

2021 Trends in Bet-the-Company Class Actions

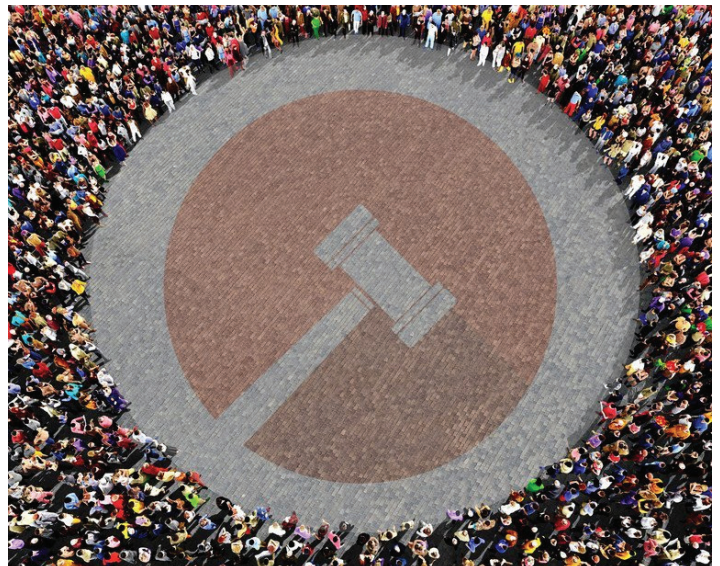
2022 looks to be a year where courts around the country will provide needed clarification on the impact of recent Supreme Court decisions concerning consumer class action litigation.

By Joshua Briones, Todd Rosenbaum and Arameh O'Boyle

Each year brings change and 2021 is no different. From the Supreme Court issuing long-awaited clarity on what constitutes an automatic telephone dialing system under the TCPA to whether all members of a class must have standing and the eye-popping spike in lawsuits brought under the ADA and California's Unruh Civil Rights Act, the year was filled with major developments for the most frequently filed consumer class actions: ADA, false advertising, TCPA and privacy based actions.

ADA and Unruh: WCAG 2.0, 2.1, 2.2 or None of the Above?

In 2021, the increase of cases in both state and federal courts against small and medium-sized businesses whose websites are allegedly not compliant with the ADA or the Unruh Act continued. Ever since 2017, when the Department of Justice withdrew its endorsement of Web Content Accessibility Guidelines (WCAG) 2.0, it has been unclear whether or not businesses are required to make their websites ADA compliant, and whether or not conformity with WCAG is a necessary component of compliance. This lack of guidance has led some courts to hold that a business's website qualifies as a "place of public accommodation" under the ADA, even when a business does not have a physical location that provides a "nexus" to the website. In response to the flood of lawsuits, some courts are finally starting to push back. For example, in April 2021, in *Winn-Dixie*, the Eleventh Circuit found that websites are not "places of public accommodation" under the ADA. At the state court



level, in September 2021 in *Omni Hotels Management*, the California Court of Appeals affirmed a jury verdict in favor of the defendant hotel management corporation after the jury determined that the plaintiff did not possess a "bona fide intent" to use the defendant's services, a pre-requisite to establish standing to sue under the Unruh Act. Without meaningful input from federal and state legislators and regulatory agencies, it is nearly certain that the trend of appellate courts making consequential decisions regarding application of the ADA and the Unruh Act will continue in 2022.

False Advertising: More Than Just Vanilla

Challenges to flavored foods, including class actions alleging that various vanilla-labeled products are not actually flavored with vanilla beans or extract but are

instead flavored with other ingredients, continue to grow. In July 2021, the Ninth Circuit affirmed dismissal of a putative consumer class action alleging Trader Joe's misleadingly labeled its store brand honey as "100% New Zealand Manuka Honey," where testing showed only 60% of the honey derived from Manuka flower nectar. *Moore v. Trader Joe's Co.*, No. 19-16618 (9th Cir. July 15, 2021). In reaching its decision, the court reinforced the importance of the "reasonable consumer" standard and the context in which information is provided to consumers in assessing whether advertising is likely to mislead.

While litigation over "natural" and "non-GMO" products also continues given the FDA's reluctance to provide guidance on the meaning of these terms, false advertising claims are now also challenging undefined "Green" claims such as "sustainable," "eco-friendly," or "ethical and responsible." Under the current administration, both the FTC and the FDA have suggested that regulating labeling, standards of identity, and advertising are top priorities. The House Appropriations Committee has directed the FDA to prioritize some of these labeling and product standards to aid consumers' understanding and, hopefully, provide more clarity in litigation.

TCPA—'Facebook v. Duguid': What Comes Next?

In April 2021, the Supreme Court addressed a circuit split on the definition of an ATDS under the TCPA. The court held, "Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." In plain English, the decision gutted authority (including from the 9th Circuit) that had created liability for the use of platforms that made calls or text messages from a pre-produced list of telephone numbers. Courts at both the district and circuit level are likely to spend the next few years building on and interpreting the *Facebook* decision—though some courts have allowed cases to proceed passed the pleadings, the trend at summary judgment appears to now favor defendants. While *Facebook* is excellent news for defendants

facing, or potentially facing, ATDS claims, the TCPA is far from dead and 2022 will likely see the plaintiffs' bar increasingly pursue non-ATDS statutory claims along with claims premised on alleged violations of similar state laws.

Privacy—'TransUnion v. Ramirez': If You Have an Injury Please Stand Up

With *TransUnion v. Ramirez*, the U.S. Supreme Court may have significantly undermined the effectiveness of many privacy laws. The decision revisits the standing issue and privacy harms under the FCRA that began with *Spokeo* in 2016. In *TransUnion*, the Supreme Court addressed whether individuals in a class may recover damages when they lack standing under Article III. The court's opinion conveyed a direct statement: "No concrete harm, no standing." And no standing, no recovery: "Every class member must have Article III standing in order to recover individual damages." The plaintiff's bar along with class representatives will now be forced to prove a concrete injury for each member of the class where a case moves through trial. An item to watch through 2022, and which the Supreme Court left open, is whether and how this decision should be applied at class certification. In addition, federal standing rules have a way of percolating down into the thinking of state court judges. So *TransUnion* may have reverberations beyond the federal system.

Conclusion

2022 looks to be a year where courts around the country will provide needed clarification on the impact of recent Supreme Court decisions concerning consumer class action litigation. Businesses of all kinds should monitor new developments in the spaces above throughout 2022 as we expect several appellate courts to weigh-in.

Joshua Briones is Managing Member of Mintz's Los Angeles office and *Todd Rosenbaum* and *Arameh O'Boyle* are Members of the firm. Associates *Crystal Lopez*, *Esteban Morales*, and *Adam Korn* contributed extensively to this article.