HERBERT SMITH FREEHILLS

THE FUTURE OF CONSUMER

Consumer Class Actions – Global perspectives

Introduction

Whilst class actions have been traditionally associated with US litigation, they have become an increasingly prominent feature of both the UK and Australian litigation landscape in recent years. Various factors, including the proliferation of law firms competing to take on this work, the availability of funding options, and the ability of both firms and funders to use sophisticated mass social and traditional media advertising campaigns to raise large classes to pursue claims, mean that class actions are likely to continue to grow in prominence and breadth.

By virtue of their customer and product focus, coupled with their scale, geographic reach and perceived "deep pockets", companies in the consumer sector are obvious targets for class action law suits. Here we explore some of the key areas of class action risk that businesses in the consumer sector are facing across key jurisdictions of the UK, the US, and Australia, including (1) Product liability and consumer law; (2) Supply-chain issues (with a focus on business human rights and environmental, social, and governance); (3) Data and privacy; (4) Employment class actions; and (5) Securities class actions. We also examine key mitigating steps that businesses can take to protect themselves against the risks of exposure to such class actions and costly and reputationally damaging campaigns.

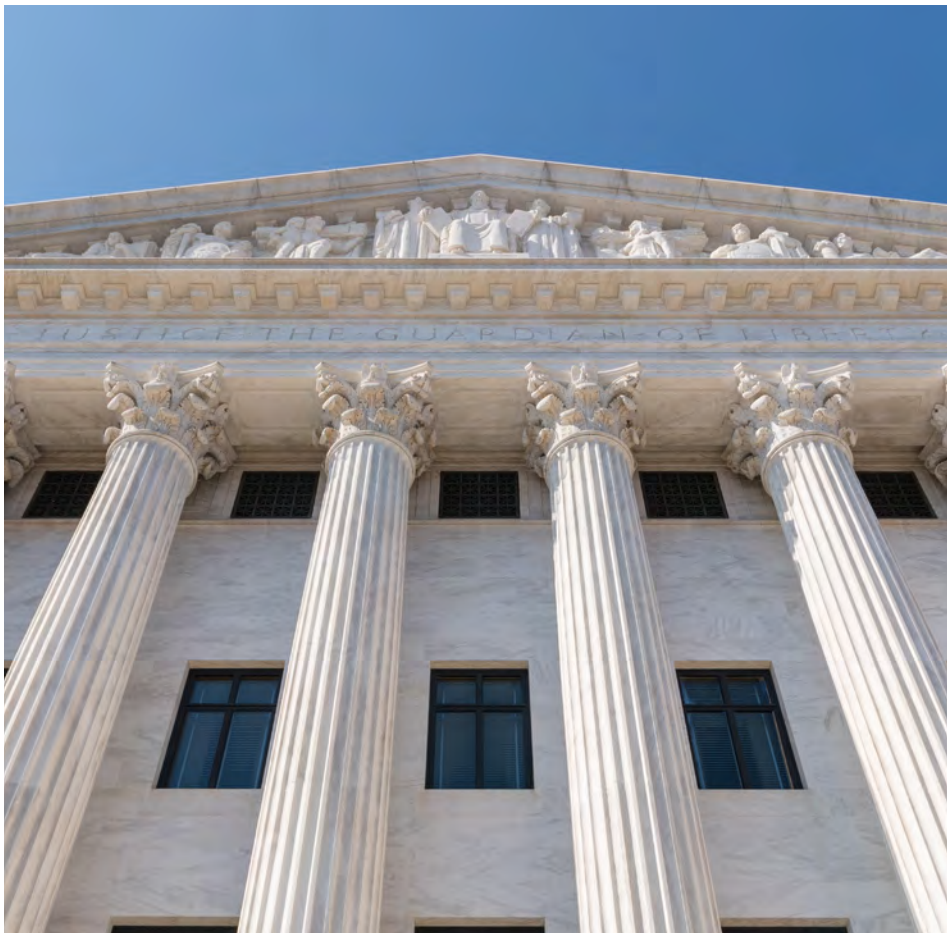
Product liability and consumer law

The US

Product liability issues – relating to the safety of the design of a product, the quality of its manufacture, and the adequacy of warnings provided to consumers – lead to thousands of claims each year in the US federal and state courts. Because of differences among individual plaintiffs, Rule 23 class actions[1] are no longer viewed as an effective means to litigate personal injury claims over defective products, but alternative procedures such as consolidated suits, federal multi-district litigation, and coordinated filings have taken their place in pursuing mass tort claims. In addition, plaintiffs' counsel in the US often seek to bring similar types of claims on behalf of an entity – for example, a local or state government, consumer rights organisation, or business association – which can assert claims on behalf of the collective interests of numerous individuals. Recent examples of such product liability mass litigation include the use of public nuisance law to bring claims on behalf of governments, including recent claims relating to climate change and opioid addiction, with many of these claims brought in the context of multi-district litigation.

Consumer product manufacturers and retailers also regularly face class actions alleging violation of various consumer fraud statutes, which are claims usually brought under state law. In such suits, class-wide treatment is usually sought based on the claim that an advertising or packaging statement, to which all members of the putative class were allegedly exposed, was misleading, or that class members were uniformly impacted by pricing policies. In recent product liability litigation involving opioid pain medication, for example, pharmaceutical manufacturers, distributors, and retail pharmacies such as CVS and Walgreens have been named in deceptive marketing suits brought by thousands of states, cities, towns, counties and townships in state and federal courts for creating a public health crisis.

In a growing trend, deceptive labelling class actions under state laws against food and beverage companies have generated hundreds of new filings in the last several years. These claims seek economic compensation for the alleged price difference between the product that consumers actually received, and what they would have paid for the product that had the benefits or



characteristics which the plaintiffs claim were falsely represented. For example, if a product labelling stated the product was "all natural" and plaintiffs can argue it was not, plaintiffs in such food mislabelling class actions would put forward economic evidence trying to demonstrate the price premium from the false "all natural" statement, with this premium being the measure of damages. While any individual would have only modest damages (eg, any purchaser of the product might only have overpaid under these theories by a few dollars per purchase), by proceeding on a class-wide basis the total amount subject to potential settlement or judgement could run into the millions.

In the past year, consumer class actions arising from the COVID-19 pandemic have also emerged. In a pair of such actions, makers of the hand sanitisers Purell and Germ-X are alleged to have falsely advertised that their products were effective at preventing the flu and other viral diseases.[2] The suits, brought on behalf of purchasers in New York and California, claim that there are no reliable studies supporting the companies' representations, and that the companies unlawfully increased their sales as a result of the misstatements.

The UK

Whilst the UK still lags behind the US, the last few years have seen a number of high profile group claims in this area, with more being threatened and advertised online.

As in the US, the subject matter of such claims can vary widely, including in relation to a product's design, manufacture, materials, fitting/installation, and/or the product's instructions/warnings. Product liability can therefore extend to any person in the supply chain, ranging from a component supplier to a retailer, and allocation of liability is often not an easy task. With global brands, manufactured and retailed across the world, claims of this type can cross-pollinate across jurisdictions, as we have seen with recent high profile examples, such as the Daimler diesel emissions scandal.

1. Rule 23 of the Federal Rules of Civil Procedure provides the principal source of law relating to class actions in the US federal courts, and most US states allow class actions under analogous regimes.
2. *Gonzalez v. Gojo Industries, Inc.*, No. 20-cv-00888 (S.D.N.Y); *David v. Vi-Jon Inc.*, No. 20-cv-00424 (S.D. Cal.)

Claimant firms and litigation funders in the UK are increasingly looking to leverage off the publicity generated by these big cases and to target other manufacturers, retailers and finance companies associated with similar products through large-scale advertising campaigns. These campaigns see very significant use of social media often by a large number of specialist law firms competing for the largest share of potential claimants. As well as individual consumers, claimant firms may also look to target large-scale business customers individually. Many of the claimant firms involved in such activities in the UK market have US and European links, giving them access not only to inside knowledge of how similar claims were run and defended (and settled) in other jurisdictions but also to significant financial resources and economies of scale.

Australia

As in the US and the UK, Australia continues to see product liability class actions filed. Recent product liability class actions have been commenced against automakers in relation to diesel emissions and airbags. In the COVID-19 period, product liability risks may be heightened in circumstances where consumer entities are experiencing supply chain issues.

Product liability and consumer law: Key Mitigating Steps

In addition to ensuring the implementation of "business as usual" processes for quality control, health and safety and compliance (including by conducting appropriate due diligence to identify potential quality control issues prior to entering into supply agreements), businesses can also look to minimise the risk of exposure to opportunistic or parasitic claims. Possible steps include:

- Negotiating for favourable indemnity, insurance, warranty and limitations of liability provisions;
- Regularly assessing the adequacy of product liability insurance policies;
- Ensuring that consumer products are accompanied by clear, prominent, and easily understandable safety warnings and instructions for use;
- Monitoring closely any issues that competitors may be experiencing and the extent to which those might be extrapolated across brands;
- Engaging proactively with retail and business customers in order to seek to differentiate and distance their products from those of competitors if such issues arise;
- Dealing with customer complaints timeously and escalating them appropriately; and
- Seeking to identify and address significant trends.

To mitigate the risk of class actions based on mislabelling claims (particularly relevant in the US), consumer sector companies should ensure the adoption of a formalised and disciplined approach to the generation and review of marketing claims, including:

- Vetting claims for scientific substantiation and compliance with federal and state regulations;
- Maintaining records, scientific studies, and other technical documentation supporting marketing statements; and
- Tracking changes in the labelling and advertising of products overtime.

Supply-chain issues - business and human rights ("BHR"), and environmental, societal and governance ("ESG")

The UK

Companies in the consumer sector may be comparatively exposed to supply chain issues, often having large and complex, multi-jurisdictional supply chains, ranging from the sourcing and extraction of raw materials, design, production, manufacturing, and distribution etc. In addition to the product liability issues described above, other issues arising from a complex supply chain relate to human rights and environmental, social and governance issues. These pose significant risks for businesses both legally and reputationally. The last 5 years have seen at least 8 such cases before the English courts (although note that there are many more threatened claims that settled before proceedings were commenced) and we expect this to increase.

Geography is obviously a key factor in assessing these risks. A number of the most prominent cases before the English courts in recent years have concerned the overseas operations of multinational businesses. There are examples of claimant law firms being particularly enterprising in this area, monitoring media to identify and target particular raw materials which may involve poor working or environmental conditions and following them through supply chains to UK-based companies. They are often assisted in this endeavour by local non-governmental organisations and agents. Recent examples include cobalt, sugar and agricultural commodities.

England and Wales is an attractive forum for claimant law firms to bring class actions due to a relatively permissive regulatory regime that allows those firms to conclude Conditional Fee Agreements and Damages Based Agreements with their clients, and because of the multitude of litigation funders who are active in the jurisdiction.

Moreover, the UK Supreme Court has recently suggested that the English Courts will be willing to assume jurisdiction over disputes that are substantially centred overseas where there is a question as to whether the claimants will be able to obtain justice in the relevant overseas courts[3] or where the group corporate structure indicates that the UK parent may

3 *Vedanta Resources Plc and Anor v Lungowe & Ors* [2019] UKSC 20.

have exercised management or supervision over the foreign subsidiary's operations[4]. In that context, UK-headquartered multinational companies should be mindful that non-UK claimants may well be able to bring claims against them in the English courts in relation to the overseas acts of their non-UK subsidiaries and potentially even suppliers, especially if those claimants face practical barriers to accessing effective judicial remedies overseas.

While theories of liability against parent companies vary – since the claims are often primarily advanced under the law of the relevant operating subsidiary – from a tortious perspective, the UK Supreme Court[5] (see our blog post for further details) has recently held that a UK parent company may in principle owe a duty of care to third parties affected by the operations of its foreign subsidiaries if it is found that the parent company controls, or assumed responsibility over, the foreign subsidiary's operations and/or if it has relevant knowledge on which the relevant subsidiary relied. The group company's management structures, policies, and practices would be subject to scrutiny in this context.

The existence of a parent company duty of care is a fact-specific analysis and this area of law is still evolving, especially in view of the fact that claimant law firms are increasingly finding creative ways to attempt to hold parent companies liable for the acts of third parties. Recent cases have sought to stretch the potential liability of parent companies not only to acts of their subsidiaries, but also to acts of suppliers where only a contractual relationship exists. Further, claimants have sought to hold parent companies liable for the harm caused by third parties with connections to their subsidiaries through accessory tortious liability.[6]

The recent trend of cases highlight the risks that companies bear when operating in jurisdictions and sectors with poor working conditions and a high risk of human rights abuses. Businesses should consider taking pro-active steps to ensure that they have policies and processes in place to ensure respect for human rights and the environment in their operations and supply chains. Recently, it was announced that the European Commission will introduce legislation in 2021 to impose a legal duty on EU companies to carry out human rights due diligence and that the new law will likely include sanctions for breach of this duty and provisions allowing victims of abuses to obtain remedies. It is also possible that the EU will extend this due diligence obligation to cover environmental impacts. It is not clear if the UK will implement similar legislation, although it is likely that the UK will face calls to pass legislation of a similar nature to impose mandatory human rights due diligence. Indeed, there have already been calls for reforms to the UK human rights law, including calls to introduce measures for stronger enforcement action to prevent human rights abuses.

In addition to the exposure to legal risks, any claims alleging failures in respect of BHR or ESG issues in the companies or their supply chains expose the companies to high risks of reputational damage. As would be expected, BHR and ESG are topical issues which often attract high levels of media attention and publicity and they are issues to which consumers are increasingly sensitive. For example, a class action was recently launched the English courts against Camellia Plc and two of its subsidiaries for alleged human rights abuses by its Kenyan subsidiary. Although the claim is still in its early stages (and the legal and factual basis of the claim is not established), there has been widespread media coverage on it. Further, shortly after the news of this claim broke out, British supermarkets including Tesco, Sainsbury's and Lidl announced that they will be suspending the supply of avocados from Camellia Plc's Kenyan subsidiary pending further investigation, highlighting the potential for damaging follow-on. Claimant law firms (who are increasingly proactive and enterprising in their campaigns) may well launch campaigns and claims with the aim to extract an early settlement, with the knowledge that such campaigns and claims will be reputationally damaging to the companies.

The US

Business and human rights litigation in the US has largely been synonymous with claims brought under the Alien Tort Statute (ATS)[7], a law that was interpreted to provide federal courts with jurisdiction to hear lawsuits filed by non-US citizens for torts committed in violation of international law, such as human rights violations.

In the last several years, a trio of Supreme Court cases[8] have narrowed both the scope of the ATS itself and, more generally, the jurisdiction of US courts to hear claims against non-US parties.[9]

Nevertheless, a few ATS claims remain ongoing, and the Supreme Court is set to rule on a pair of such supply-chain cases involving Nestlé USA and Cargill this term.[10] The suits, which were filed in 2005, assert claims against a number of chocolate companies, including Nestlé USA and Cargill, by former child slaves who were forced into labour on cocoa plantations in Côte d'Ivoire. The plaintiffs allege that the US companies aided and abetted human rights abuses by providing technical and financial assistance to the cocoa plantations in Côte d'Ivoire, and that the companies should have known they were trafficking in forced labour. The court has been asked to decide whether the ATS can apply to claims where the primary violation of international law occurred outside the United States, and whether the ATS allows claims to be brought against domestic US corporations under any circumstances.

4 *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
5 *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2021] UKSC 3.
6 *Kalma & Ors v African Minerals Ltd & Ors* [2020] EWCA Civ 144.
7 28 U.S.C. § 1350.
8 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018).
9 Under these precedents, federal courts may not hear claims against non-US parties for breaches of international law occurring overseas, and the significance of the ATS for business and human rights litigation more generally is in doubt.
10 *Nestlé USA v. Doe I*, No. 19-416 (S.C. Dec. 1, 2020); *Cargill, Inc. v. Doe I*, No. 19-453 (S.C. Dec. 1, 2020).

In addition to international law claims brought under the ATS, there have been attempts to bring supply chain litigation against US companies pursuant to state law. For example, retailers J.C. Penney Corporation, The Children's Place, and Wal-Mart were named in a class action asserting claims for negligence and wrongful death under Delaware law stemming from the April 2013 Rana Plaza garment factory building collapse in Bangladesh.[11] The plaintiffs argued that, because the defendants had publicly announced policies to ensure safe working environments in their supply chains, and represented that they satisfied such standards, the companies owed a duty of care to the employees of their overseas business partners. This reasoning was rejected by the trial court, in a 2016 decision dismissing the action. In the court's view, where no duty to the employees of an independent contractor exists under Delaware law, the companies' statements could not by themselves create such basis for a tort claim.

Moreover, in *Barber v. Nestle USA, Inc.*,[12] , plaintiffs sought to hold Nestle liable for violation of California consumer protection statutes for failing to disclose that some products, in this case cat food brands, may have included seafood which was sourced from forced labour overseas. Rejecting these claims, the court held that the California Transparency in Supply Chains Act of 2010 (Cal. Civ. Code § 1714.43) did not mandate any such disclosure by the company. The court also held that the plaintiffs did not plead any misrepresentations by the defendant in statements about its supply practices, as the company's standards were aspirational, reflected the company's realistic expectations for suppliers, and reflected a nuanced and accurate summary of the company's efforts to combat the use of forced labour in the supply chain for its products.

With the exception of actions relating to specific manufacturing facilities and site contamination, environmental class actions and similar mass torts have not generally been pursued against consumer goods entities based on the sales of their products. However, plaintiffs' counsel are continually pursuing new theories of liability and advancing novel claims against a wider array of defendants (see, for example two recent cases in California seeking to hold retailers Kroger and Amazon liable in per- and polyfluoroalkyl substances (PEAS) litigation).[13] Whilst there have been some securities-based climate litigation claims that have emerged in the United States, primarily against Exxon, to date no similar actions have been brought against consumer goods companies.[14]

Despite these challenges to plaintiffs' claims, consumer goods companies should expect that claims in respect of BHR and ESG issues may continue to be brought in the United States, as plaintiffs adapt their claims, litigate the interpretation of disclosure laws such as California's Supply Chains Act, and pursue novel case theories, particularly given the ATS jurisprudence over the years that has limited if not outright excluded that statute as a vehicle for pursuing supply chain liability claims.

Australia

Currently, consumer entities in Australia have not seen supply chain class actions relating to BHR or ESG issues similar to those experienced in the US and the UK.

Environmental class actions in Australia have related to issues including land contamination and natural disasters such as bushfires. To date, these types of actions have not generally targeted consumer entities but the potential for climate change and environmental class actions remains an area of emerging risk, particularly for listed consumer sector entities. Indeed, Australia's corporate conduct regulator, ASIC, has stated that directors and officers of ASX listed companies "need to understand and continually reassess existing and emerging risks (including climate risk) that may affect the company's business".

With the increased focus on environmental and climate change risk disclosures, it is possible that class actions centred on such disclosures will continue to emerge. For example, it may be alleged that a consumer entity has failed to properly disclose the climate change or environmental risks facing the company or the steps taken to mitigate those risks, and has therefore failed to present an accurate picture of the company's true value to investors. Similar actions have been commenced in Australia, but not against consumer entities to date.

Supply-chain issues: Key Mitigating Steps

To mitigate against potential claims arising from supply chain issues, companies should:

- Actively review and audit public statements in relation to their products and supply chain responsibility (including in relation to marketing, advertising and package labelling) to ensure that they are and remain accurate;
- Adopt protocols for identifying suppliers;
- Ensure clear communication of corporate expectations and policies to suppliers, taking into account the degree of control they can realistically exercise over their supply chain;
- Develop risk assessments to vet potential suppliers at the outset; and
- Maintain appropriate monitoring, including potentially audits or site inspections, as the relationship with suppliers progresses.

Companies need to factor in crisis communication when faced with such campaigns or claims to alleviate the reputational damage caused.

11 *Rahman v. J.C. Penney Corp.*, No. 15-cv-619 (D.D.C. May 4, 2016).
12 *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015)
13 See, for example, in *Ambrose v. The Kroger Co.*, No. 20-cv-04009 (N.D. Cal.); and *Nguyen v. Amazon.com, Inc.*, No. 20-cv-04042 (N.D. Cal.).
14 *New York v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Dec. 10, 2019).

Data and privacy

The US

Over the last 10 years, claims seeking compensation for the loss of personal data have become a regular feature of class action litigation against companies doing business in the US. The claims typically follow public announcements of a cybersecurity breach, and rely principally on traditional tort theories such as negligence and fraud, breach of contract, and other common law claims. The number of organisations impacted by data breaches in the US, and related litigation for failure to prevent the unauthorised disclosure of personal information, continues to increase.

In a majority of such actions, the plaintiff class will allege that personal financial information, such as credit or debit card numbers, has been compromised. Claims relating to the loss of personal identifying information, such as social security numbers, and sensitive medical information are also commonly asserted.

Retailers and other consumer-facing companies have long been the target of both cybersecurity breaches and related litigation claims. For example, as the result of a 2013 data breach, Target Corp. announced that the personal information, including contact details or credit card information, of as many as 110 million people had been stolen by a third party. In the ensuing class action lawsuits, Target agreed to a $10 million settlement with shoppers and a settlement in excess of $39 million with credit card issuers.[15] While it might be expected that major retailers would hold large volumes of data pertaining to customers and employees, leading to higher risks of cyberattacks and claims, data breaches and related class action litigation poses a risk to all manner of businesses and organisations.

Courts continue to disagree on the applicable legal requirements to maintain a data breach claim. Since the Supreme Court's decision in Spokeo[16] left the issue unresolved, federal appellate courts have split over whether the unauthorised disclosure of personal data, without any actual financial loss to the individual, is an "injury-in-fact" that confers standing to bring a data breach class action in federal court. Several appellate courts, including the Third, Sixth, Seventh, and Ninth Circuits, have agreed with the arguments advanced by class members that the elevated "risk of future harm" following loss of personal

information from a cybersecurity breach, such as potential identify theft or fraudulent charges, is sufficient whereas other appellate courts have found no standing in these circumstances absent a use of the lost data that caused harm to plaintiffs.

In a significant recent development, the California Consumer Privacy Act ("**CCPA**") took effect in 2020, permitting residents of that state to seek statutory damages without requiring proof that the resident was actually damaged by a data breach. The statute requires companies to implement "reasonable security procedures and practices" to prevent a data breach, and creates a private right of action for individuals whose "nonencrypted and non-redacted personal information" is "subject to an unauthorised access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures."[17] Claims based on the new law, which appears to have been modelled on the EU's General Data Protection Regulation, have already started to emerge, but remain at the early stages of litigation.

With data breach class actions showing no signs of abating, and the emergence of the CCPA, potential preventative measures warrant added attention by companies and organisations with potential exposure to claims in California and the US more generally.

The UK

The potential for claims in respect of data and privacy breaches from both customers and employees has increased in recent years, in light of factors including: the increasing importance, role and volume of data coupled with a heightened focus by individuals on data protection rights; increased expectations from regulators concerning data security systems and privacy measures; and an ever-increasing proliferation of data breaches. As has been widely publicised, COVID-19 has also added to a rise in the number and seriousness of cyber hacks and data breaches, including personal data breaches. The trend therefore looks set to continue.

Because data breaches tend to affect large numbers of potential claimants, they are potentially lucrative sources for group claims. They are also often widely publicised and may be the subject of parliamentary and regulatory scrutiny, adding to the risk of civil litigation. We have already seen high profile data and privacy class actions and more are known to be in the pipeline. Some of the most high profile actions or threatened actions include alleged breaches flowing from (1) the unlawful and covert tracking of mobile phone users' internet activities for commercial purposes; (2) the unlawful trading of personal information of users tracked via cookies; (3) disgruntled former employees leaking other employees' personal and financial

15 *In re Target*, 14-MDL-2522 (2014).
16 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
17 Cal. Civ. Code § 1798.150(a).

information online; (4) customer data being stolen as a result of a cybersecurity attack; and (5) the unlawful targeting of minors with addictive programming and the harvesting of such data for advertising purposes.

Legal procedural developments through which data and privacy breach class actions can be brought may also, in time, lead to an increase in mass damages claims. To date, such class actions have been generally brought under a group litigation order ("**GLO**") on what is effectively an "opt-in" basis. A recent Court of Appeal decision, *Lloyd v Google* (summarised below), however, has established that claims for data and privacy breaches may also be able to proceed on what is effectively an "opt-out" basis using the representative action procedure (CPR 19.6). The key distinction between the procedures is that under the representative action procedure there is no need for the represented class to be joined as parties to the action or even identified on an individual basis. In practice, this distinction is likely to make it easier to get a financially viable claim off the ground compared to the GLO procedure. This is a developing area and time will tell whether it will lead to a sharp increase in claims and, if so, how such claims will look. One notable feature is that the ability to bring a claim using the representative action procedure remains subject to the strict "same interest" requirement, meaning that the procedure cannot be used where class members' losses must be determined individually, or where there may be different defences to the claims. In practice this is likely to mean that such cases will be low value in terms of the damages sought by the individual claimants, but that the pool of claimants will be large, increasing the chances of such cases being high profile and reputationally damaging.

In *Lloyd v Google LLC* [2019] EWCA Civ 1599 (considered in this post on our Litigation Blog) Richard Lloyd, a former executive director of the UK Consumers' Association, brought a claim against Google on behalf of a class of more than four million UK-resident iPhone users. The claim alleges that the defendant secretly tracked some of their internet activity, for commercial purposes, in 2011/2012. The claim seeks compensation under the Data Protection Act (1998), rather than the GDPR which superseded it. The Court of Appeal's decision is significant in finding that damages can be awarded to compensate for an individual's loss of control of personal data, without the need to establish financial loss or distress. The Supreme Court has granted permission to appeal the decision in Lloyd and this is expected to be heard in early 2021.

Australia

In Australia there is currently no direct statutory right for an individual to bring an action seeking compensation for a breach of privacy. Instead, individuals can make a complaint to the Office of the Australian Information Commissioner, who has standing to bring a claim, or individuals can commence legal proceedings on the basis of other causes of action. An example of a class action involving privacy issues was *Evans v Health Administration Corporation*[18], which obtained settlement approval in December 2019. In that case, a contractor for the New South Wales ambulance service illegally accessed and sold the personal information of employees and the employees commenced a class action claiming, amongst other things, a breach of confidence and a breach of the employees employment agreement.

The Australian Attorney-General's Department is currently reviewing the Privacy Act 1988 (Cth), with a discussion paper to be released in 2021. The Australian Government has noted its in-principle support to previous recommendations to introduce a direct right of action for individuals to enforce privacy obligations.[19] Such a reform, if adopted, has the potential to increase representative proceedings by customers and employees on privacy issues.

Data and privacy: Key Mitigating Steps

Companies should consider the following steps:

- The adoption of formal cybersecurity policies, including employee training programs, to safeguard personal information relating to clients, consumers, and employees;
- Companies without the necessary expertise in-house should consider consulting with a cybersecurity firm regarding state-of-the-art technical solutions;
- Incident plans should be formulated addressing how to respond efficiently in the case of an actual data breach, including steps to be taken to detect, report, remediate and, if necessary, notify external parties regarding an incident;
- Agreements with suppliers, distributors, vendors, and other parties with whom personal information or systems might be shared should include contractual protections in the case of a data breach, and where feasible their data security practices should be subject to vetting and periodic oversight for compliance with best practices; and
- Whilst not preventative, obtaining adequate cyber liability insurance can mitigate the harm stemming from a data breach.

18 [2019] NSWSC 1781.
19 Privacy Act Review Issues paper October 2020 at 4 (available at https://www.ag.gov.au/system/files/2020-10/privacy-act-review--issues-paper-october-2020.pdf.)

Employment class actions

The UK

As a result of recent high profile cases, companies with large workforces carrying out the same or similar roles, such as in a factory, warehouse or retail premises, face a heightened risk of group claims in the UK. Some of the most common threatened actions include alleged breaches linked to: (1) equal pay and gender discrimination; (2) the classification of employee/worker status and related arguments linked to a worker's entitlement to the minimum wage, holiday pay benefits and the Working Time Directive; (3) collective redundancy legislation; and (4) improper sexual misconduct or harassment by senior employees.

Such claims continue to attract high levels of publicity and media interest, often through high-profile media and social media campaigns. Similarly, unions are increasingly encouraging and supporting such claims against employers, particularly in cases of breakdown in the relationship between employer and union or where the union is put under pressure from its members. Online forums, petitions and other protest sites likewise provide a platform for complainants to coalesce and galvanise.

Most recently, COVID-19[20] continues to present risks for employers whose businesses require employees to be physically present. The risk of claims brought, for example, by employees working in close proximity to other employees with insufficient protection is obvious. Employers are of course under a duty to ensure safe working conditions for their staff (with specific duties in respect of any disabled or pregnant staff), and most businesses will be doing all they can to meet this obligation. Where there are failings, the risk of claims is obvious.

The risk of claims also exists if a business does not have employees on site. As employees transition from furlough, for example, employers will need to consider anti-discrimination legislation. Similarly, where employers make widespread redundancies or seek to require employees to alter working hours, or take unpaid leave or reduced pay where failure to do so would risk losing their employment, any failings in the employer's consultation processes and decision-making (in particular, where collective consultation duties apply) could also lead to group actions. Employers should also be mindful of not making promises – for example in providing certain employees with benefits extending beyond legal obligations such as concerning childcare or working arrangements – that they are unable to fulfil.

The US

In the US, the most common employment class action filings are employment discrimination claims, claims alleging violation of federal and state wage and hours laws, claims asserting violation of the Employee Retirement Income Security Act, and breach of contract claims. Recent rulings of the US Supreme Court have continued to influence class action litigation, and reflect an overall conservative reading of the applicable employment statutes and class action procedures.

For example, in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the court upheld the legality of class action waivers in mandatory arbitration agreements. Whilst the full impact of the Supreme Court's ruling on the potential for employment classes remains to be seen, businesses that have since instituted such arrangements into their employment practices have had an additional defence to counter employment class litigation at the outset. On the other hand, notwithstanding the more stringent requirement of commonality for certification under Rule 23 established in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), plaintiffs in recent years have been relatively successful in winning class certification in the federal court for claims alleging wage and hour law violations.

As a result of COVID-19, thousands of lawsuits have been filed against employers in the US, asserting a number of different claims stemming from workplace and employment practices in response to the pandemic, including: (1) workplace safety violations; (2) violation of the employment termination notice period under the federal Worker Adjustment and Retraining Notification (WARN) Act and state law equivalents; (3) wage and hour adjustments; (4) retaliation; (5) employment discrimination; and (6) employee privacy claims. These include hundreds of putative class actions against employers, alleging negligence and violation of federal and state laws in providing workers with adequate protective equipment and/or a safe working environment, denying paid sick leave, and punishing employees with COVID-19 symptoms who miss work.

Australia

In Australia, recent employment class actions have focussed on allegations relating to underpayments of staff under an enterprise agreement or award and the mischaracterisation of employees as "casuals" or "independent contractors" rather than as permanent employees.

Current underpayment proceedings include two separate class actions commenced in the Federal Court. The claims allege that salaried managers were not paid for overtime hours worked in accordance with the General Retail Industry Award. A number of other actions against supermarkets and major retailers in relation to the alleged underpayment of wages are also being investigated by plaintiff law firms.

Employment class actions based on the alleged mischaracterisation of employees have centred on claims made by casual employees or independent contractors that they are permanent employees and therefore entitled to additional benefits. While these actions have commonly been filed against employers in industries such as mining and telecommunications, they present a risk for consumer sector entities that employ large numbers of casual employees. In *Work Pac v Rossato*[21] the Full Federal Court found that casual employees (despite being paid at a higher rate) were in fact permanent employees and therefore able to obtain annual leave entitlements. As the High Court of Australia has recently granted special leave to appeal this decision it will continue to be an area for consumer entities to watch.

20 For more information on employment issues related to COVID-19, see our briefing on key issues for UK employers, here.
21 [2020] FCAFC 84.

Employment class actions: Key Mitigating Steps

Looking forward, as lockdown restrictions continue to fluctuate, businesses should ensure they have carefully-considered and dynamic plans in place to safeguard employees and other third parties. Practical steps may include:

- Undertaking regular surveys to identify risk areas;
- Ensuring effective mechanisms are in place to deal with employee concerns;
- Staying abreast of, and implementing, all safety guidelines outlined by government and public health agencies (in the US and Australia this should include both state and local requirements, and advice from legal counsel should be sought in the case of conflicting rules);
- Timely, thoroughly, and accurately documenting employment decisions, including in relation to remote working procedures;
- Investigating employee complaints and inquiries relating to workplace safety and, where appropriate, following such complaints/inquiries with prompt remedial action and communication with employees regarding steps being taken to address issues that have been raised.

The potential reputational damage that may flow from a company adopting a defensive and reactive approach to employee-related issues requires companies to deal with such issues in a proactive manner. Doing so will also help to mitigate the risk of follow-on litigation. From a governance perspective, it is important that companies' Boards focus on employee-related issues in setting standards and expectations. It is also important that Board members ensure they have adequate knowledge and information in relation to how the standards are followed within the business and that certain directors have responsibility for employee engagement. It is also becoming increasingly important for companies to monitor social media and ensure that any issues are dealt with proactively. Failure to handle such cases properly will often result in serious reputational harm. We have seen many examples of how real harm can be done as a result of social media campaigns which can be extremely fast building and sometimes reactionary and self-affirming, even if the underlying facts are complicated and nuanced.

Securities class actions

Australia

Securities class actions remain the most prevalent type of class action filed in Australia. These class actions commonly arise from allegations that companies have breached the continuous disclosure and misleading or deceptive conduct provisions[22] under the Corporations Act by statements made in, or omitted from, corporate disclosures.

Numerous listed consumer sector entities have been the subject of securities class actions in Australia. Notably, in 2019 the first shareholder class action to proceed to judgment in Australia was a proceeding commenced against major retailer Myer.[23] The proceeding centred on an earnings representation made by Myer's CEO on calls with financial journalists and analysts in September 2014. The Court found that in a certain period, Myer breached its continuous disclosure obligations and engaged in misleading or deceptive conduct by failing to correct the September 2014 representation at various intervals. Despite this, the Federal Court was of the view that the contravention did not cause any loss to shareholders. The Myer decision was also the first Australian judgment to accept a market-based theory of causation in a shareholder class action.

In light of the earnings uncertainty for many companies (including those in the consumer sector) during the COVID-19 pandemic, the Australian Government introduced temporary relief for listed companies in relation to their continuous disclosure obligations.[24] While the measures do not prevent plaintiffs from bringing securities class actions arising out of disclosures made (or failed to have been made) to the market, the measures make it more difficult to establish a contravention. The securities class action risk for listed consumer sector entities will likely increase if these measures cease as planned in March 2021. The Parliamentary Joint Committee on Corporations and Financial Services, has recently recommended that this change to Australia's continuous disclosure laws be made permanent.[25]

Subsequently on 17 February 2021, the Australian Government proposed new laws which, if enacted, would make permanent the temporary relief from liability for certain breaches of a listed entity's continuous disclosure obligations.[26] For the purpose of a securities class action, a continuous disclosure contravention would be established if the entity withheld information from disclosure with knowledge that it would, or with recklessness or negligence as to whether it would, have a material effect on the price or value of the entity's securities. The Bill also seeks to introduce the same standard of liability for misleading or deceptive conduct in respect of non-disclosures.

The UK

Shareholder claims in England and Wales are likely to be brought on a statutory basis under the Financial Services and Markets Act 2000 ("**FSMA**") but may also be brought as common law claims in tort. Securities class actions have not traditionally been a prominent part of the litigation landscape in England and Wales, but this has been changing in recent years, with a number of high profile claims being threatened or brought in the English courts. Such claims are typically brought against banks (such as claims brought against the Royal Bank of Scotland and Lloyds Banking Group plc), but are also brought against other public companies, including

22 Corporations Act 2001 (Cth) s 674 and s 1041H
23 *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.
24 The Corporations (Coronavirus Economic Response) Determination (No. 2) 2020 (C'th) temporarily amended the continuous disclosure provisions in the Corporations Act so that a breach would only occur when information was withheld from disclosure with "knowledge, recklessness or negligence" that it would have a material effect on the price or value of the entity's securities.
25 Parliamentary Joint Committee Report on Corporations and Financial Services, Litigation Funding and the Regulation of the Class Action Industry, December 2020 at xx, xxxi and 351.
26 Treasury Laws Amendment (2021 Measures No. 1) Bill 2021.

those in the consumer sector. A claim involving Tesco plc was set to be the first trial brought by shareholders under section 90A FSMA, which provides a mechanism to hold issuers accountable for public statements (such as those made in annual reports and accounts) other than prospectuses and listing particulars (which are subject to section 90 FSMA). However, since the case settled before trial, many uncertainties remain relating to the scope and application of section 90A FSMA.

This growth in securities class actions has been fuelled by many factors, including the 2010 US Supreme Court judgment in *Morrison v National Australia Bank*, 561 US 247 (2010), which placed limitations on the extraterritorial application of US securities laws, such that claimants may have to look elsewhere to bring such claims. The existence of high profile securities claims such as the ones mentioned above also resulted in increasing attention on this area, and claimant law firms and litigation funders who see such claims as a significant revenue opportunity, are also increasingly interested in securities class actions.

The US

Securities class actions typically assert claims that a publicly-traded company violated SEC Rule 10-b5 and Section 10(b) of the Securities Exchange Act of 1934[28] through a deceptive act, such as a misleading statement or omission in annual disclosures, securities filings, or representations to the market, or market manipulation. Claims that challenge a company's accounting practices, statements concerning financial performance and/or potential future earnings, failure to disclose regulatory actions or investigations, and statements in connection with a merger or acquisition are commonly the basis for such actions.

The landscape of US securities class actions continues to evolve. A decade following the Supreme Court's *Morrison* decision, rejecting securities claims against overseas issuers by overseas investors relating to securities traded on an overseas exchange[26], securities class action filings against non-US issuers are once again on the rise.

In 2020, there were an estimated 326 new federal securities class actions filed in the United States, a reduction from the prior year but still representing a significant number of actions.[27] With respect to manufacturers of consumer goods, the proportion of securities class actions against companies in the sector has ranged in recent years between roughly 5%-10% of all annual securities class action filings.

Conclusion – Key takeaways

Fuelled by myriad factors, including most recently by the impact of COVID-19 and (in the UK and Australia) the increased proactivity of claimant firms and litigation funders, we expect that class actions against companies in the consumer sector in the UK, US and Australia will continue to grow in number, prominence, and size. As highlighted above, companies in the consumer sector are exposed to a number of risk areas for class actions to bite, and therefore should be proactive and vigilant in identifying and mitigating against these risks, including by: (1) conducting frequent risk assessments of their products and supply chains; (2) regularly auditing and reviewing their policies, internal processes, and public statements/disclosures (in particular, in relation to environmental and human rights issues); (3) implementing practical steps to strengthen their data security posture and responding to cyber and data incidents in a way that reduces the risk of regulatory criticism and litigation; (4) ensuring appropriate governance and supervision in relation to employee relations and addressing issues proactively prior to the risks materialising; and (5) generally monitoring social media in relation to all these issues.

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27 *Morrison v. National Australia Bank*, 561 U.S. 247 (2010).
28 McIntosh, Janeen and Starykh, Svetlana, Recent Trends in Securities Class-Action Litigation: 2020 Full-Year Review, NERA Economic Consulting (2021) (https://www.nera.com/publications/archive/2021/recent-trends-in-securities-class-action-litigation--2020-full-y.html).

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This article is part of our **Future of Consumer series** on upcoming issues affecting the Consumer Sector. For other articles in this series see the Future of Consumer pages of our website or contact Rachel Montagnon

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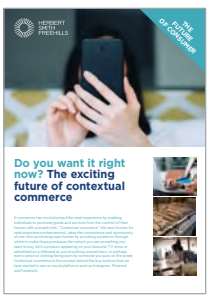

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