

In This Issue

- The outlook for consumer law practice is sanguine indeed as a new administration will predictably be focusing more on privacy and protection..... Page 1
- As law firms look toward renewed growth post-pandemic, expect the number of mergers and acquisition to spike appreciably in 2021 Page 3
- Patrick McKenna offers some cogent examples of the lessons—both strategic and tactical—that law firms can learn from today’s technology behemoths Page 5
- James Cotterman advises less tinkering with compensation systems that may not be broken, and more attention to dealing with underperforming partners Page 10
- Susan Saltonstall Duncan explores how law firms can build client loyalty, from the onboarding stage to the persistent search for honest feedback..... Page 13
- With a cumulative career record of handling more than \$1 billion in deals, Nicole Hatcher is now a key factor driving Foley & Lardner’s growth in California..... Back Page

Practice Area Overview ...

Array of Forces Generate Full Workloads for Consumer Law Attorneys

It’s a good time to be a consumer law plaintiff’s attorney and, for that matter, the same can be said of consumer defense lawyers. After all, it takes two to tango, or perhaps “tangle” is a more appropriate term in this context.

Consumer law—involving both consumer finance and products matters—is clearly emerging as one of the hottest practice areas in the legal profession. What’s more, given the many drivers fueling the uptick in this area, not the least of which arises from the change of administration in Washington, it’s poised

for even more growth as 2021 heads to the halfway mark of the year.

“We are rocking and rolling, about as busy as we’ve ever been,” says Luanne Sacks, a co-founder of Sacks, Ricketts & Case, a women-owned, business-disputes boutique with

Continued on page 2

offices in Palo Alto, Phoenix, San Francisco, and San Diego.

At Hanson Bridgett, a San Francisco-based firm, attorneys are very busy defending clients on class actions and multi-district litigation as well as counseling companies on an increase in consumer-related risks, in an effort to help them avoid litigation, according to Merton Howard, chair of the firm's product liability and tort practice group.

"There's a lot of work and the courts are even able to keep those cases moving in a COVID environment," Howard says. "We're also seeing much more consumer-driven activity that's presenting new risks for companies of all shapes and sizes in terms of their ability to learn what's bothering consumers and deciding how best to respond to that. I'm getting a lot of inquiries about that. Consumers are becoming increasingly sophisticated in their approach to whatever issue they have with a company that's selling them a product or service."

Of course, COVID has played a role in influencing consumer law, as it has in virtually every area of the profession—not to mention in every aspect of our lives. This is particularly true in regards to closures and billing issues involving businesses that operate under a subscription model, most notably gyms and fitness centers. This has triggered many class actions. "COVID created this whole new area in which we're seeing a lot of litigation," Sacks says.

Interestingly, one COVID ramification that surfaced with the advent of and the expansion in the use of Zoom and other video conferencing platforms has resulted in wider consumer participation in class actions. "With Zoom hearings for class settlement approvals, all of a sudden you have people who say they can participate because they can do it online, instead of having to come in-person to the actual courtroom," Howard explains. "That's really shaking up and changing the consumer law environment."

More and More Mass Arbitrations

On the financial services side of this arena, consumer activity has also been surging through the pandemic and will likely only spike higher in coming months. Consider this report from the Consumer Financial Protection Bureau, as reported in late March: "The impact of the COVID-19 pandemic on the consumer financial marketplace is reflected in the increase of complaints

Continued on page 17



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OF COUNSEL (ISSN 0730-3815) is published monthly by Wolters Kluwer, 28 Liberty Street, New York, NY 10005. Subscription rate, \$1,230 for one year; single issues cost \$154 (except **OF COUNSEL 700 ANNUAL SURVEY**). To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660. Address correspondence to **OF COUNSEL**, 28 Liberty Street, New York, NY 10005. Send address changes to **OF COUNSEL**, Wolters Kluwer, Distribution Center, 7201 McKinney Circle, Frederick, MD 21704.

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Consumer Law

Continued from page 2

submitted to the CFPB. The CFPB handled approximately 542,300 complaints last year—a nearly 54% increase over the approximately 352,400 complaints handled in 2019.”

Acting director Dave Uejio was quoted in the report: “Consumer complaints provide the CFPB with an important real-time window into where consumers encounter problems in the marketplace. The CFPB expects companies to respond to these concerns and that consumers receive responses from companies that address the issues consumers raise in their complaints.”

While sometimes companies “address the issues,” often they don’t adequately fix consumer problems, which of course, can lead to another remedy—class action litigation, or increasingly, mass arbitration.

“We’ve started seeing more and more mass arbitrations, which are complex and involve thousands of claims made by individual consumers,” says Kate Spelman, co-chair of the consumer law practice at Chicago-headquartered Jenner & Block. “This trend grew out of the arbitration provisions that a lot of companies use in their dealings with consumers,”

Many technology companies, in particular, require consumers to agree to terms of use to use their products, and sometimes those terms include these provisions, which essentially direct consumers to bring their claims in arbitration often resulting in large groups of consumers. “This has led to a rise in these mass arbitrations, and we expect to see more and more of them,” Spelman says, who practices in Jenner’s Los Angeles office.

Often plaintiff’s lawyers enlist large national or international technology companies like

Google and Facebook to get the word out and enroll consumers who felt they’ve been wronged by a company, creating mass arbitration groups.

“Plaintiff’s lawyers team up with big high-tech companies, placing ads on Google, for example, that essentially say, ‘Do you have issues with Product X? Then, click here,’” says Majed Dakak, a partner and litigator at Los Angeles’s Kesselman Brantly & Stockinger, who handles a range of clients including plaintiffs. “That’s an effective automated way to generate claims, basically starting them from the convenience of consumers’ phones. You can sign up a lot of people, which is one way that consumer-side attorneys take the mass arbitration route.”

Another force behind consumer legal activity keeping consumer law attorneys busy stems from complaints and claims filed under the umbrella of the Americans with Disabilities Act. “ADA website accessibility is incredibly hot right now,” Sacks says, adding that she and her colleagues are handling a lot of work for clients in this area. “People who are visually challenged need to have the same level of access to companies who sell products off their sites. Lots of companies have the very best intentions of trying to ensure that their websites are fully accessible but there are very strict guidelines. This requires extensive expense by companies to make sure their websites are fully ADA-compatible.”

Of course, when companies can’t adhere to the ADA guidelines, despite their “best intentions,” or simply won’t spend the time and money to enhance accessibility, litigation often ensues.

Stepped Up Enforcement

It’s no secret that, generally speaking, when a Democrat takes the White House the regulatory environment strengthens and federal agencies ramp up their scrutiny of activities in a range of industries. This is especially the case after four years of the Trump administration rolling back regulations across the board, underfunding certain agencies,

staffing them with anti-regulatory industry insiders, and/or simply ignoring entire agencies. For example, “many people have felt that the Consumer Product Safety Commission has been neglected and unattended to in the last four years,” according to Howard.

Consequently, consumer law attorneys are preparing for an increase in activity under the Biden administration. “With the change in administration, you’re going to see more enforcement on the consumer side as well as on the anti-trust front,” Dakak says, “and when you have that you usually have more consumer cases.”

Or, as Sacks puts it, “It happens automatically: Where the government goes, the consumer plaintiffs follow.”

And those plaintiffs and their attorneys will certainly be following the actions of those agencies that now have teeth again, like the CFPB and the CPSC, which means defense attorneys will be busy as well. “There’s renewed vigor and enthusiasm for the appointment of a new [CPSC] commissioner, and there are some initiatives that the commission believes will free it up,” Howard says. “It will be more transparent and willing take affirmative action in the area of consumer safety.”

While it may be too early to tell for sure, it certainly seems that the Biden administration has given regulators its blessing to go after violators of the laws and regulations governing consumer finances, products, and another major area, privacy. Certain states have never looked the other way regarding these matters and have, in fact, strengthened their laws. “In California,” Spelman says, “we continue to see privacy-related consumer litigation, particularly with the California Consumer Privacy Act and the recent enactment of the California Consumer Privacy Rights Act, which will only increase litigation in the future.”

Bolstering the Ranks

As a result of all of these and other developments affecting the consumer law practice

area, firms are growing or plan on growing their lawyer ranks to meet client demand. Dakak expects Kesselman Brantly Stockinger to hire more attorneys, “especially if some of the mass arbitration cases I was approached about get the green light,” he says. “Those cases take a lot of heavy-lifting. You essentially have thousands of clients so you’re going to have to hire people to keep up with that volume.”

Sacks Ricketts & Case just announced a new senior associate hire and two more associates. When asked what the firm looks for in its new hires, Sacks doesn’t hesitate. “We honor our diversity goals,” she says. “When we talk to headhunters we stress how important that is to us.”

And, Sacks, Cynthia Ricketts, and Hope Anne Case are drawn to attorneys who demonstrate a particular attribute that, again, has emerged because of the pandemic. “We need people who know how to connect with people in this remote world that we’re continuing to live in,” Sacks explains, “lawyers who don’t need to be sitting next someone to [forge] a strong connection. That’s a professional maturity and it doesn’t necessarily correspond to chronological age. In fact, younger attorneys may have an advantage.”

At Hanson Bridgett, Howard and his team look for attorneys who can stay abreast of the ever-evolving consumer-related regulatory landscape and fully understand and translate complex statutes and guidelines in the courtroom, around the arbitration table, or on a Zoom call.

“We want people who have a real-world appreciation and understanding for how standards and regulations play out in the eyes of consumers and who are always thinking about how they can communicate them to a judge or jury,” he says. “That means you must have the ability to speak plain English clearly and concisely.” ■

— Steven T. Taylor