals refer to loss of control re: privacy (GDPR is based on giving control to data subjects over their data)
- Claims likely to be brought for misuse of private information and distress
- Joint liability risk – controllers and processors/controllers and other controllers
- Privacy claims following regulatory investigations (ICO, FCA etc) are a risk
- No “plaintiff bar” in the UK but lots of traditionally claimant firms advertise for claimants to join a class and GLOs are advertised on the Government website

# New Collective Actions Law in EU

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# The EU Consumer Class Action

- On November 24, 2020, in reaction to several scandals (Volkswagen, Ryanair...), the EU adopted a directive to implement a consumer class action in each Member State.
- This directive has two objectives:
  - Establishing a **domestic class action regime** enabling the defense of consumer interests: each Member State is free to define the procedural regime, consistent with their domestic law and, in particular, choose between opt-in or opt-out mechanism.
  - Enabling a group of consumers to **file a class action in any EU Member State**, called a **cross-border class action**, aiming at:
    - **Obtaining injunction measures**
    - **Protecting the collective interests of consumers**

# The EU consumer class action

- The class is represented by a **qualified entity** registered in the Member State. The qualified entity must be non-profit; independent; engaged in the protection of consumer's interests since at least 12 months; solvent and transparent on its fundings.
- **Transposition of the European directive:** Deadline on **June 25, 2023** (so far, only Lithuania, Hungary, and the Netherlands transposed the directive).



# Procedural Position



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# Procedural Position: Background Points

- UK regime less developed than US
- Opt-in with two exceptions:
  - (i) Competition
  - (ii) representative actions
- Loser pays system
- Development of third party funding market
- Developing Claimant bar

# Procedural position: Routes for collective action

- Group litigation orders
- Representative actions
- Developing in collective actions: securities, aircraft
- “same interest” requirement
- Data claims

# Procedural Position: The Death Knell for Collective Data Claims?

- No individualized assessment
- Typically unavailable for damages claims
- Subsequent more expansive approach: Commission Recovery
- Some possible avenues exist

# Third Party Funding



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# Third Party Funding: General position

- Background to present position
- Current use in the UK
- Typical funding models
- Funding of collective actions



# Third Party Funding: Collective Actions

- History
- Competition claims
- Data & privacy claims
- Securities claims
- Possible tactical approaches for defendants

# Funding of class actions in France

- No third-party financing authorized for class actions.
- **Mostly funded by the accredited associations:**
  - Funded by the associations' business activities
  - Funded by government subsidies,
  - Not possible to ask potential victims for the payment of a subscription or membership.
- Accredited associations have been complaining that the funding regime prevents them from bringing class actions. In fact, they have to advance the litigation costs.

# Introducing Class and Collective Actions in France



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# Focus on Class and Collective Actions re. Privacy and Cybersecurity

- In France, privacy and cybersecurity related issues would fall under the personal data protection.
- The applicable regime was the **general regime of class actions** implemented in 2016.
- Only **two** class actions have been brought since 2016:
  - **2018** against Facebook;
  - **2019** against Google.
- **Preference for collective actions** (7 in 2019 before the French Data Protection Authority).



# Focus on the French Bill of Law on Class Actions New Procedural Regime (Transposition of the EU Directive)

- March 8, 2023, the French National Assembly unanimously adopted on first reading a proposed law to extend the **class actions'** scope and indemnification. The Senate must now examine the bill.
  - Domestic class actions**
  - Cross-border class actions**
- The bill has **three main topics**:
  1. A **single legal framework for class actions**:
  2. An **extension to the scope** provided by the directive; and
  3. The creation of a **specialized court**.
- Although the EU directive permits qualified entities to benefit from third-party funding (as long as the qualified entity is transparent on this funding and that it does not create a situation of conflict of interest), the **2023 French bill of law does not contain any provision on third-party funding**.

# French Collective Actions

- **A collective action** can be filed directly by a group of individuals or an organization representing the plaintiffs.  
Collective actions are subject to the same conditions of admissibility as any ordinary civil action.
  - **Hard to determine the exact number of collective actions brought before the French courts**, for instance:
    - **Personal data protection**
    - **Poly Implant Prostheses collective action**
    - **Levothyrox collective action**
    - **Renault/Nissan collective action** (complaint filed on June 5, 2023, by tens of plaintiffs);
- As **collective actions** are governed by the same rules as any other legal action, **class actions** will mostly be discussed in this presentation.

# Class Actions in France

- **Class actions** were implemented in France by the Consumer law of **March 17, 2014**. They were initially limited to consumer law related issues.
- The law on the modernization of the economy of **November 18, 2016**, extended class actions to other areas:
  - Health product liability
  - Environmental liability
  - Personal data protection
  - Discrimination

## A few numbers:

- **Only 32 class actions** filed since 2014, including **20 consumer class actions**.
- **6 class actions** enabled the victims to obtain compensation (3 through a declaration of liability and 3 through an out-of-court settlement).
- **Reasons for low number of class actions**

# Specificities of French Class Actions

- **Two procedural regimes:**
  - Consumer class action procedural regime (consumer law related issues).
  - General class action procedural regime (Health product liability; Environmental liability; Personal data protection; Discrimination).
- **A class action must be filed by an accredited association**
- **Opt-in mechanism only** to join the class action.
  - **Step 1: Liability judgment**
  - **Step 2: Compensation**

# Differences Between the Two Class Actions Procedural Regimes in France

|                              | Formal notice   | Causes  | Scope   | Compensation   | Claimant  |
|------------------------------|---|---|---|--|---|
| <b>Consumer class action</b> | No formal notice required   | <p>Failure to comply with a legal or contractual obligation:</p> <ul style="list-style-type: none"> <li>• Sale of goods, services or leasing real estate.</li> <li>• Anti-competitive practices.</li> </ul> | <ul style="list-style-type: none"> <li>• Consumer law.</li> </ul>   | <ul style="list-style-type: none"> <li>• Compensation for material loss only.</li> </ul>   | <ul style="list-style-type: none"> <li>• Accredited consumer protection association.</li> <li>• 15 associations are accredited in France.</li> </ul>  |
| <b>General class action</b>  | 4-month formal notice required except in class actions related to health product liability. | <ul style="list-style-type: none"> <li>• Failure to comply with a legal or contractual obligation.</li> <li>• Liability claim.</li> </ul>   | <ul style="list-style-type: none"> <li>• Health product liability;</li> <li>• Environmental liability;</li> <li>• Personal data protection;</li> <li>• Discrimination.</li> </ul> | <ul style="list-style-type: none"> <li>• Cessation of the breach (except for the health product liability claims where only compensation for material loss is possible).</li> <li>• 2 types of compensation decided by the judge case by case:               <ol style="list-style-type: none"> <li>1. <u>Individual compensation</u> (most common type): Damages are directly paid to each plaintiff.</li> <li>2. <u>Collective compensation</u>: The accredited association and the defendant negotiate the amount and details of the compensation.</li> </ol> </li> </ul> | <ul style="list-style-type: none"> <li>• Accredited association</li> <li>• Association registered for more than 5 years, and whose statutory purpose is the defense of either:               <ul style="list-style-type: none"> <li>- Discrimination;</li> <li>- Personal data; protection;</li> <li>- Environmental liability;</li> <li>- Health product liability.</li> </ul> </li> </ul> |



# Similarities in the Two Procedural Regimes

1. The parties always have the option to settle the action outside of the court:
  1. **Mediation**
  2. **Amicable settlement**
2. Class actions are **time-barred after five years from the date on which the victim knew or should have known of the facts enabling them to exercise this right**. The writ of summons interrupts the limitation period.
3. The competent court is the one of the **defendant's domicile**. If the defendant is located abroad, the competent court is the court of Paris.

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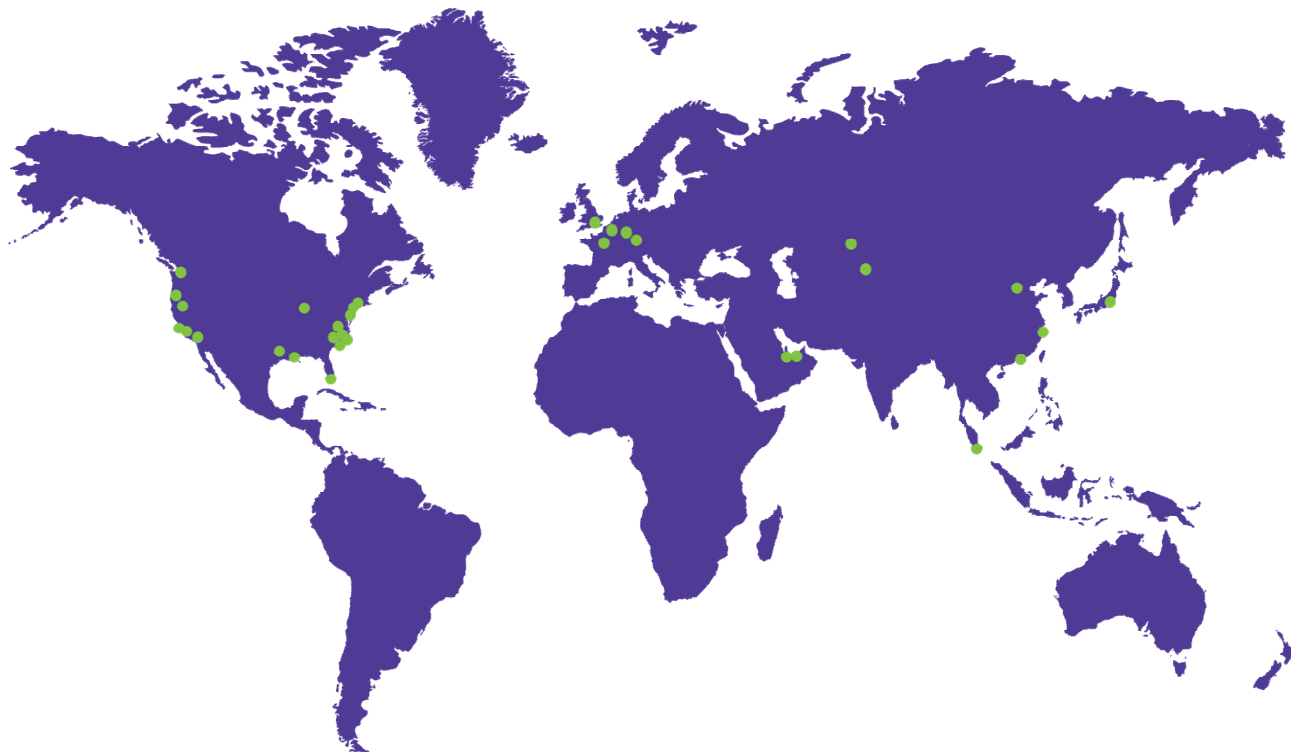
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