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CLASS ACTION REVIEW – 2023

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CITATION FORMATS

All citations in the Duane Morris Class Action Review are designed to facilitate research.

If available, the preferred citation of the opinion included in the West bound volumes is used, such as *Simpson, et al. v. Dart*, 23 F.4th 706 (7th Cir. 2022).

If the decision is not available in the preferred format, a Lexis cite from the electronic database is provided, such as *EEOC v. AutoZone, Inc.,* 2022 U.S. Dist. LEXIS 179912 (N.D. Ill. Sept. 30, 2022).

If a ruling is not available in one of these sources, the full case name and docket information is included, such as *Lerman, et al. v. Apple, Inc.,* No. 15-CV-7381 (E.D.N.Y. Oct. 4, 2022).

eBook Highlights

The Duane Morris Class Action Review is available for use on a smartphone, laptop, iPad, or any personal electronic reader by using any eBook reader application. eBook reading allows users to quickly scroll, highlight important information, link directly to different sections of the Review, and bookmark pages for quick access at a later time. The eBook is designed for easy navigation and quick access to informative data.

NOTE FROM THE EDITORS

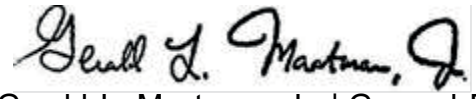
The stakes at issue in class action litigation are often significant. A company's market share and corporate reputation are typically implicated by a class action, as are the careers of senior management. For obvious reasons, these exposures and risks put immense pressure on corporate decision-makers.

The purpose of the Duane Morris Class Action Review is multi-faceted. We hope it will demystify some of the complexities of class action litigation, and keep corporate counsel updated on the ever-evolving nuances of Rule 23 issues. In this respect, we hope this book will provide our clients with an analysis of trends and significant rulings that enable them to make informed decisions in dealing with complex litigation risks.

The scope and content of the Duane Morris Class Action Review is unique. No other annual study exists that addresses class action litigation across all substantive areas of law. In 23 chapters and four appendices, this book analyzes virtually any class action issue that corporate executives and general counsel are apt to encounter.

Defense of class actions is a hallmark of the litigation practice at Duane Morris. We hope this book – manifesting the collective experience and expertise of our class action defense group – will assist our clients by identifying developing trends in the case law and offering practical approaches in dealing with class action litigation.

Sincerely,



Gerald L. Maatman, Jr. | General Editor

Jennifer A. Riley | General Editor

January 4, 2023

CONTRIBUTORS

The Duane Morris Class Action Practice Group consists of over 100 lawyers who defend class actions in all varieties and areas of law. We wish to thank various members of the practice group for their contributions to this Review, including Eden Anderson, Elisabeth Bassani, Aaron Bauer, Rebecca Bjork, Sharon Caffrey, Molly Connor, James Coster, Susan Delgado, Michael DeMarino, Danielle Dwyer, Ethan Feldman, Sarah Gilbert, Michael Gradisek, Katelynn Gray, Anne Gruner, Alex Karasik, Randy Kim, Hari Kumar, Nicole Mirjanich, Alessandra Mungioli, Bryan Shapiro, Brandon Spurlock, Jesse Stavis, Nelson Stewart, Brian Sullivan, Gregory Tsonis, Sheila Raftery Wiggins, Shaina Wolfe, and Tyler Zmick.

GLOSSARY AND KEY U.S. SUPREME COURT DECISIONS

Adequacy Of Representation – Plaintiffs must show adequacy of representation per Rule 23(a)(4) to secure class certification. It requires representative plaintiffs and their counsel to be capable of fairly and adequately protecting the interests of the class.

***Amchem Products, Inc. v. Windsor, et al.*, 521 U.S. 591 (1997)** – *Windsor* is the U.S. Supreme Court decision that elucidated the requirements in Rule 23(b), insofar as common questions must predominate over any questions affecting only individual class members and class resolution must be superior to other methods for the adjudication of the claims.

Ascertainability – Although not an explicit requirement of Rule 23, some courts hold that the members of a proposed class must by ascertainable by objective criteria.

***Comcast Corp. v. Behrend, et al.*, 569 U.S. 27 (2013)** – *Comcast* is the U.S. Supreme Court decision that interpreted Rule 23(b)(3) to require that, for questions of law or fact common to the class, the plaintiffs' damages model must show damages are capable of resolution on a class-wide basis.

Commonality – Plaintiffs must show commonality per Rule 23(a)(2) to secure class certification. This requires that common questions of law and fact exist as to the proposed class members.

Class – A group of individuals that has suffered a similar loss or alleged illegal experience on whose behalf one or more representatives seek to bring suit.

Class Action – The civil action brought by one or more plaintiffs in which they seek to sue on behalf of themselves and others not named in the suit but alleged to have suffered the same or similar harm.

Class Certification – The judicial process in which a court reviews the submissions of the parties to determine whether the plaintiffs have met their burden of showing that class treatment is the most appropriate form of adjudication. In federal courts, the process is governed by Rule 23 of the Federal Rules of Civil Procedure.

Collective Action – A type of representative proceeding governed by 29 U.S.C. § 216(b) where one or more plaintiffs seeks to bring suit on behalf of others who must affirmatively opt-in to join the litigation. It is applicable to claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act.

Decertification – Following an order granting conditional certification of a collective action or certification of a class action, a defendant can move for decertification based on the grounds that the members of the collective action are not actually similarly-situated or that the requirements of Rule 23 are no longer satisfied for the class action.

***Epic Systems Inc. v. Lewis, et al.*, 138 S. Ct. 1612 (2018)** – *Epic Systems* is the U.S. Supreme Court decision holding that arbitration agreements requiring individual

arbitration and waiving a litigant's right to bring or participate in class actions are enforceable under the Federal Arbitration Act.

Opt-In Procedures – Under 29 U.S.C. § 216(b), a collective action member must opt-in to join the lawsuit before he or she may assert claims in the lawsuit or be bound by a judgment or settlement.

Opt-Out Procedures – If a court certifies a class under Rule 23(b)(3), class members are bound by the court's judgment unless they opt-out after receiving notice of the lawsuit.

Numerosity – Plaintiffs must show that their proposed class is sufficiently numerous that adding each class members to the complaint would be impractical. This is a requirement for class certification imposed by Rule 23(a)(1).

***Ortiz, et al. v. Fibreboard Corp.,* 527 U.S. 815 (1999)** – *Ortiz* is the U.S. Supreme Court ruling that interpreted Rule 23(b)(3) to require personal notice and an opportunity to opt-out of a class action where money damages are sought in a class action.

Predominance – The Rule 23(b)(3) requirement that, to obtain class certification, the plaintiffs must show that common questions predominate over any questions affecting individual members.

Rule 23 – This rule from the Federal Rules of Civil Procedure governs class actions in federal courts and requires that a party seeking class certification meet four requirements of section (a) and one of three requirements under section (b) of the rule.

Rule 23(a) – It prescribes that a class meet four requirements for purposes of class certification, including numerosity, commonality, typicality, and adequacy of representation.

Rule 23(b) – To secure class certification, a class must meet one of three requirements of Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).

Rule 23(b)(1) – A class action may be maintained if Rule 23(a) is satisfied and if prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members or adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Rule 23(b)(2) – A class action may be maintained if Rule 23(a) is satisfied and the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Rule 23(b)(3) – A class action may be maintained if Rule 23(a) is satisfied and questions of law or fact common to class members predominate over any questions

affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Similarly-Situated – Under 29 U.S.C. § 216, employees may bring suit on behalf of themselves and others who are similarly-situated. The standard is not clearly defined in the statute and many courts have found that, if plaintiffs make a preliminary showing that they are similarly situated to those they seek to represent, conditional certification is appropriate. A finding in this regard is usually not based on the merits of the claims.

Superiority – The Rule 23(b)(3) requirement that a class action can be permitted only if class resolution is the superior method of adjudicating the claims.

Typicality – The plaintiffs' claims and defenses must be typical to those of proposed class members' claims. This is required by Rule 23(a)(3).

***Wal-Mart Stores, Inc. v. Dukes, et al.,* 564 U.S. 338 (2011)** – *Wal-Mart* is the U.S. Supreme Court ruling that tightened the commonality requirement of Rule 23(a)(2) and held that judges must conduct a "rigorous analysis" to determine whether there is a "common" contention central to the validity of the claims that is "capable of class-wide resolution."

TABLE OF CONTENTS

APPENDICES

CHAPTER 1

I. Introduction

Class action litigation presents one of the most significant risks to corporate defendants today. Procedural mechanisms like the one set forth in Rule 23 of the Federal Rules of Civil Procedure have the potential to expand a claim asserted on behalf of a single person into a claim asserted on behalf of a behemoth that includes every employee, customer, or user of a particular company, product, or service, over an extended period.

With the potential for exponential enlargement of the size and scope of an action comes the potential for exponential expansion of peril for a corporate defendant. Class action lawsuits can create legal nightmares for the companies they target and their management teams. The exposure created by such aggregation of claims can pose a challenge to a corporation's balance sheet, market share, and reputation. Sometimes such litigation can push a defendant into bankruptcy.

The aggregation of claims also increases leverage for a plaintiff's class action attorney. The class action device is a powerful tool that can provide him or her an opportunity to attempt to redistribute a sizable proportion of ultimate settlement dollars to his or her own coffers. These attributes attract skilled litigation counsel to the plaintiffs' class action bar. They likewise make the effective defense of class action litigation a top priority for corporate counsel facing class action lawsuits.

With the growth of class action litigation over the past decade, counsel for defendants and plaintiffs alike have become more sophisticated, the statutory authority and case law precedents have continued to evolve, and parties on both sides have expanded their arsenal of tools to pursue and to defend these cases. As a result, class action litigation entails ever-changing guideposts, new playbooks, and innovation. The plaintiffs' class action bar used Rule 23 to its fullest in 2022 in prosecuting class actions against Corporate America. The result was a year like no other in the class action space.

This chapter offers an overview of 2022 in terms of the most significant trends and developments that shaped the class action landscape.

We identified 10 key trends that characterize the past year. These trends involve: (i) massive class action settlements; (ii) U.S. Supreme Court decisional law on class action issues; (iii) set-backs and statutory impediments to the arbitration defense; (iv) plaintiff-friendly class certification conversion rates; (v) a simmering in government enforcement actions paired with indications of more aggressive federal and state agency litigation against corporations in the coming year; (vi) expansive growth in privacy class action litigation; (vii) an expansion of data protection issues that continue to plague corporate defendants; (viii) continued confusion over the problem of uninjured class members to class certification; (ix) aggressive assertion of defenses based on personal jurisdiction and venue; and (x) transformative rulings on the PAGA front including the first major setback for the plaintiffs' bar.

II. The Class Action Trends Of 2022

Trend # 1 – Class Action Settlements In 2022 Redistributed Wealth At An Unprecedented Level

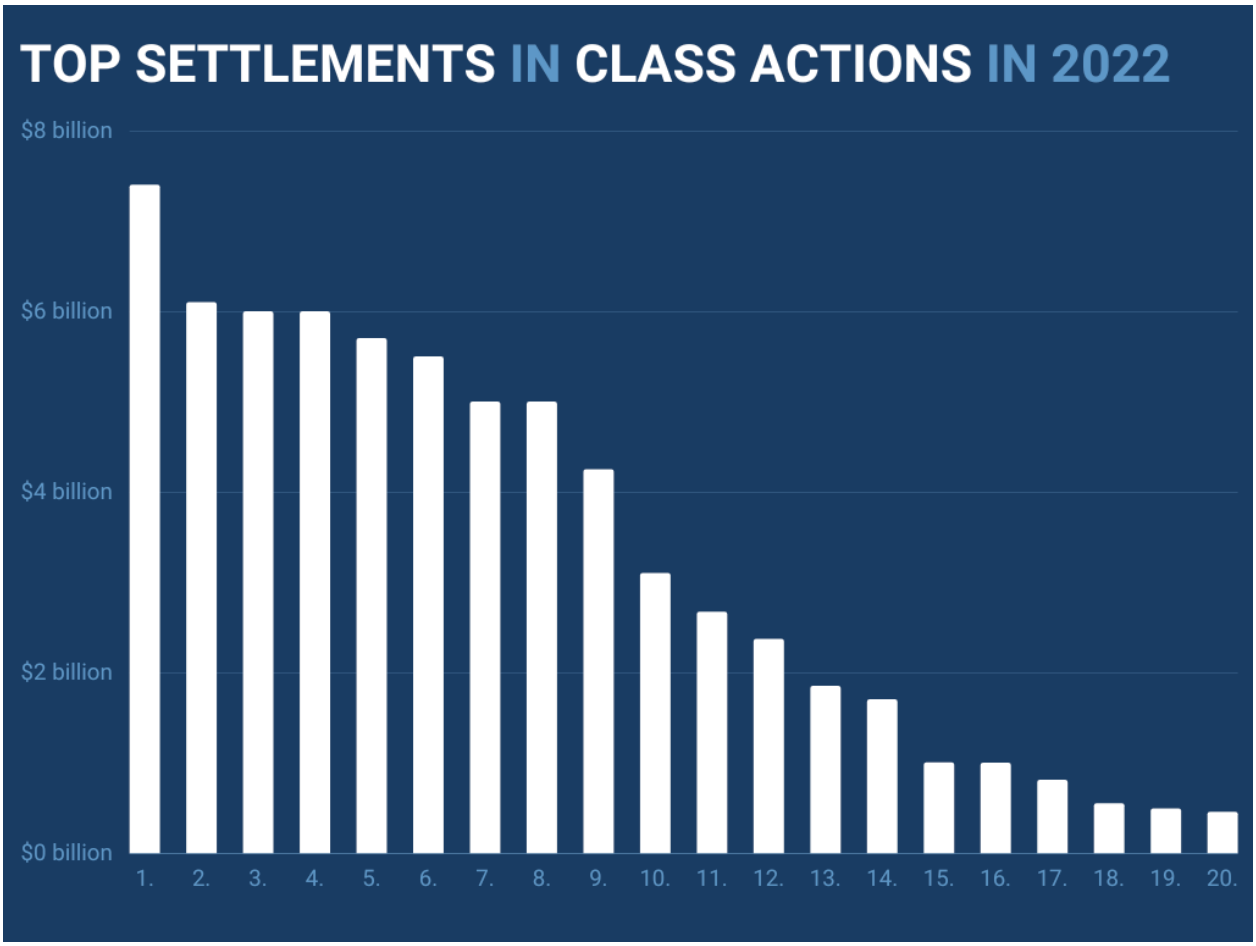
Aside from the Big Tobacco settlements nearly two decades ago, 2022 marked the most extensive set of billion-dollar class action settlements in the history of the American court system.

The largest 20 settlements during 2022 included the following:

1. *In Re National Prescription Opiate Litigation* (McKesson) - **$7.4 billion**
2. *In Re National Prescription Opiate Litigation* (AmerisourceBergen) - **$6.1 billion**
3. *Sweet, et al. v. Cardona Student Debt Cancellation Settlement* - **$6 billion**
4. *In Re National Prescription Opiate Litigation* (Cardinal Health) - **$6 billion**
5. *In Re National Prescription Opiate Litigation* (Walgreens) - **$5.7 billion**
6. *In Re National Prescription Opiate Litigation* (Purdue Pharma) - **$5.5 billion**
7. *In Re National Prescription Opiate Litigation* (Johnson & Johnson) - **$5 billion**
8. *In Re National Prescription Opiate Litigation* (CVS Pharmacy) - **$5 billion**
9. *In Re National Prescription Opiate Litigation* (Teva Pharmaceuticals) - **$4.25 billion**
10. *In Re National Prescription Opiate Litigation* (Wal-Mart) - **$3.1 billion**
11. *In Re Blue Cross Blue Shield Antitrust Litigation MDL* - **$2.67 billion**
12. *In Re National Prescription Opiate Litigation* (Abbvie Inc.) - **$2.37 billion**
13. *Commonwealth Of Pennsylvania v. Navient Corp.* - **$1.85 billion**
14. *In Re National Prescription Opiate Litigation* (Mallinckrodt) - **$1.7 billion**
15. *In Re Dell Technologies Inc. Class V Stockholders Litigation* - **$1 billion**
16. *In Re Champlain Towers South Collapse Litigation* - **$997 million**
17. *In Re Twitter Inc. Securities Litigation* - **$809.5 million**
18. *City Of Long Beach v. Monsanto Co.* - **$550 million**
19. *Doe, et al. v. University of Michigan* - **$490 million**
20. *In Re Glumetza Antitrust Litigation* - **$453 million**

Many of these settlements arose from opioid litigation against the pharmaceutical industry.

On an aggregate basis, class actions and government enforcement lawsuits against opioid manufactures, retailers, and distributors garnered more than $50 billion in settlements.



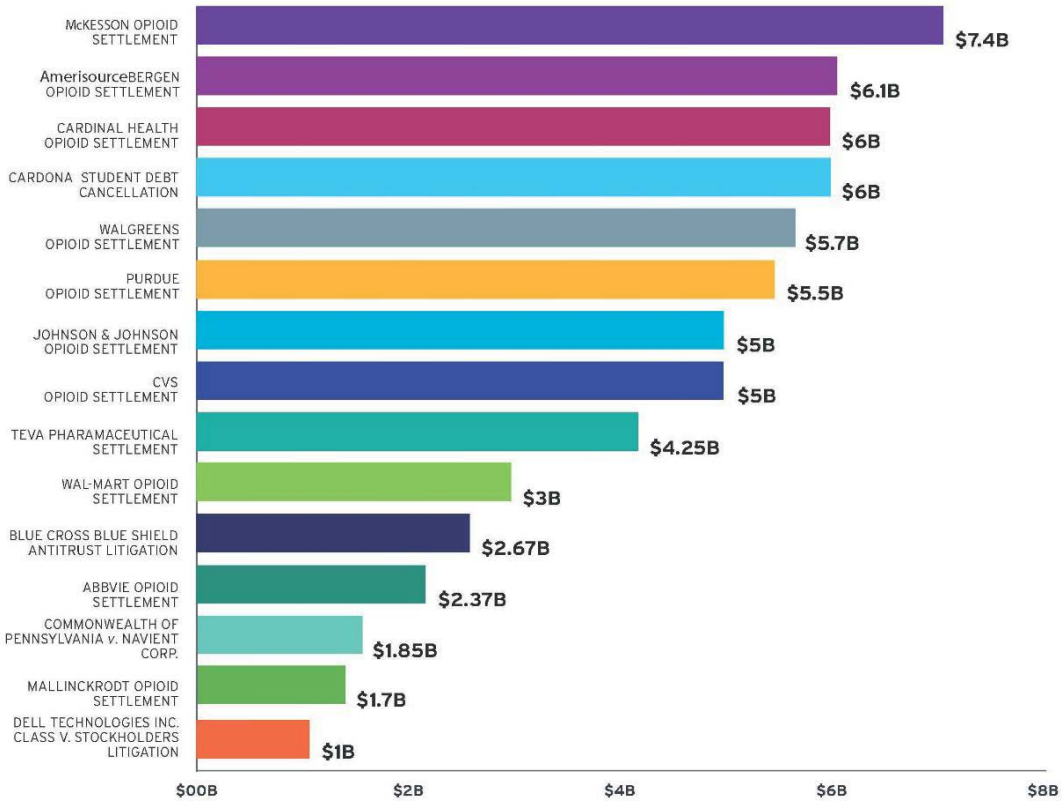
Much like the era of Big Tobacco settlements that transformed that industry, the opioid settlements are transforming the pharmaceutical industry and its distribution chain.

When the final tally is completed over the next several years, the aggregate settlements may top $100 billion.

These settlements have redistributed wealth at an unprecedented rate.

In 2022, there were 15 class actions that resolved cases for $1 billion or more in settlements.

In the aggregate, the value of these settlements totaled $63.66 billion. The members of the billion-dollar settlement club include the following:



The plaintiffs' class action bar scored rich settlements in virtually every area of class action litigation. The following provides the overall total of the top 10 most lucrative settlements in each of these areas:

$50.32 billion – Products liability class actions and mass tort
$8.596 billion – Consumer fraud class actions
$3.729 billion – Antitrust class actions
$3.254 billion – Securities fraud class actions
$1.31 billion – Civil Rights class actions
$896.7 million – Privacy class actions
$597 million – Employment discrimination class actions
$574.55 million – Wage & hour class and collective actions
$404.5 million – Government enforcement actions
$399.6 million – ERISA class actions
$719.21 million – Data breach class actions
$210.11 million – Fair Credit Reporting Act class actions

Suffice to say, 2022 was unlike any other year on the class action settlement front. As success often begets copy-cats, corporations can expect the plaintiffs' class action bar will be equally if not more aggressive in their case filings and settlement positions in 2023.

Trend # 2 – The U.S. Supreme Court's Decisions In 2022 Continued To Define The Class Action Landscape

As the ultimate referee of law, the U.S. Supreme Court has continued to define and shift the playing field for class action litigation.

The Supreme Court's rulings in 2022 were no exception. Consistent with its approach over the past several years, the Supreme Court issued three key rulings that impact the plaintiffs' bar's ability to bring and maintain class actions. The rulings include *Southwest Airlines Co. v. Saxon, et al.*, 142 S.Ct. 1783 (2022), *Morgan, et al. v. Sundance, Inc.*, 142 S.Ct. 1708 (2022), and *Viking River Cruises, Inc. v. Moriana, et al.*, 142 S.Ct. 1906 (2022).

The most effective tool for combating class actions may be the arbitration defense. Contrary to the tendency of its rulings in recent years to expand the arbitration defense, and thus make it more difficult for the plaintiffs' bar to pursue claims on a class-wide basis, this past year the U.S. Supreme Court pulled back on the arbitration defense by narrowing its coverage.

After expanding this defense for defendants over the past decade, for the first year we can recall, the Supreme Court issued two decisions that arguably pull back on and weaken the defense for defendants. In a third decision, the Supreme Court continued to protect the defense from state efforts to dilute its impact and limit its application to claims asserted under state law.

Arguably as important as the areas for which it offered guidance, the Supreme Court declined to take up cases in two key areas apt to continue to fuel defenses and, thus, to have a significant impact on class action litigation over the upcoming year, including defenses regarding personal jurisdiction and those that challenge a court's ability to certify classes that include uninjured members.

These defenses are analyzed in Trend # 9 and Trend # 8, respectively, below.

A. *Southwest Airlines Co. v. Saxon, et al.,* 142 S.Ct. 1783 (2022)

In the first and arguably the largest door-opener to the courthouse for the plaintiffs' class action bar during 2022, the Supreme Court narrowed the application of the Federal Arbitration Act by expanding its so-called "transportation worker exemption."

The plaintiff, a ramp supervisor, brought a collective action lawsuit against Southwest for alleged failure to pay overtime. *Id.* at 1787. Southwest moved to enforce its workplace arbitration agreement under the Federal Arbitration Act (FAA). In response, the plaintiff claimed that she belonged to a class of workers engaged in foreign or interstate commerce and, therefore, fell within §1 of the FAA, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* The plaintiff filed an "uncontroverted declaration" stating that, as a ramp supervisor, she "frequently" stepped in to load and unload cargo on and off airplanes traveling across state lines. *Id.* at 1787-88.

The district court rejected the plaintiff's argument and granted Southwest's motion. It held that only those involved in "actual transportation," and not those merely "handling goods" fall within the exemption. *Id.* at 1787. The U.S. Court of Appeals for the Seventh Circuit reversed and the U.S. Supreme Court granted review. As an initial matter, the Supreme Court noted that Southwest did not "meaningfully contest" that ramp supervisors like the plaintiff "frequently load and unload cargo." Thus, it accepted the premise that the plaintiff "belongs to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis." *Id.* at 1788.

The Supreme Court went on to hold that "any class of workers directly involved in transporting goods across state or international borders" falls within the exemption. *Id.* at 1789. It had no problem finding the plaintiff part of such a class: "We have said that it is 'too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it.' . . . We think it equally plain that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods." *Id.* (citation omitted).

The Supreme Court interpreted the §1 exemption in a way such that contracts with workers who engage in the process of transportation across state lines are not enforceable under the FAA. Thus, employers will need to turn to state law to attempt to enforce those agreements.

B. *Morgan, et al. v. Sundance Inc.,* 142 S.Ct. 1708 (2022)

In a second door-opener for the plaintiffs' class action bar during 2022, the U.S. Supreme Court broadened the circumstances that may give rise to a defendant's waiver of the arbitration defense.

The plaintiff, an hourly employee at a Taco Bell franchise, brought a nationwide collective action lawsuit alleging that Sundance violated the FLSA by failing to pay overtime. When applying for her job, the plaintiff signed an agreement to use

"arbitration, instead of going to court" to resolve any employment dispute. *Id.* at 1711. Sundance defended the lawsuit by moving to dismiss the suit as duplicative of another collective action previously brought by other employees, by subsequently answering the complaint, and by asserting 14 affirmative defenses, none of which included arbitration. Nearly eight months after the plaintiff filed the lawsuit, Sundance moved to stay the litigation and to compel arbitration under the FAA. The plaintiff opposed the motion and argued that, by litigating for eight months, Sundance waived enforcement of the arbitration agreement.

Applying Eighth Circuit precedent, the district court held that a party waives its right to arbitration only if it knows of the right, acts inconsistently with the right, and prejudices the other party by its inconsistent actions. *Id.* at 1711-12. The U.S. Court of Appeals for the Eighth Circuit agreed. It reasoned that, although the prejudice requirement is not a feature of federal waiver law generally, the requirement should apply because of the "federal policy favoring arbitration." *Id.* at 1712. The U.S. Supreme Court subsequently granted review.

Although the parties disagreed about the role of state law in resolving questions as to when a party's litigation conduct results in the loss of a contractual right to arbitrate, the Supreme Court observed that appellate courts, including the Eighth Circuit, generally have resolved such issues as a matter of federal law. Assuming the correctness of such decision, the Supreme Court considered only whether it was correct to "create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.'" *Id.* The Supreme Court decided the issue in the negative. It observed that, outside the arbitration context, federal courts assessing waiver do not generally ask about prejudice and, instead, focus on the actions of the person who held the right. *Id.* at 1713.

The Supreme Court noted that the Eighth Circuit's rule in this case derives from a decades-old Second Circuit decision that grounded the rule in the FAA's policy. *Id.* The Supreme Court, however, held that the FAA's "policy favoring arbitration" does not authorize federal courts to "invent special, arbitration-preferring procedural rules." *Id.* at 1713. Rather, the policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Id.* In other words, the Supreme Court clarified that "[t]he policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" *Id.* Accordingly, it concluded that a court must hold a party to its arbitration contract just like any other contract but may not devise novel rules to favor arbitration over litigation.

C. *Viking River Cruises Inc. v. Moriana, et al.*, 142 S.Ct. 1906 (2022)

In the largest door-closer to the courthouse to representative proceedings, the U.S. Supreme Court reacted to a state's attempt to render alleged violations of its laws immune from arbitration.

The plaintiff filed an action under California's Private Attorneys General Act of 2004 (PAGA) alleging that her former employer violated the California Labor Code. The PAGA purports to authorize any "aggrieved employee" to initiate an action "on behalf of himself or herself and other current or former employees" to obtain civil penalties recoverable by the State. *Id.* at 1914. The PAGA contains what the Supreme Court recognized as "effectively a rule of claim joinder" in that it allows a party to unite multiple claims against an opposing party in a single action. *Id.* at 1915.

The plaintiff's employment contract with Viking contained a mandatory arbitration agreement and a class action waiver that prohibited any party from bringing a class, collective, or representative action under the PAGA. Viking moved to compel arbitration of the plaintiff's individual PAGA claim and to dismiss her other PAGA claims. The trial court denied the motion, reasoning that, according to California precedent, courts cannot split claims into arbitrable "individual" claims and non-arbitrable "representative" claims. After the California Supreme Court affirmed, the U.S. Supreme Court granted review. *Id.* at 1917.

The Supreme Court ruled that the FAA preempts California precedent insofar as such precedent precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. The Supreme Court reasoned that, according to its precedents, the imposition of class procedures leaves unwilling parties with an unacceptable choice between being compelled to arbitrate using such procedures and foregoing arbitration altogether. While a rule that prohibits a court from enforcing a plaintiff's waiver of standing to assert claims on behalf of absent principals does not conflict with the FAA, a rule prohibiting a court from enforcing a plaintiff's waiver of the PAGA's built-in claim joinder mechanism does conflict with the FAA because it unduly circumscribes the freedom of the parties to determine "the issues subject to arbitration" and "the rules by which they will arbitrate." *Id.* at 1923.

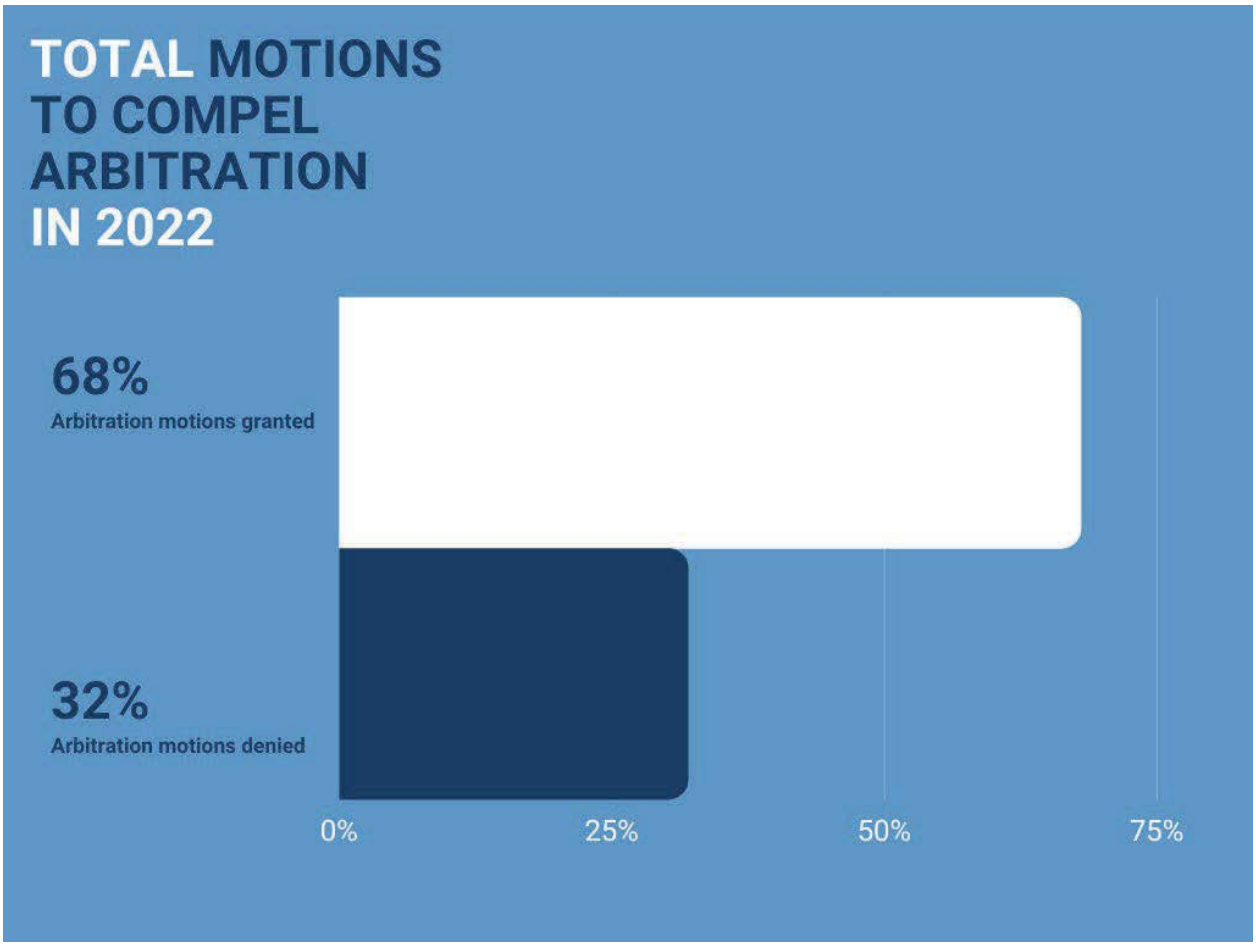
The Supreme Court concluded that state law cannot condition the enforceability of an agreement to arbitrate on the availability of a procedural mechanism that permits an expansive rule of joinder. *Id.* at 1924. Because, as interpreted by California precedent, the PAGA's joinder rule would function in such a way, it effectively would coerce parties into opting for a judicial forum rather than realizing the benefits of private dispute resolution. Thus, while the FAA does not preempt a wholesale waiver of PAGA claims, it does preempt a rule that prevents the PAGA claims from being divided into their individual and non-individual claims. *Id.* at 1925. The Supreme Court also noted that, because the PAGA does not contain a mechanism that enables a court to adjudicate non-individual claims after compelling individual claims to a separate proceeding, the lower court should have granted Viking's motion to compel arbitration and dismissed the remaining claims. *Id.*

Trend # 3 – The Arbitration Defense Suffered Setbacks In 2022

Of all defenses, a defendant's ability to enforce an arbitration agreement containing a class or collective action waiver may have had the single greatest impact in terms of shifting the pendulum of class action litigation. With its decision in *Epic Systems*

Corp. v. Lewis, et al., 138 S. Ct. 1612 (2018), the U.S. Supreme Court cleared the last hurdle to widespread adoption of such agreements. In response, more companies of all types and sizes updated their onboarding materials, terms of use, and other types of agreements to require that any disputes be resolved in arbitration on an individual basis. To date, companies have enjoyed a high rate of success enforcing those agreements and using them to thwart class actions out of the gate.

Statistically, corporate defendants fared well in asserting the defense. Across various areas of class action litigation, the defense won approximately 68% of motions to compel arbitration (roughly 69 motions granted in 102 cases).



By almost any measure, the arbitration defense had a tumultuous year in 2022. In the courts, chinks in the armor of the defense began to grow. While the U.S. Supreme Court shut down state efforts to evade arbitration of wage and hour claims, as discussed above, it limited application of the FAA to workers who participate in interstate transportation. Perhaps more significantly, on the legislative front, Congress significantly limited the availability of arbitration for cases alleging sexual harassment or sexual assault when it passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. President Biden signed the Act into law on March 3, 2022.

The Act amends the FAA and provides a plaintiff the discretion to enforce pre-dispute arbitration provisions and class and collective action waivers in cases where he or she alleges "conduct constituting a sexual harassment dispute or a sexual assault dispute" or is "the named representative of a class or in a collective action alleging such conduct." In other words, whereas the Act does not render such agreements invalid, it allows the party bringing sexual assault or sexual harassment claims to elect to enforce them or avoid them. The Act does not impact agreements entered into after a dispute arises.

The plaintiffs' bar often alleges other claims along with claims for sexual assault or sexual harassment. Whereas the Act refers to a "case," it remains to be seen whether courts will attempt to limit a plaintiff's option to avoid pre-dispute arbitration to sexual assault or sexual harassment claims or will extend such option to all claims at issue in a case. The Act provides that "no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." To date, courts have not issued significant decisions interpreting such language.

Given the impact of the arbitration defense, in 2023, companies may face additional hurdles, on the judicial or the legislative front, as the plaintiffs' bar continues to look for workarounds. In particular, we expect to see litigation over whether the Act's use of the word "case" renders the statute applicable to all claims in the case, including claims other than sexual harassment and sexual assault and whether the statute, therefore, will allow for a broader shield to the arbitration defense.

Trend # 4 – The Likelihood Of Class Certification In 2022 Was As Strong As Ever

In 2022, the plaintiffs' class action bar succeeded in certifying class actions at a high rate. Across all major types of class actions, courts issued rulings on 360 motions to grant or to deny class certification in 2022. Of these, plaintiffs succeeded in obtaining or maintaining certification in 268 rulings, an overall success rate of nearly 75%.

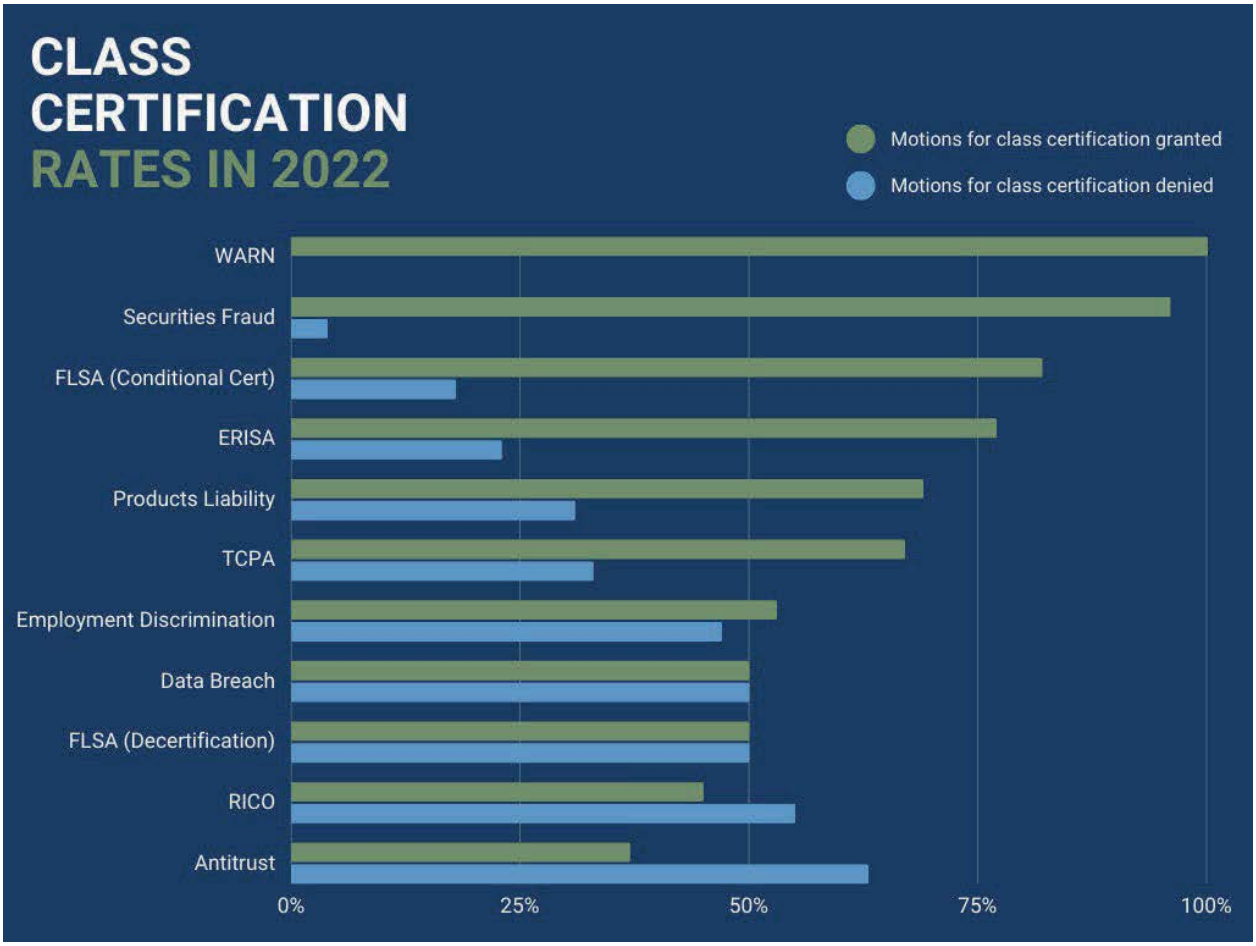
A. Certification Numbers Remained High

The number of motions that courts considered varied significantly by subject matter area, and the number of rulings they issued varied accordingly. The following summarizes the results in each of 10 key areas:

Securities Fraud – 96% granted / 4% denied (23 of 24 granted / 1 of 24 denied)
Data Breach – 50% granted / 50% denied (3 of 6 granted / 3 of 6 denied)
Employment Discrimination – 53% granted / 47% denied (8 of 15 granted / 7 of 15 denied)
ERISA – 78% granted / 22% denied (18 of 23 granted / 5 of 23 denied)
RICO – 45% granted / 55% denied (5 of 11 granted / 6 of 11 denied)
TCPA – 67% granted / 33% denied (10 of 15 granted / 5 of 15 denied)

WARN – 100% granted / 0% denied (5 of 5 granted / 0 of 5 denied)
FLSA (Conditional Certification) – 82% granted / 18% denied (175 of 218 granted / 39 of 218 denied)
FLSA (Decertification) – 50% granted / 50% denied (9 of 18 granted / 9 of 18 denied)
Antitrust – 37% granted / 63% denied (10 of 27 granted / 17 of 27 denied)
Products Liability / Mass Torts – 69% granted / 31 % denied (11 of 16 granted / 5 of 16 denied)

The plaintiffs' class action bar obtained the highest rates of success in securities fraud, ERISA, WARN, and FLSA actions. In cases alleging securities fraud, plaintiffs succeeded in obtaining orders certifying classes in 23 of the 24 rulings issued during 2022, a success rate of 96%. In ERISA litigation, plaintiffs succeeded in obtaining orders certifying class in 18 of 23 rulings issued during 2022, a success rate of 78%. In cases alleging WARN violations, plaintiffs managed to certify classes in 100% of the suits that resulted in decisions this year.



As to the FLSA, plaintiffs achieved a high rate of success on motions for conditional certification, and they also received a high number of rulings that dwarfs the number of other rulings by a substantial margin.

B. More Rulings Issued In FLSA Collective Actions Than In Other Areas

In 2022, courts issued more certification rulings in FLSA collective actions than in any other type of case. The ease by which plaintiffs can obtain conditional certification surely contributes to the allure of that space to members of the plaintiffs' bar. The plaintiffs' bar has succeeded in gaining conditional certification in FLSA matters at a high rate year over year, contributing to the volume of filings in this area.

In 2022, courts considered more motions for certification in FLSA matters than in any other substantive area. Overall, courts issued 236 rulings.

Of these, 219 addressed first-stage motions for conditional certification of collective actions under 29 U.S.C. § 216(b), and 18 addressed second-stage motions for decertification of collective actions.

Due to the low burden at the conditional certification stage, plaintiffs historically have enjoyed a high rate of success on such motions. Rulings in 2022 was no exception.

Of the 219 rulings that courts issued on motions for conditional certification, 180 rulings favored plaintiffs, for a success rate of 82%. Such rate is in line with and slightly higher than the historic rate of success that plaintiffs have achieved with respect to such motions.

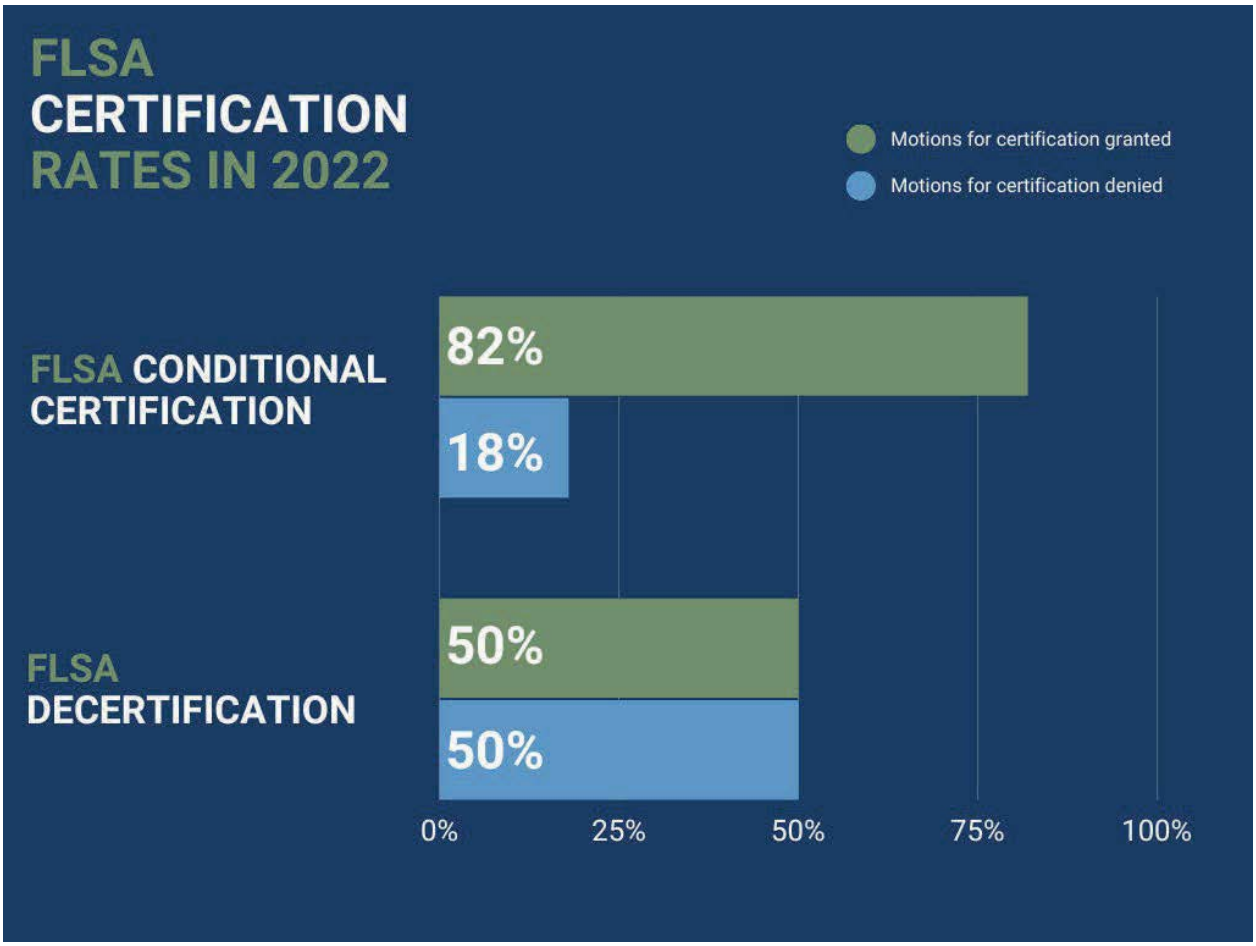
At the decertification stage, courts generally have conducted a closer examination of the evidence and, as a result, defendants historically have enjoyed an equal if not higher rate of success on these second-stage motions as compared to plaintiffs. Again, 2022 was no exception.

Of the 18 rulings that courts issued on motions for decertification of collective actions, 9 rulings favored defendants, for a success rate of 50%. Such rate again is in line with the historic rate of success that defendants have achieved at the decertification stage.

An analysis of these rulings, provided in Chapter 13, demonstrates that a disproportionate number of these rulings emanated from pro-plaintiff jurisdictions, including the judicial districts within the Second (33 decisions) and Ninth Circuits (19 decisions), which include California and New York, respectively.

Similar to recent years, however, the number of rulings emanating from the Sixth Circuit (36 decisions) proved as high if not higher than the number of rulings in these traditional pro-plaintiff forums.

The following graph illustrates these variations:



These numbers no doubt flow from the different standards by which courts in different circuits evaluate motions for conditional certification and decertification and, in turn, the likelihood of plaintiffs' success on such motions in these areas. Various factors discussed in this Review could impact these trends in 2023. If, for instance, the Sixth Circuit joins the Fifth Circuit in abandoning the two-step certification process, and thereby increases the time and expense of gaining a conditional certification order, it may lead to a reshuffling of the deck in terms of where plaintiffs seek to pursue cases.

Trend # 5 – Government Enforcement In 2022 Took A Back Seat

Over the past year, the Biden Administration continued to roll out changes on several fronts as it aimed to expand the rights, remedies, and procedural avenues available to workers. During 2022, such efforts fueled litigation. With its decision in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022), the U.S. Supreme Court imposed another hurdle to agency rule-making. Meanwhile, government enforcement litigation activity took a back seat.

Over the past two years, the U.S. Department of Labor, in particular, has continued to roll out worker-friendly rules that could have a cascading impact on workplace class actions, including rules designed to wipe out the pro-business policies of the Trump

Administration. Such efforts continued on multiple fronts in 2022, including with respect to rules regarding businesses' utilization of independent contractors and their use of the tip credit.

As to the former, effective January 6, 2021, the DOL during the Trump Administration adopted an Independent Contractor Rule that addressed the circumstances under which a worker qualifies as an independent contractor. The Rule arguably made it easier for companies, including companies operating in the gig economy, to utilize independent contractors. Although the DOL under the Biden Administration withdrew the Rule in May 2021, in March 2022, a federal district court in Texas found the DOL's withdrawal of the Rule unlawful. Although the DOL appealed the decision in May 2022, it later abandoned the appeal and, instead, on October 13, 2022, the DOL issued a proposed new rule on independent contractor status. It described the proposed framework as "more consistent with longstanding judicial precedent" and stated that the DOL "believes the new rule [will] preserve essential worker rights and provide consistency for regulated entities." The rule is likely to fuel further litigation in 2023 and have a cascading impact on the workplace class action landscape as it impacts litigation and potential recoveries.

The DOL's efforts to regulate use of the tip credit have met similar controversy. The FLSA, at 29 U.S.C. § 203(m), permits an employer to use the tips received by tipped workers to satisfy a portion of its minimum wage obligation. In 1988, however, the DOL added a rule (the 80/20 Rule) to its Field Operations Handbook that purported to require employers to pay employees at the full minimum wage rate for time spent performing non-tip-producing tasks that exceeded 20% of their workweek. Multiple courts attempted to apply this guidance so as to require employers to separate tasks performed by tipped workers into categories of tip-producing, non-tip-producing, and unrelated tasks, and the ensuring litigation over these issues has plagued the hospitality industry, in particular, over the past decade.

In November 2018, the DOL under the Trump Administration issued an opinion letter withdrawing the 80/20 Rule and, in February 2019, it amended the Field Operations Handbook to include a "reasonable time" standard, explaining that "an employer of an employee who has significant non-tip related duties which are inextricably intertwined with [his or her] tipped duties should not be forced to account for the time that employee spends doing those intertwined duties." In December 2020, the DOL issued the Tip Regulations Final Rule. After twice delaying the effective date of the Final Rule, on October 23, 2021, the DOL under the Biden Administration withdrew and replaced the Final Rule. In doing so, the DOL resurrected the 80/20 Rule and purported to limit the tip credit to non-tip-producing work that directly supports tip-producing work and does not exceed "a continuous period" of 30 minutes. The new rule went into effect on December 28, 2021. In 2022, the Restaurant Law Center and Texas Restaurant Association filed suit seeking to invalidate the new final rule. On February 22, 2022, the U.S. District Court for the Western District of Texas denied their much-watched emergency motion seeking to enjoin nationwide enforcement of the new final rule but did not issue a ruling on the merits, and the appeal remains pending in the Fifth Circuit. The results are apt to fuel additional litigation in 2023.

The ultimate result is apt to elucidate the limits of agency rule-making authority and test the impact of the U.S. Supreme Court's recent ruling in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022). In that case, the Supreme Court considered the validity of the Environmental Protection Agency's new Affordable Clean Energy (ACE) Rule that was promulgated under Clean Air Act (CAA). It held that, under the major questions doctrine, the agency must point to "clear congressional authorization" for the authority it claims. The government failed to offer such authorization, instead pointing to a "vague statutory grant" that the Supreme Court found "not close to the sort of clear authorization required by our precedents." *Id.* at 2614.

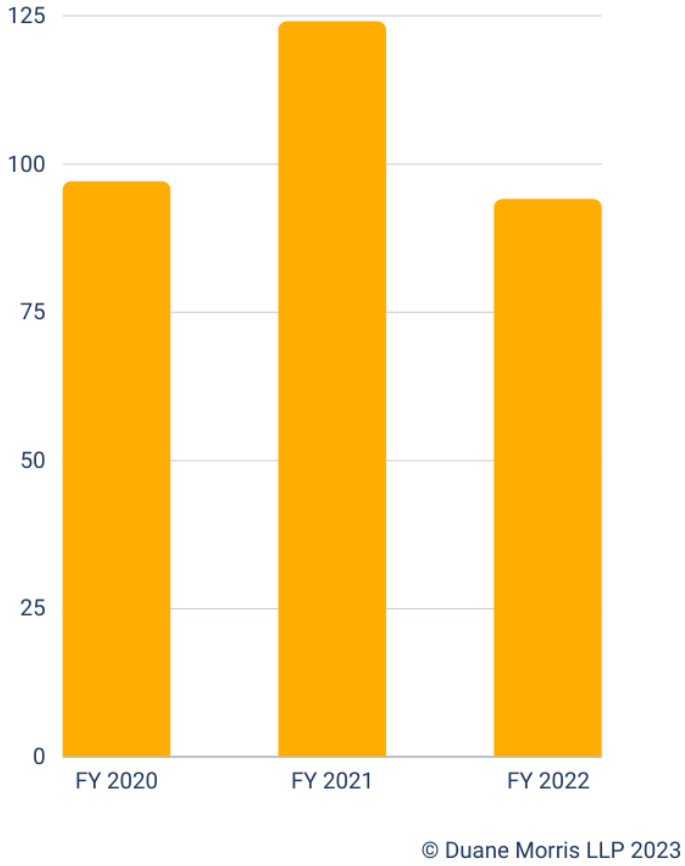
The changing tide of the Biden Administration's policies has been slow to impact other areas. Whereas the DOL acted swiftly to reverse course on many fronts, over most of the past year, the EEOC continued to operate with a Trump-appointed majority of commissioners.

During 2022, however, the EEOC continued to operate with a Trump-appointed majority of commissioners. Although President Biden quickly named two Democrats for the five-member Commission, Charlotte E. Burrows and Jocelyn Samuels, as Chair and Vice Chair, respectively, the commission retained a Republican-appointed majority until former chair Janet Dhillon's resignation on November 18, 2022. Although such expiration opened the door to a Democratic-appointed majority, the Senate has not yet confirmed a replacement.

As the DOL continued efforts to work an about-face on the rule-making front, the EEOC's year-over-year activity remained fairly steady. During fiscal year 2022, the EEOC filed 94 lawsuits. The EEOC's year-over-year activity remained fairly steady. During fiscal year 2022, the EEOC filed 94 lawsuits, including 92 merits lawsuits and two subpoena enforcement actions. This number marked a significant decrease from the filings during fiscal year 2021, when the EEOC filed 124 lawsuits, including 116 merits lawsuits. This year's filing data more closely resembles fiscal year 2020, when the EEOC filed 97 total lawsuits, including 93 merits lawsuits.

Notably, the EEOC's California district offices in San Francisco and Los Angeles combined for 13 filings this past year, which is identical to the combined 13 cases they filed in fiscal year 2021.

EEOC Lawsuit Filings 2020-2022



According to the EEOC, it filed 13 systemic lawsuits this past year, the same number it filed during fiscal year 2021. The EEOC reported that it has 29 pending systemic cases, which accounted for 16% of the EEOC's docket in fiscal year 2021. This data has not yet been published for fiscal year 2022.

In contrast, by the end of FY 2018, the EEOC had 71 systemic cases on its active docket, two of which included over 1,000 victims, and systemic cases accounted for 23.5% of its active lawsuits in that year, likely reflecting a stalling in the ability of its Democratic-appointment members to push this aspect of the EEOC's agenda.

Comparing its monetary recovery to previous years, the EEOC recovered $535.5 million in all types of cases in FY 2020, $486 million in FY 2019, and $505 million in FY 2018.

In sum, whereas companies continued to see pro-business rules promulgated by the Trump Administration withdrawn and overwritten in 2022, courts continued to impose hurdles to agency rulemaking, the success of which will continue to be seen in 2023. Enforcement activity remained steady as political appointments remain pending.

Employers are apt to see increased activity in 2023 as the EEOC in particular gains its full component of Biden appointees and can exercise its majority power to advance its agenda.

Trend # 6 – Privacy Class Actions Became An Intense Focus Of The Plaintiffs' Class Action Bar

Privacy litigation – in a multitude of forms and theories – revealed itself as the hottest area of growth in terms of activity by the plaintiffs' class action bar.

A. The Illinois Biometric Privacy Act Continued To Drive Lawsuits

In 2022, the plaintiffs' class action bar continued to focus on businesses and vendors utilizing biometric technology and filed numerous class action lawsuits based on the Illinois Biometric Information Privacy Act (BIPA).

Enacted in 2008, the BIPA regulates the collection, use, and handling of biometric identifiers and information by private entities. Subject to limited exceptions, the BIPA generally prohibits the collection or use of an individual's biometric identifiers and biometric information without notice, written consent, and a publicly-available retention and destruction schedule. Although Texas and Washington have implemented similar biometric protections, the BIPA provides for a private cause of action with aggressive statutory penalties allowing for $1,000 per violation and $5,000 per intentional or reckless violation. Because of this damages provision, the plaintiffs' bar files almost all BIPA lawsuits as class actions. Plaintiffs have focused more than one-third of BIPA cases on fingerprinting and have focused roughly a quarter on facial recognition surveillance.

The most noteworthy BIPA case of the year was *Rogers, et al. v. BNSF Railway Co.*, Case No. 19-CV-3083 (N.D. Ill.), the first federal jury trial in a case brought under the BIPA. After a week-long trial in the U.S. District Court for the Northern District of Illinois, a jury found that BNSF recklessly or intentionally violated the law 45,600 times and entered a verdict in favor of the class of 45,000 workers. The court thereafter awarded damages against BNSF of $228 million. BNSF subsequently filed a motion for a new trial arguing that none of the 45,000 class members suffered any actual harm and raising constitutional concerns about the BIPA. That motion remains pending for decision, and is almost sure to result in an appeal in 2023.

As BIPA class actions proliferate and businesses struggle to defeat such claims, the Illinois Supreme Court is poised to clarify the scope of the statute of limitations applicable to the BIPA in two important cases. In *Tims, et al. v. Black Horse Carriers*, 2022 Ill. LEXIS 89 (Ill. Jan. 26, 2022), it will decide whether a one-year statute of limitations applies to BIPA claims involving "publication" of biometric data and whether a five-year statute of limitations period applies to other BIPA claims. In *Cothron, et al. v. White Castle Systems*, 2021 U.S. App. LEXIS 37593 (7th Cir. Dec. 20, 2021), the Seventh Circuit asked the Illinois Supreme Court to provide much-needed clarification on the accrual of BIPA violations, specifically whether certain BIPA claims accrue only once upon the initial collection or disclosure of biometric information or whether a claim accrues each time a company collects or discloses biometric information.

The Illinois Supreme Court likely will rule on these key BIPA matters in the early part of 2023 and the statute will continue to drive class action litigation. Its technical requirements, combined with stiff statutory penalties and fee-shifting, provide a recipe for attention from the plaintiff's class action bar, and companies' continued development and use of innovative technologies are apt to provide a veritable barrel of opportunity.

B. Class Action Suits Alleging Wiretapping Violations

A new wave of class action lawsuits filed in California, Florida, Massachusetts, and Pennsylvania targeted companies that use technologies to track user activity on their websites, based on the theory that such practices violate electronic interception provisions of various state laws when done without consent.

The plaintiffs' bar grounded these claims in the electronic interception provisions of various state laws. Wiretap statutes like the California Invasion of Privacy Act, the Pennsylvania Wiretapping and Electronic Surveillance Act, and the Florida Security of Communications Act generally prohibit the unauthorized interception or disclosure of communications transmitted electronically.

The plaintiffs' bar targeted technologies that track a user's interactions with the website (*e.g.*, clicking, scrolling, swiping, hovering and typing) and create a recording of those interactions and inputs – known as session replay software. They also attacked coding tools that create and store transcripts of conversations with users in a website's chat feature. The plaintiffs in this new string of class actions allege that recording their interactions with a website and sending that recording to a third party for analysis without their consent is an illegal invasion of their privacy.

Recent decisions from the Ninth and Third Circuits fueled the swell of lawsuits alleging violations of these wiretap statutes. In May 2022, in *Javier, et al. v. Assurance IQ, LLC*, 2022 U.S. App. LEXIS 14951 (9th Cir. May 31, 2022), the Ninth Circuit held that the California Invasion of Privacy Act requires prior consent and explicitly rejected the argument that this wiretap statute allows a business to obtain consent to the use of session replay software after the recording already has begun. The Ninth Circuit, however, did not comment on what would amount to effective consent to the use of session reply software under the wiretap statute. A few months later, the Third Circuit in *Popa, et al. v. Harriet Carter Gifts*, 2022 U.S. App. LEXIS 22707 (3d Cir. Aug. 16, 2022), ruled that an electronic interception violating the Pennsylvania Wiretapping and Electronic Surveillance Act occurred when the plaintiff visited a website to purchase a product and her interactions on that site were recorded and transmitted to a third-party marketing firm. The Third Circuit concluded that the location of the interception was plaintiff's browser, and it rejected the defendants' argument that the wiretap statute did not apply because the third-party marketing firm's servers - where the information was sent - were located in Virginia. If other circuits follow the Third Circuit's approach, it could subject companies to liability under a state wiretap statute each time a user accesses its website from that state.

In each of the three lawsuits brought thus far in Pennsylvania, the class consisted of allegedly more than 5,000 individuals. This new wave of lawsuits alleging wiretap violations threatens to subject businesses to a substantial amount in penalties, including fines ranging from $1,000 to $50,000 per violation, depending on the state. If a violation occurs every time a user accesses a website in one of these states, the amount of penalties to which a company may be subject can balloon quickly.

C. More State Legislation Created And Expanded Data Privacy Rights

While Congress has refrained from addressing data privacy through federal legislation, many states have enacted their own laws, and 2022 saw significant state legislative activity regarding data privacy with five states preparing for new privacy laws to take effect in 2023, including California, Colorado, Connecticut, Utah, and Virginia.

On the heels of California's enactment of the California Consumer Privacy Act (CCPA) in 2020, California businesses will need to comply with all requirements of the California Privacy Rights Act (CPRA) effective January 1, 2023. The CPRA expands the current CCPA private right of action by authorizing consumers to bring lawsuits arising from data breaches involving additional categories of personal information and is arguably the strictest data privacy law in the United States, which places California privacy law closer, in many respects, to Europe's GDPR. With potential statutory damages ranging from $100 to $750 per consumer per incident, and breaches often involving hundreds of thousands or even millions of users, these types of claims will almost certainly lead to a sharp rise in class action litigation.

Virginia, Colorado, Connecticut, and Utah likewise enacted sweeping data privacy laws that will roll out in 2023. These laws are all similar in structure, but unlike California's statute, which allows an individual to sue a company for alleged violations, enforcement will be left to the respective state attorneys general. Each of these laws provides for expanded consumer rights related to their data, including: (i) *Right of access* (*i.e.,* allows for a consumer to access from a business/data controller the information or categories of information collected about a consumer); (ii) *Right of deletion* (*i.e.*, right for a consumer to request deletion of personal information about the consumer under certain conditions; (iii) *Right to opt-out* (*i.e.*, allows for a consumer to opt out of the sale of personal information about the consumer to third parties); (iv) *Right of portability* (allows for a consumer to request personal information about the consumer be disclosed in a common file format); and (v) *Notice and transparency requirements* (*i.e.,* an obligation placed on a business to provide notice to consumers about certain data practices, privacy operations, and/or privacy programs).

The approach each state attorney general takes regarding enforcement of these new laws will provide lessons for other states looking to regulate consumer privacy in the absence of a federal standard and almost certainly will be closely monitored by the plaintiffs' bar, as it attempts to draw from favorable rulings and to anticipate which state will enact the next plaintiff-friendly data privacy laws.

Trend # 7 – Data Protection Issues Continued To Plague Corporate Defendants

In 2012, General Keith B. Alexander, former head of the National Security Agency and U.S. Cyber Command, stated "either you know you've been hacked, or you've been hacked and you don't know you've been hacked." Ten years after that statement, the number of data breaches continues to rise, costing U.S. businesses millions of dollars. High profile companies such as Apple, Meta, Twitter, and Samsung have all disclosed cybersecurity attacks in 2022. Companies that experienced data breaches faced a convergence of risk factors in 2022 as data protection issues continued to plague corporate defendants.

Companies that fall victim to such attacks have to contend not only with the significant costs of responding to the data breach and potential of government fines, but also the high costs of dealing with high-stakes class action lawsuits. Capital One suffered a massive data breach in 2019 that involved 80,000 US bank accounts and led to a $190 million settlement that did not reach its claim filing close date until September 2022. Other notable settlements include the data breach involving 76 million Americans which led to a settlement of $350 million that received preliminary approval in July 2022, and the TikTok data breach that impacted nearly a billion users globally and resulted in a $92 million settlement that received final approval in August 2022.

The settlement of such cases faced hurdles in 2022 as courts increased their scrutiny of claims rates. Although not every settlement is of astronomical proportions like those discussed above, many follow a similar structure in that they include injunctive relief and provide for credit monitoring services along with a claims mechanism. The claims rate for data breach class lawsuits has been comparatively low, easing the ultimate payout for the targets of data breach class actions. In *Powers, et al. v. Filters Fast, LLC*, U.S. Dist. LEXIS 119148 (W.D. Wash. July 6, 2022), the grounds that the claims rate of barely 1.0% was suspiciously low. Another example is the historic *Anthem* data breach that settled for $115 million. Although the court granted final approval, the overall claims rate for a class size of nearly 80 million was only 1.7%. *See In Re Anthem Data Breach Litigation,* Case No. 15-MD-02617 (N.D. Cal.).

The victims of data breaches also faced hurdles on the internal investigation front as courts questioned whether data breach forensic reports are protected by the attorney-client privilege and work product doctrine. In the wake of *In Re Capital One Consumer Data Security Breach Litigation,* 2020 U.S. Dist. LEXIS 112177 (E.D. Va. June 25, 2020), *Wengui, et al. v. Clark Hill PLC*, 2021 U.S. Dist. LEXIS 5395 (D.D.C. Jan. 12, 2021), and *In Re Rutter's Data Security Breach Litigation*, 2021 U.S. Dist. LEXIS 136220 (E.D. Penn. July 22, 2021), federal courts sounded alarm bells when they ordered the production of internal forensic reports.

For example, in *Clark Hill*, the court found that, in addition to sharing the report with outside and in-house counsel, the company shared the report with members of the company's leadership and IT teams, provided a copy to the FBI in response to its investigation, and used the report for a range of non-litigation purposes. In *In Re*

Rutter's, the court denied work product protection for the forensic report because the company's statement of work with its vendor stated that the overall purpose of the investigation would be to determine whether unauthorized activity within the system resulted in the compromise of sensitive data and, if so, to determine the scope of such compromise. The court found that this language demonstrated that defendant did not have a "unilateral" belief that litigation would result at the time it requested the report. In light of these key rulings, 2022 was replete with legal articles, blogs, and webinars on the topic of how to protect these types of reports in data breach cases, particularly class actions, where the stakes are often significantly greater.

Finally, corporations suffered setbacks as courts disagreed over the application of the U.S. Supreme Court's decision in *TransUnion v. Ramirez, et al.,* 141 S. Ct. 2190 (2021), to data breach cases. In *TransUnion*, the Supreme Court ruled that certain putative class members, who did not have their credit reports shared with third parties, did not suffer concrete harm and, therefore, lacked standing to sue. Since the decision, standing has emerged as a key defense to data breach litigation because the plaintiffs often have difficulty demonstrating that class members suffered concrete harm. Courts, however, have continued to disagree over the application of *TransUnion* in the data breach context and have handed down varying decisions.

Whereas some courts have applied *TransUnion* strictly and dismissed data breach cases basing claims on the anticipated risk of future harm, others have allowed such lawsuits to proceed based on allegations regarding the potential for future harm (arguably ignoring *Ramirez*). For example, in *Legg, et al. v. Leaders Life Insurance*, 2021 U.S. Dist. LEXIS 2322833 (W.D. Okla. Dec. 6, 2021), the court followed *Ramirez* and dismissed a data breach class action because plaintiff did not allege that he or any other class member had been the victim of identity theft or fraud but instead described his injuries as including an imminent, immediate, and continuing risk of harm from identity theft and fraud.

On the other hand, the Third Circuit in *Clemens, et al. v. ExecuPharm, Inc.*, 48 F.4th 36 (3d Cir. 2022), took a different approach in analyzing *Ramirez*, finding that allegations of future injury in a data breach case will be sufficient for standing if the injury is "certainly impending" or there is a "substantial risk that harm will occur." In assessing whether harm was certainly impending, the Third Circuit examined the facts particular to the breach such as whether the breach was intentional versus negligent, whether the data was used (*e.g.*, an attempt to open a bank account), and whether the nature of the data subjects a plaintiff to risk of identity theft (*e.g.*, social security numbers, birth dates, names) as opposed to non-identifiable data such as account numbers with no names.

Thus, the Supreme Court decision in *Ramirez* has not resulted in a bright line rule on standing in data breach cases, as courts continue to apply different interpretations of *Ramirez* when analyzing the particular circumstances surrounding the breach in assessing the question of standing.

Trend # 8 – Courts Continued To Grapple With Problems Of Standing And Uninjured Class Members

During 2022, courts continued to grapple with the rules that govern the certification of classes that contain uninjured class members. Various cases climbed to the federal circuit level, with varying results, and the U.S. Supreme Court once again declined to take up the issue, making uninjured class members a continued topic of disagreement and debate for 2023.

By definition, individuals who did not suffer injury as the result of the defendant's conduct cannot maintain claims, and courts do not have the power to award them relief. As the U.S. Supreme Court reiterated in its seminal 2020 decision in *TransUnion*, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez, et al.*, 141 S.Ct. 2190, 2208 (quoting *Tyson Foods v. Bouaphakeo, et al.*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). In this respect, the "plaintiffs must maintain their personal interest in the dispute at all stages of the litigation . . . And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.*

Courts, however, continue to grapple with the application of these concepts in the class certification context and, in particular, they disagree over whether to certify a class, a plaintiff must demonstrate that every putative class member has standing or, stated differently, must demonstrate that the class excludes those individuals who did not suffer harm. In *TransUnion*, the Supreme Court expressly left open the question of "whether every class member must demonstrate standing before a court certifies a class." *Id.* at n.4. Such a requirement has significant consequences for the class action landscape and, as a result, multiple federal circuits considered the issue over the past year.

In *Drazen, et al. v. Pinto*, 41 F.4th 1354 (11th Cir. 2022), for example, the Eleventh Circuit vacated and remanded an order approving a class settlement after finding that some settlement class members did not experience an Article III injury. The plaintiffs filed suit alleging that the defendant violated the Telephone Consumer Protection Act by sending unwanted calls and text messages. Although the Eleventh Circuit previously held that a single unauthorized text message is not sufficient for an Article III injury, the district court approved the settlement on the basis that "only the named plaintiffs must have standing." *Id.* at 1357. Although only about 7% of the settlement class members had received a single text, the Eleventh Circuit reversed. Applying *TransUnion*, it explained that, when plaintiffs seek certification, they must limit the class definition "to those individuals who have Article III standing." *Id.* at 1361. Because the settlement class may have included individuals who received a single unwanted text message, the Eleventh Circuit held that approving the settlement would allow "individuals without standing [to] receiv[e] what is effectively damages in violation of *TransUnion*." *Id.* at 1362. The Eleventh Circuit remanded to provide the parties an opportunity to revise the class definition.

In *Hyland, et al. v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022), the Second Circuit confronted a similar issue in the context of a non-monetary settlement and reached the opposite result. The plaintiffs, a group of public servants with loans that the federal Public Service Loan Forgiveness program did not forgive, filed suit claiming that the defendant loan service companies misled them regarding their eligibility for the program. *Id.* at 115. The parties reached a nationwide non-monetary settlement that preserved class members' rights to file individual claims for money damages. *Id.* at 114. The district court approved the settlement, and a group of objectors appealed. On appeal, the objectors argued that because "[s]ome class members were no longer using the company to service their loans when the class was certified . . . the class as a whole . . . lacked standing to pursue injunctive relief." *Id.* at 117. The Second Circuit rejected that argument. It held that "[s]tanding is satisfied so long as at least one named plaintiff can demonstrate the requisite injury." *Id.* at 117-18. It reasoned that, because the plaintiffs alleged that they "continued to rely on [the company] for information about repaying their student loans," they plausibly alleged that they "were likely to suffer future harm." *Id.* at 118. The Second Circuit concluded that these allegations were "enough to confer standing on the entire class" and affirmed the district court's order. *Id.* (citing *Amado, et al. v. Andrews*, 655 F.3d 89, 99 (2d Cir. 2011) ("In a class action, once standing is established for a named plaintiff, standing is established for the entire class.")).

In *Bowerman, et al. v. Field Asset Services, Inc.*, 39 F.4th 652 (9th Cir. 2022), the Ninth Circuit considered what happens when the plaintiffs cannot or are not able to define their class so as to exclude uninjured class members. The plaintiff filed suit on behalf of a putative class of workers alleging that the defendant misclassified them as independent contractors rather than employees and, as a result, improperly failed to pay them overtime and failed to reimburse their business expenses. *Id.* at 657. The district court granted class certification, and the Ninth Circuit reversed. The plaintiffs did not dispute that they lacked common proof that putative class members worked overtime hours or incurred reimbursable expenses, but argued that, under Ninth Circuit precedent, "the presence of individualized damages cannot, by itself, defeat class certification." *Id.* at 661-62 (quoting *Leyva, et al. v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)). The Ninth Circuit disagreed. It distinguished between "the calculation of damages and the existence of damages in the first place." *Id.* at 662. Quoting its decision in *Castillo, et al. v. Bank Of America, NA*, 980 F.3d 723, 730 (9th Cir. 2020), the Ninth Circuit noted that "if the plaintiffs cannot prove that damages resulted from the defendant's conduct, then the plaintiffs cannot establish predominance." The Ninth Circuit concluded that the defendant's liability to any class member for failing to pay overtime wages or to reimburse business expenses "would implicate highly individualized inquiries on whether that particular class member ever worked overtime or ever incurred any 'necessary' business expenses" and, under such circumstances, class certification is improper.

Further contributing to the divergence of case law precedents, in *Olean Wholesale Grocery Cooperative, Inc., et al. v. Bumble Bee Foods, LLC*, 31 F.4th 651 (9th Cir. 2022), in an *en banc* decision, the Ninth Circuit ruled 9 to 2 to uphold an order certifying a class that potentially included a significant number of uninjured class members. The

plaintiffs brought suit against Starkist alleging that it engaged in a price-fixing scheme from 2011 to 2013 that led to their paying supra-competitive prices for tuna products. The district court granted class certification. After a panel vacated the order, the Ninth Circuit agreed to hear the case *en banc* and affirmed the ruling. Both parties presented expert testimony regarding antitrust impact, but their experts disagreed as to whether 28% of the class members could rely on the plaintiffs' model to show injury attributable to the alleged conspiracy. Similar to *Bowerman*, the Ninth Circuit addressed the issue as one of predominance, noting that, when individualized questions relate to "the injury status of class members," Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters predominate over common questions." *Id.* at 668.

The Ninth Circuit rejected the argument that Rule 23 does not permit a district court to certify a class that potentially includes more than a *de minimis* number of uninjured class members, reasoning that Rule 23(b)(3) "requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages." *Id.* at 669. The Ninth Circuit noted that, here, the defendants did not show that 28% of the class members were uninjured. Rather, the defendants disputed whether class members with no or limited transactions during the benchmark period could rely on the plaintiffs' model. The district court was not required to resolve the dispute; rather, if the jury were persuaded by the critique, it could conclude that the plaintiffs had failed to prove antitrust impact on a class-wide basis, but "[i]n neither case would the litigation raise individualized questions regarding which members of the class had suffered an injury." *Id.* at 681.

In August 2022, Starkist filed a petition with the U.S. Supreme Court asking it to strike down the decision and to elucidate the circumstances in which a court may or may not certify a class that includes a significant number of class members who were never injured by the alleged harm. On November 14, 2022, however, the U.S. Supreme Court turned down the request. Hence, the issue remains one that divides lower federal courts, thereby fueling uncertainty on an important class action issue.

If a defendant's showing that one or more members of the defined class did not suffer a concrete harm can defeat class certification, such a defense is a potent tool for the defense.

As a result, while 2022 saw the further development of the defense, corporate defendants are likely to see continued litigation over this issue during the upcoming year.

Trend # 9 – Corporate Defendants Aggressively Asserted Defenses Based On Personal Jurisdiction

In 2022, corporate defendants aggressively asserted defenses based on personal jurisdiction to fracture collective actions in particular. In *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County,* 137 S. Ct. 1773 (2017), the U.S. Supreme Court held that each plaintiff in a mass action must demonstrate a basis for the court to exercise personal jurisdiction over the defendant for purposes of adjudicating his or her claims, even if those claims are similar to the claims of other plaintiffs.

Federal circuits, however, have disagreed on the impact of the Supreme Court's ruling in the collective action and class action context. Such a decision has the potential to curtail the forums in which the plaintiffs' bar may file class and collective actions against a corporate defendant and, in particular, could limit the forums where a plaintiff could bring a nationwide action to those where a court may exercise general personal jurisdiction over the defendant (*i.e.*, typically only the state where the company is organized and the state where it maintains its principle place of business).

Given the potential of the defense to fracture nationwide suits, multiple defendants raised personal jurisdiction in 2022, and the number of federal circuits holding that *Bristol-Myers* applies to collective actions grew to three (the Third, Sixth, and Eighth Circuits), with one circuit holding otherwise (the First Circuit).

In *Fischer, et al. v. Federal Express Corp.*, 42 F.4th 366 (3d Cir. 2022), the Third Circuit joined the Sixth and Eighth Circuits in concluding that *Bristol-Myers* requires a court to find personal jurisdiction over the claims of opt-in plaintiffs in an FLSA collective action. The plaintiff, a Pennsylvania resident, brought suit against FedEx in the U.S. District Court for the Eastern District of Pennsylvania alleging that FedEx misclassified her and other security specialists as exempt from the overtime requirements of the FLSA. Two non-resident FedEx employees, who worked for FedEx in their home states, filed notices of consent to join the action. The district court held that it lacked specific personal jurisdiction over FedEx with respect to their claims, and they filed a petition for interlocutory appeal. The Third Circuit granted the petition to resolve whether, in an FLSA collective action, where the district court lacks general personal jurisdiction over the defendant, all opt-in plaintiffs must demonstrate that the district court may exercise specific personal jurisdiction over the defendant to resolve their claims.

The Third Circuit recognized that the Sixth and Eighth Circuits had answered in the affirmative, holding that the claims of FLSA opt-in plaintiffs must arise out of or relate to the defendant's minimum contacts with the forum state, *Id.* at 370 (citing *Canaday, et al. v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021), and *Vallone, et al. v. CJS Solutions Group, LLC*, 9 F.4th 861 (8th Cir. 2021)), whereas the First Circuit had answered in the negative, holding that only the named plaintiffs must show that their claims arise out of or relate to the defendant's minimum contacts with the forum state. *Id.* (citing *Waters, et al. v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022)).

The Third Circuit agreed with the former, holding that, like the out-of-state plaintiffs in *Bristol-Myers*, the opt-in plaintiffs in FLSA collective actions must satisfy the personal jurisdiction requirements of the Fourteenth Amendment to join the suit by demonstrating general personal jurisdiction or specific personal jurisdiction. As to the former, the opt-ins could not establish general personal jurisdiction over FedEx because the company was incorporated in Delaware and had a principal place of business in Tennessee. As to the latter, the opt-ins could not establish specific jurisdiction because they lived and worked in New York and Maryland, respectively, and based their claims entirely on their treatment by FedEx in their home states. *Id.* at 383.

During 2022, the parties in three of these cased filed petitions for review by the U.S. Supreme Court, and requested that it address the question of personal jurisdiction in the context of collective actions. To date, the Supreme Court has denied two of the petitions, with the *Fischer* petition outstanding. Thus, it is unlikely that the Supreme Court will resolve this issue in 2023, and corporate defendants can expect that personal jurisdiction will remain a powerful defense for facing collective actions outside of their home states.

Trend # 10 – PAGA Actions Suffered Their First Setback, Work-Arounds Continued To Percolate

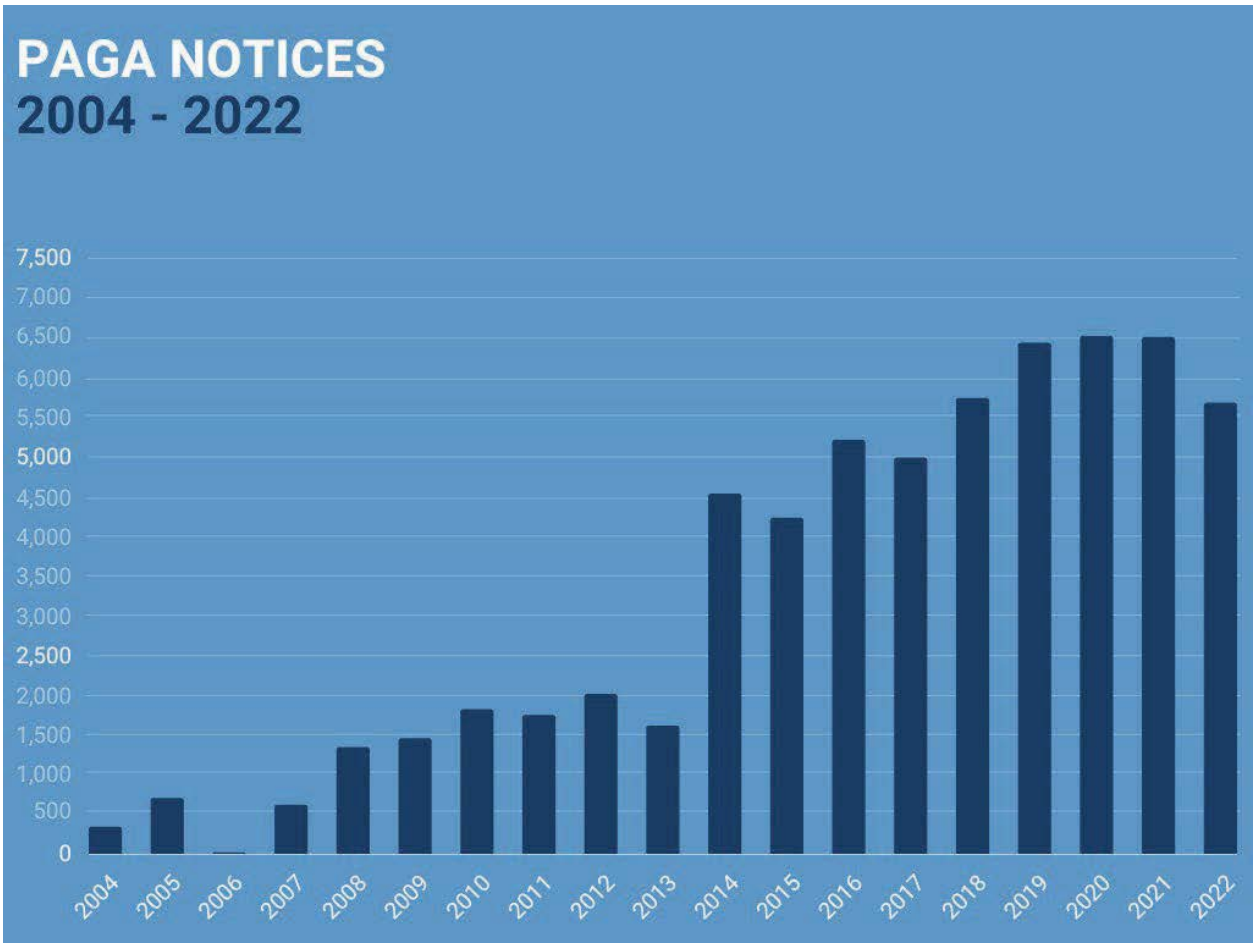
In 2022, actions under the California Private Attorneys General Act (PAGA), Cal. Lab. Code, §§ 2698, *et seq.,* saw their first setback as a workaround to workplace arbitration programs that require individual proceedings.

The PAGA created a scheme to "deputize" private citizens - "aggrieved employees" - to sue their employers for violations of the California Labor Code on behalf of their co-workers as well as the State. If successful, aggrieved employees receive 25% of any recovered civil penalties and pass the other 75% to the California Labor and Workforce Development Agency (LWDA). The PAGA authorizes the attorneys who pursue the action to collect their attorney's fees and costs in addition to the civil penalties.

A. The Explosion Of PAGA Notices

According to data maintained by the California Department of Industrial Relations, the number of PAGA notices filed with the LWDA has increased exponentially over the past two decades. The number grew from 11 notices in 2006 to 1,743 in 2011, to 5,208 in 2016, and to 6,502 in 2021. From 2013 to 2014, employers saw the largest single year increase, from 1,605 notices in 2013 to 4,532 notices in 2014, an increase of 182%. Over the five-year period from 2017 to 2021, the number of notices grew from 4,985 in 2017, to 6,502 in 2021, an increase of 30%.

The following chart illustrates this trend.



The increase is a likely reaction to the growth of workplace arbitration, fueled by the availability of fee-shifting.

B. The PAGA As A Work-Around To Arbitration

Although the proliferation of mandatory arbitration programs started as early as 1991 when the U.S. Supreme Court issued *Gilmer, et al. v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the movement did not gain steam until 2011, when the U.S. Supreme Court issued its ruling in *AT&T Mobility LLC v. Concepcion, et al.*, 563 U.S. 333 (2011), and held that the FAA preempts state rules that stand "as an obstacle to the accomplishment of the FAA's objectives," and it did not peak until 2018 with the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis, et al.*, 138 S.Ct. 1612 (2018), wherein the last hurdle to enforcement of class and collective action waivers was eliminated.

As the adoption of arbitration programs gained popularity as a mechanism to contract around class and collective actions, the plaintiffs' class action bar identified work-arounds. The California Supreme Court's cemented the PAGA as the frontrunner for generated labor-related claims with its 2014 decision in *Iskanian, et al. v. CLS*

Transportation Los Angeles, 59 Cal.4th 348 (Cal. 2014), which seemingly immunized the PAGA from arbitration programs. In *Iskanian*, the California Supreme Court held that "where an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." *Id.* at 384. Whereas the California Supreme Court acknowledged *Concepcion,* it nevertheless reasoned that the rule against PAGA representative action waivers did not frustrate the FAA's objectives because, whereas the FAA aims to ensure an efficient forum for the resolution of private disputes, a PAGA action "is a dispute between an employer and the state Labor and Workforce Development Agency." *Id.*

The ruling likely fueled the filing of PAGA notices in 2014 and thereafter, as it cleared the PAGA as a mechanism by which to maintain a representative action unhindered by agreements to arbitrate on an individual basis. The PAGA workaround suffered its first significant set-back in 2022 with the U.S. Supreme Court's highly anticipated decision in *Viking River Cruises, Inc. v. Moriana, et al.*, 142 S.Ct. 1906 (2022), which addressed the arbitrability of PAGA claims.

C. The Dagger Of *Viking River*

In *Viking River*, the U.S. Supreme Court drove a dagger through the heart of this work-around by continuing its trend of enforcing the FAA over state efforts to avoid or flat-out prohibit arbitration. *See, e.g.*, Cal. Lab. Code § 229 ("Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."). The U.S. Supreme Court confirmed that, whether judicial or legislative in nature, where the FAA is in play, it preempts efforts to enforce those rules.

In *Viking River*, the U.S. Supreme Court found a conflict between the FAA and PAGA's procedural structure. It recognized that the statute contains a "built-in mechanism of claim joinder," which permits "aggrieved employees" to use the Labor Code violations they personally suffered as a basis to join to the action any claims that could have been raised by the State in an enforcement proceeding. *Id.* at 1923. It held that, to the extent that *Iskanian* precludes division of PAGA actions into individual and non-individual claims, and thereby "prohibits parties from contracting around this joinder device," the FAA preempts such rule. *Id.*

Importantly, however, after finding that Viking should have been able to compel arbitration of plaintiff's individual claim, the U.S. Supreme Court addressed "what the lower courts should have done with Moriana's non-individual claims." *Id.* at 1925. It ruled that, once an individual claim has been committed to a separate proceeding, the employee is no different from a member of the general public, and the PAGA provides no mechanism for such person to maintain suit. As a result, the correct course was to dismiss the remaining claims. *Id.*

As a result, the U.S. Supreme Court eviscerated perhaps the most popular work-around to workplace arbitration, dealing a significant blow to the plaintiffs' bar and its ability to pursue claims on a representative basis.

D. What's Next?

In her concurrence, Justice Sotomayor expressly opened the door to two potential solutions to the majority opinion. She suggested that, in its analysis of the parties' contentions, the Supreme Court detailed "several important limitations on the pre-emptive effect of the [FAA]," meaning that "California is not powerless to address its sovereign concern that it cannot adequately enforce its Labor Code without assistance from private attorneys general." *Id.* at 1925. First, she suggested that, if the majority was incorrect in its understanding that the plaintiff lacked "statutory standing" under the PAGA to litigate her "non-individual" claims separately, "California courts, in an appropriate case, will have the last word." Second, alternatively, Justice Sotomayor opined that "the California Legislature is free to modify the scope of statutory standing under the PAGA within state and federal constitutional limits." *Id.* at 1925-26.

Although the California State Legislature has not taken action, on July 20, 2022, the California Supreme Court granted review in *Adolph, et al. v. Uber Technologies, Inc.*, No. G059860, on the question as to whether an aggrieved employee, who agreed to arbitrate claims under the PAGA that are "premised on Labor Code violations actually sustained by" the aggrieved employee, maintains standing to pursue "PAGA claims arising out of events involving other employees" in court or in any other forum agreed by the parties. The California Supreme Court is likely to issue a decision on these questions in 2023.

In the meantime, despite the U.S. Supreme Court's ruling in *Viking River*, many plaintiff's attorneys have requested, and many California courts have granted, stays of representative claims, rather than dismissals, likely in order to preserve tolling in the event that the California Supreme Court fashions a rule that permits them to proceed with representative claims.

III. What Should Companies Expect In 2023?

Class action litigation is a staple of the American judicial system. The volume of class action filings has increased each year for the past decade, and 2023 is likely to follow that trend. A company's programs designed to ensure compliance with existing laws and strategies to mitigate class action litigation risks are corporate imperatives.

The plaintiffs' bar is nothing if not innovative and resourceful. Given the massive class action settlement figures in 2022, coupled with the ever-developing law, corporations can expect more lawsuits, expansive class theories, and an aggressive plaintiffs' bar in 2023. These conditions necessitate planning, preparation, and decision-making to position corporations to withstand and defend class action exposures.

Defendants often have very little time to react to the plaintiff's forum choice after a class action is filed, even though it may be one of the most important initial questions in the case. In turn, a cascading number of strategic considerations are typically faced by corporate decision-makers upon receipt of the class action filing. Should the company opt to remove the case from state court to federal court (and

are there grounds to do so under the Class Action Fairness Act of 2005)? Is it better to have a federal judge who has the time and expertise to fully review the briefs and arguments and likely will apply a more rigorous evidentiary standard to expert testimony and class certification requirements? However, will removing the case cause other plaintiff's counsel to track the litigation and lead to more sophisticated counsel becoming involved or more "tag-along" class action filings? Will removing the case make settlement more difficult and potentially affect the structure of the settlement as well as its costs and the exposure in the class action? How will standing issues play out in each forum, and is standing a viable defense to gut the basis of the class theories? Can jurisdictional defenses fracture the class action by invoking *Bristol-Myers*? Does the company have an arbitration agreement with employees, consumers, or third-parties that would support a motion to compel arbitration of the claims in the lawsuit on an individual, bilateral basis? Is the potential of a motion to transfer the case to an MDL after removal good or bad for the ultimate defense and handling of the litigation? What are the steps for a full and complete early case assessment, and is the company's relevant electronically-stored information (ESI) available, assessable, and in a format that can be easily and quickly analyzed? Are there ways to resolve the individual complaint, either before filing responsive pleadings or by way of negotiation with plaintiffs' counsel? Could early concessions or a voluntary change to a challenged practice moot the litigation, or lead to an argument by plaintiff's counsel that they are entitled to attorneys' fees if corporate changes are made?

Once the parties are at issue in the litigation, another series of strategic decisions need to be confronted. Should the company request a stay of discovery while the court is considering a motion to dismiss? Should the defendant agree to broader discovery in the hope of demonstrating the presence of individualized issues to set up its class certification defenses? How broadly should discovery be drafted and what type of agreement on ESI is appropriate? Can the defendant make predominance arguments regarding varying facts without allowing broad discovery on those facts? Is bifurcation of discovery between merits issues and class issues still a viable option after Rule 23 case law has made clear that merits issues can overlap with the elements of class certification? Are communications allowed with class members before and/or after certification and on what terms? Is the list of class members discoverable? Is discovery allowed from absent class members and, if so, in what forms? Can and should a corporate defendant move for summary judgment before class certification (as to the named plaintiffs' claims individually or as to all class claims)? Are there advantages even if the motion will not win the case (for instance, narrowing the case, causing the plaintiff to respond in an individualized way, etc.)?

As to the future opposition to the plaintiffs' motion for class certification, can the class definition be attacked because it includes uninjured class members? Furthermore, it is rare that a motion for class certification is filed without an accompanying expert witness report. Likewise, virtually every opposition brief uses expert testimony. When should a defense expert be retained, on what subjects, and how should they plan their support of the defense efforts to block class certification?

The competing expert testimony typically centers on whether the claims can be proven with common evidence although they can be used for many other purposes (e.g. numerosity, feasibility of notice, merits issues, etc.). *Daubert* motions, which test the admissibility of expert testimony, are an essential part of almost every class certification battle and the U.S. Supreme Court has focused on expert testimony in several of its recent class certification decisions. Does the court apply the same *Daubert* standard at class certification as it does before trial? Does the expert rely upon admissible evidence? Does the testimony "fit" the legal theory and claims? Would the testimony be admissible in an ordinary single plaintiff case? Should the plaintiff or defendant hire a consulting expert to assist in litigating the case? How can an expert use sampling to support claims of class-wide liability or impact?

Finally, corporations must consider settlement from the very beginning of a class action and the desire for a final global resolution can drive decision-making in terms of overall defense strategies. Defendants may decide not to remove or compel arbitration; plaintiffs may avoid issuing press releases to avoid copycat cases. Settlement on a class-wide basis pose myriad strategic issues. When the defense has decided to settle, a corporation will normally want the most expansive class definition and the broadest release, even though it has vociferously opposed any certification earlier in the case. When the terms of a settlement are finally hammered out, the plaintiff's lawyer and defense counsel share a common goal of obtaining approval and will then join forces to this end and against any objectors who oppose the accord.

These crucial issues are inevitably posed by any class action litigation. By their very nature, class actions involve decisions on strategy at every turn. The positions of the parties are constantly changing and corporate defendants must always be looking ahead and anticipating issues during every phase of the litigation.

We hope the Duane Morris Class Action Review provides practical insights into complex potential strategies relevant to all aspects of class action litigation and other claims that can cost billions of dollars and require changed business practices in order to resolve.

APPENDIX 3

Top Settlements In Class Actions In 2022

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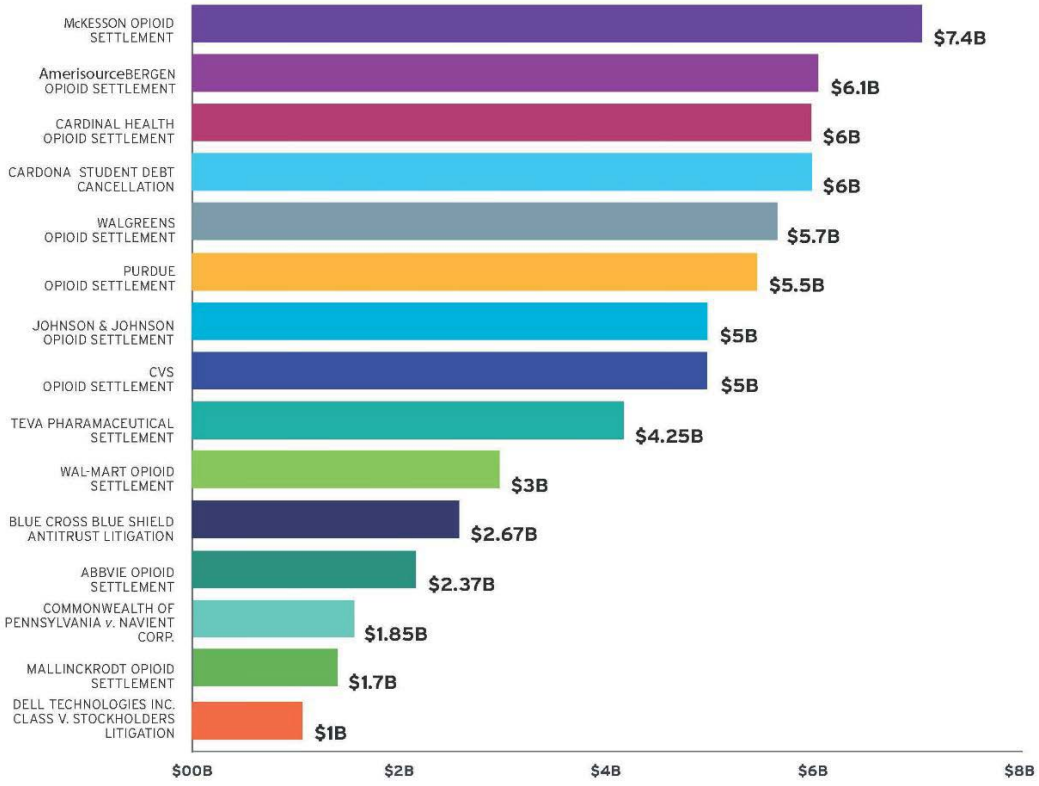
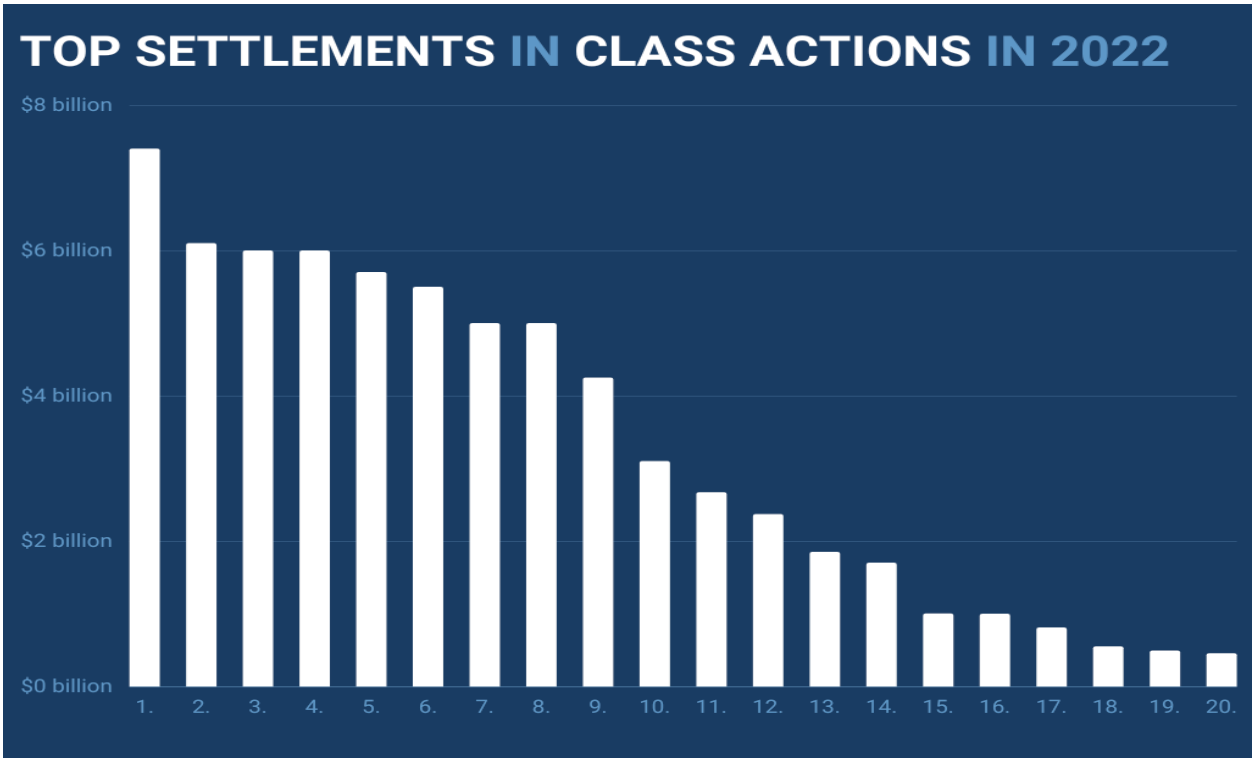
Top Settlements In Class Actions In 2022

In 2022, the top 20 settlements for all class action types tracked in the Class Action Review totaled $66.96 billion.





1. *In Re National Prescription Opiate Litigation* (McKesson) - **$7.4 billion**
2. *In Re National Prescription Opiate Litigation* (AmerisourceBergen) - **$6.1 billion**
3. *Sweet, et al. v. Cardona Student Debt Cancellation Settlement* - **$6 billion**
4. *In Re National Prescription Opiate Litigation* (Cardinal Health) - **$6 billion**
5. *In Re National Prescription Opiate Litigation* (Walgreens) - **$5.7 billion**
6. *In Re National Prescription Opiate Litigation* (Purdue Pharma) - **$5.5 billion**
7. *In Re National Prescription Opiate Litigation* (Johnson & Johnson) - **$5 billion**
8. *In Re National Prescription Opiate Litigation* (CVS Pharmacy) - **$5 billion**
9. *In Re National Prescription Opiate Litigation* (Teva Pharmaceuticals) - **$4.25 billion**
10. *In Re National Prescription Opiate Litigation* (Wal-Mart) - **$3.1 billion**
11. *In Re Blue Cross Blue Shield Antitrust Litigation MDL* - **$2.67 billion**
12. *In Re National Prescription Opiate Litigation* (Abbvie Inc.) - **$2.37 billion**
13. *Commonwealth Of Pennsylvania v. Navient Corp.* - **$1.85 billion**
14. *In Re National Prescription Opiate Litigation* (Mallinckrodt) - **$1.7 billion**
15. *In Re Dell Technologies Inc. Class V Stockholders Litigation* - **$1 billion**
16. *In Re Champlain Towers South Collapse Litigation* - **$997 million**
17. *In Re Twitter Inc. Securities Litigation* - **$809.5 million**
18. *City Of Long Beach v. Monsanto Co.* - **$550 million**
19. *Doe, et al. v. University of Michigan* - **$490 million**
20. *In Re Glumetza Antitrust Litigation* - **$453 million**

1. **$7.4 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with distributor McKesson to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

2. **$6.1 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with distributor AmerisourceBergen to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

3. **$6 billion – *Sweet, et al. v. Cardona Student Debt Cancellation Settlement*, Case No. 19-CV-03674 (N.D. Cal. Nov. 16, 2022)** (final settlement approval granted for a class action settlement resolving allegations the U.S. Department of Education failed to address hundreds thousands of applications to a program that cancels student loan debts for borrowers whose colleges misled them).

4. **$6 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with distributor Cardinal Health to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

5. **$5.7 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 2, 2022)** (settlement agreement reached with retail pharmacy Walgreens to settle all opioid claims against it by participating states, subdivisions and tribes).

6. **$5.5 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Mar. 3, 2022)** (settlement agreement reached with 13 states by OxyContin manufacturer Purdue Pharma to resolve claims that the company held to fuel the U.S. opioid epidemic).

7. **$5 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with Johnson & Johnson, the consumer products and health company that manufactured generic opioid medications, to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

8. **$5 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 2, 2022)** (settlement agreement reached with CVS Pharmacy to settle all opioid claims against it by participating states, subdivisions and tribes).

9. **$4.25 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 22, 2022)** (settlement agreement reached with Teva Pharmaceutical Industries to resolve thousands of lawsuits by U.S. state and local governments over the marketing of opioid painkillers).

10. **$3.1 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 15, 2022)** (settlement agreement reached with retail store Wal-Mart to resolve all opioid lawsuits and potential lawsuits by state, local, and tribal governments).

11. **$2.67 billion – *In Re Blue Cross Blue Shield Antitrust Litigation MDL,* Case No. 13-CV-20000 (N.D. Ala. Aug. 9, 2022)** (preliminary settlement approval granted in an antitrust class action resolving claims that the health insurance companies violated the Sherman Act by entering into an unlawful agreement to restrain competition between them in the markets of selling health insurance).

12. **$2.37 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 22, 2022)** (settlement agreement reached with Abbvie Inc. to resolve thousands of lawsuits by U.S. state and local governments over the marketing of opioid painkillers).

13. **$1.85 billion – *Commonwealth Of Pennsylvania v. Navient Corp.*, Case No. 17-CV-1814 (M.D. Penn. Jan. 13, 2022)** (consent judgement ordered for a class action settlement resolving allegations of widespread unfair and deceptive student loan servicing practices and abuses in originating predatory student loans).

14. **$1.7 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 22, 2022)** (settlement agreement reached with Mallinckrodt to resolve thousands of lawsuits by U.S. state and local governments over the marketing of opioid painkillers).

15. **$1 billion – *In Re Dell Technologies Inc. Class V Stockholders Litigation*, Case No. 2018-0816 (Del. Chan. Ct. Nov. 16, 2022)** (settlement reached in a class action alleging claims that the defendants breached their fiduciary duties to the former holders of Dell Class V tracking stock).

16. **$997 billion – *In Re Champlain Towers South Collapse Litigation*, Case No: 2021-015089-CA-01 (Fla. Cir. Ct. June 23, 2022)** (final settlement approval granted for a class action settlement resolving claims related to the collapse of the tower).

17. **$809.5 million – *In Re Twitter Inc. Securities Litigation*, Case No. 16-CV-531 (N.D. Cal. Nov. 17, 2022)** (final settlement approval granted in a class action alleging claims that Twitter artificially inflated its stock price by misleading investors about user engagement).

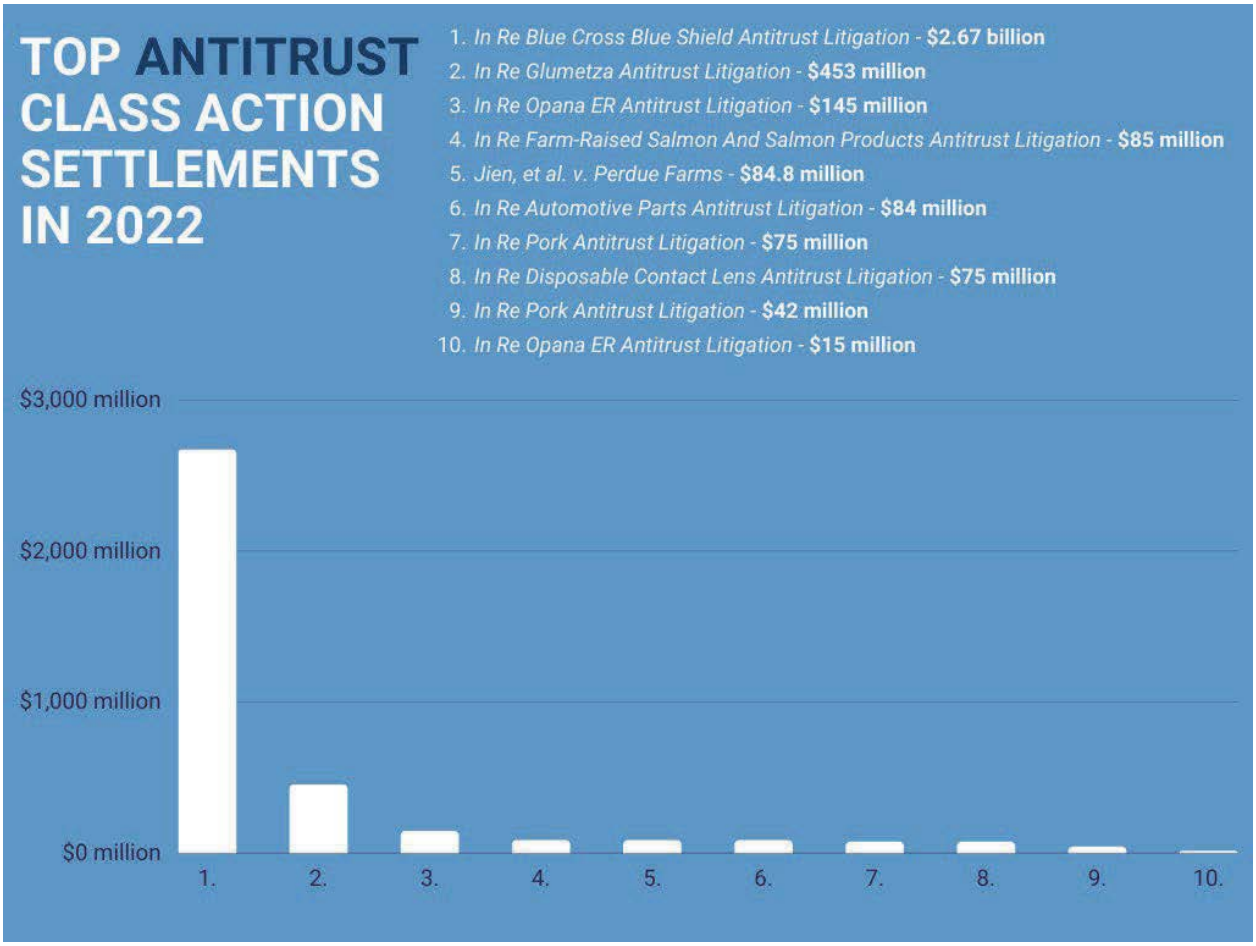
18. **$550 million – *City Of Long Beach v. Monsanto Co.*, Case No. 16-CV-03493 (C.D. Cal. Oct. 13, 2022)** (final settlement approval granted in a class action alleging claims that the company contributed to waterway contamination with polychlorinated biphenyls).

19. **$490 million – *Doe, et al v. University Of Michigan,* Case No. 20-CV-10629 (E.D. Mich. Nov. 8, 2022)** (settlement of a putative class action filed against the University of Michigan alleging sexual abuse of thousands of male students by a doctor employed by the school were dismissed by stipulation of the parties).

20. **$453 million – *In Re Glumetza Antitrust Litigation*, Case No. 19-CV-5822 (N.D. Cal. Feb. 3, 2022)** (final settlement approval granted in an antitrust class action resolving claims the companies suppressed generic versions of Glumetza in order to raise the price of the drug).

Top Antitrust Class Action Settlements In 2022

In 2022, the top ten antitrust class action settlements totaled over $3.72 billion.



1. **$2.67 billion – *In Re Blue Cross Blue Shield Antitrust Litigation*, Case No. 13-CV-20000 (N.D. Ala. Aug. 9, 2022)** (preliminary settlement approval granted in an antitrust class action resolving claims that the health insurance companies violated the Sherman Antitrust Act by entering into an unlawful agreement to restrain competition between them in the markets of selling health insurance).

2. **$453 million – *In Re Glumetza Antitrust Litigation*, Case No. 19-CV-5822 (N.D. Cal. Feb. 3, 2022)** (final settlement approval granted in an antitrust class action resolving claims the companies suppressed generic versions of Glumetza in order to raise the price of the drug).

3. **$145 million – *In Re Opana ER Antitrust Litigation,* Case No. 14-CV-10150 (N.D. Ill. Nov. 3, 2022)** (final settlement approval granted in an antitrust action by a group of drug wholesalers and large retailers over an alleged scheme to delay generic versions of the painkiller Opana ER).

4. **$85 million – *In Re Farm-Raised Salmon And Salmon Products Antitrust Litigation*, Case No. 19-CV-21551 (S.D. Fla. Sept. 8, 2022)** (final settlement approval granted in antitrust class action alleging that salmon producers violated federal law with a price-fixing scheme to artificially increase the price of salmon products).

5. **$84.8 million – *Jien, et al. v. Perdue Farms Inc.*, Case No. 19-CV-2521 (D. Md. Sept. 27, 2022)** (preliminary settlement approval granted in an antitrust action brought by factory workers alleging that chicken producers conspired to depress the hourly wages paid to workers in their chicken processing plants in violation of federal antitrust laws).

6. **$84 million – *In Re Automotive Parts Antitrust Litigation*, Case No. 12-CV-601 (E.D. Mich. Sept. 15, 2022)** (final settlement approval granted in an antitrust class action alleging that defendants conspired to raise the prices of life safety occupant systems such as airbags and seat belts).

7. **$75 million – *In Re Pork Antitrust Litigation,* Case No. 18-CV-1776 (D. Minn. Nov. 9, 2022)** (final settlement approval granted in an antitrust class action brought by direct purchasers against Smithfield Foods alleging a conspiracy to inflate pork prices).

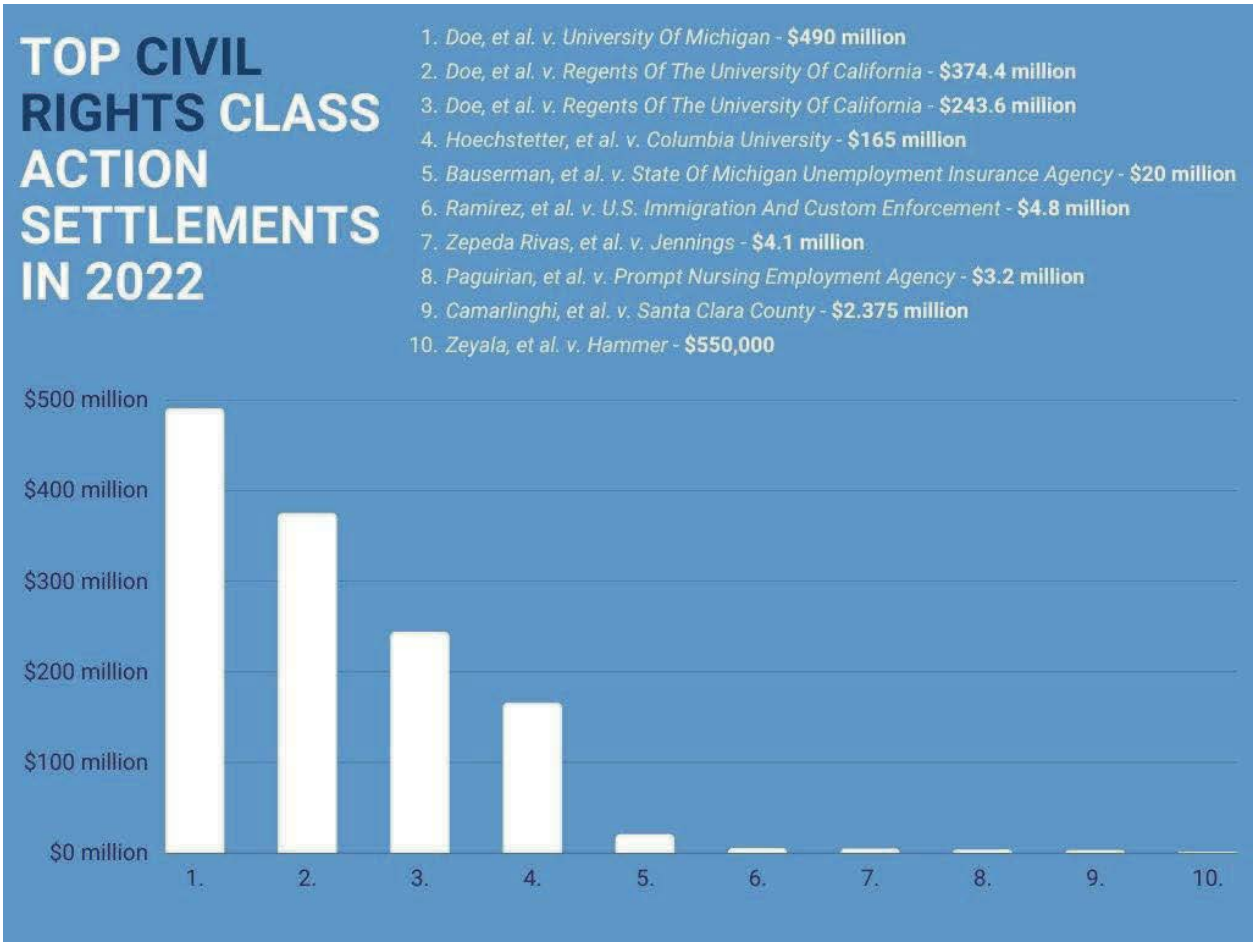
8. **$75 million – *In Re Disposable Contact Lens Antitrust Litigation*, Case No. 15-MD-2626 (M.D. Fla. Oct. 12, 2022)** (final settlement approval granted in an antitrust class action brought by consumers alleging that several companies agreed to implement unilateral pricing policies that set a minimum retail price for disposable contact lenses).

9. **$42 million – *In Re Pork Antitrust Litigation,* Case No. 18-CV-1776 (D. Minn. Oct. 19, 2022)** (final settlement approval granted in an antitrust class action brought by commercial and institutional indirect purchaser plaintiffs against Smithfield Foods alleging conspiracy to artificially inflate pork prices).

10. **$15 million – *In Re Opana ER Antitrust Litigation,* Case No. 14-CV-10150 (N.D. Ill. Dec. 15, 2022)** (final settlement approval granted in an antitrust action by a group of indirect purchasers over an alleged scheme to delay generic versions of the painkiller Opana ER).

Top Civil Rights Class Action Settlements In 2022

Settlement numbers in civil rights class actions were robust. The top ten settlements totaled $1.31 billion. Among the various case resolutions, an array of sexual abuse class actions against universities fueled over $1 billion worth of settlements.



1. **$490 million – *Doe, et al v. University Of Michigan,* Case No. 20-CV-10629 (E.D. Mich. Nov. 8, 2022)** (settlement of a putative class action filed against the University of Michigan alleging sexual abuse of thousands of male students by a doctor employed by the school were dismissed by stipulation of the parties).

2. **$374.4 million – *Doe, et al. v. Regents Of The University Of California*, Case No. 19-STCV-20594 (Cal. Super. May 24, 2022)** (settlement agreement reached resolving claims of 300 individuals alleging that they were subjected to sexual abuse by a gynecologist employed by the university).

3. **$243.6 million – *Doe, et al. v. Regents Of The University Of California*, Case No. 19-STCV-20594 (Cal. Super. Feb. 8, 2022)** (settlement agreement reached resolving claims from more than 200 individuals alleging that they were subjected

to sexual abuse by a gynecologist employed by the university).

4. **$165 million – *Hoechstetter, et al. v. Columbia University*, Case No. 19-CV-2978 (S.D.N.Y. Oct. 7, 2022)** (settlement agreement reached in class action against the university alleging sexual abuse of hundreds of female patients by university personnel).

5. **$20 million – *Bauserman, et al. v. State Of Michigan Unemployment Insurance Agency*, Case No. 15-202-MM (Mich. Cl. Ct. Sept. 28, 2022)** (funds set aside by the Legislature for resolution of a class action alleging that Michigan had used an automated fraud-detection system to determine that plaintiffs had received unemployment benefits for which they were not eligible and then garnished plaintiffs' wages and tax refunds to recover the amount of the alleged overpayments, interest, and penalties without due process).

6. **$4.8 million – *Ramirez, et al. v. U.S. Immigration And Custom Enforcement*, Case No. 18-CV-508 (D.D.C. Sept. 7, 2022)** (final settlement approval granted in class action alleging that the government routinely failed to consider safer options before transferring teens to adult detention facilities after they turned eighteen).

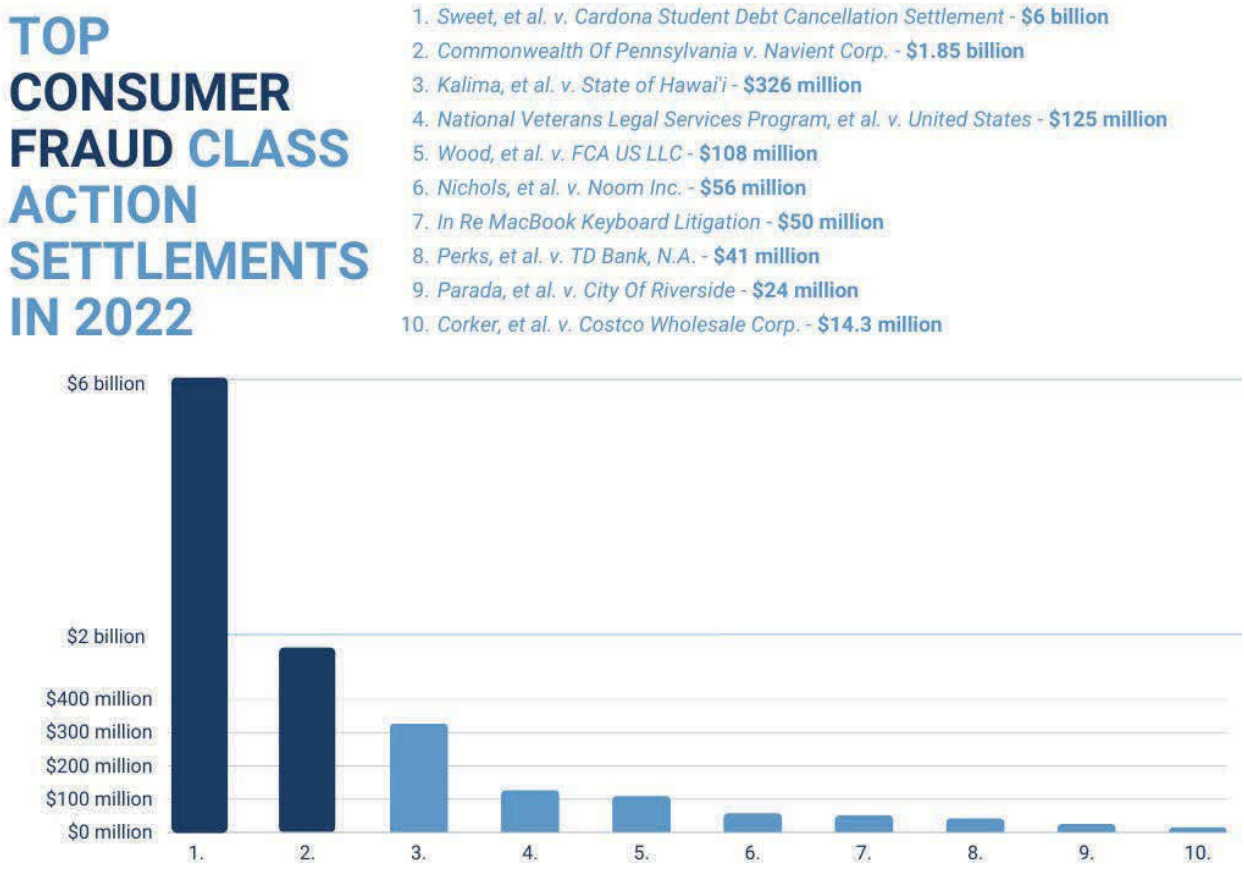
7. **$4.1 million – *Rivas, et al. v. Jennings*, Case No. 20-CV-2731 (N.D. Cal. June 9, 2022)** (final settlement approval granted for class action alleging that the government failed to provide adequate protections against COVID-19 in detention centers that also entailed payment of attorneys' fees and costs).

8. **$3.2 million – *Paguirian, et al. v. Prompt Nursing Employment Agency LLC*, Case No. 17-CV-1302 (E.D.N.Y. Apr. 7, 2022)** (final settlement approval granted in class action alleging violation of the Trafficking Victims Protection Act).

9. **$2.375 million – *Camarlinghi, et al. v. Santa Clara County*, Case No. 21-CV-03020 (N.D. Cal. Dec. 15, 2022)** (final approval granted in class action challenging the County's detention of people at its jail for 12 or more hours after the District Attorney declined to prosecute them).

10. **$550,000 – *Zeyala, et al. v. Hammer*, Case No. 19-CV-62 (E.D. Tenn. Oct. 19, 2022)** (preliminary settlement approval granted in class action alleging ICE raid illegally targeted Latino workers in violation of the workers' Fourth Amendment right to be free from unreasonable searches and their equal protection rights under the Fifth Amendment).

Top Consumer Fraud Class Action Settlements In 2022



1. **$6 billion – *Sweet, et al. v. Cardona Student Debt Cancellation Settlement*, Case No. 19-CV-03674 (N.D. Cal. Nov. 16, 2022)** (final settlement approval granted for a class action settlement resolving allegations the U.S. Department of Education failed to address hundreds of thousands of applications to a program that cancels student loan debts for borrowers whose colleges misled them).

2. **$1.85 billion – *Commonwealth Of Pennsylvania v. Navient Corp.*, Case No. 17-CV-1814 (M.D. Penn. Jan. 13, 2022)** (consent judgement ordered for a class action settlement resolving allegations of widespread unfair and deceptive student loan servicing practices and abuses in originating predatory student loans).

3. **$328 million – *Kalima, et al. v State Of Hawai'i,* Case No. 99-4771-12, (Haw. Cir. Ct. June 9, 2022)** (preliminary settlement approval granted for a class action settlement resolving allegations that the closure the Hawaiian Claims Office, which reviewed alleged breaches of trust regarding the Hawaiian Home Lands Trust, led residents having to wait decades with no work on when they would be

eligible to receive land from the trust).

4. **$125 million – *National Veterans Legal Services Program, et al. v. United States*, Case No. 16-CV-745 (D.D.C. Oct. 11, 2022)** (settlement reached refunding users of the electronic records system known as PACER to resolve a class action lawsuit alleging the judiciary overcharged members of the public who downloaded court documents).

5. **$108 million – *Wood, et al. v. FCA US LLC*, Case No. 20-CV-11054 (E.D. Mich. Dec. 1, 2022)** (final settlement approval granted for nine consolidated class actions alleging that the defendant manufactured and sold certain Chrysler, Dodge, Jeep, Ram and Fiat vehicles with a 2.4L Tigershark engine with a defect that caused the vehicles to consume excessive amounts of engine oil).

6. **$56 million – *Nichols, et al. v. Noom Inc.*, Case No. 20-CV-3677 (S.D.N.Y. July 11, 2022)** (final settlement approval granted in a class action alleging that the company violated consumer protection laws by not clearly disclosing the auto-renewal terms of consumers' online subscriptions).

7. **$50 million – *In Re MacBook Keyboard Litigation*, Case No. 18-CV-2813 (N.D. Cal. Dec. 2, 2022)** (preliminary settlement approval granted in a class action alleging that allegations that the company knowingly sold laptops with defective keyboards).

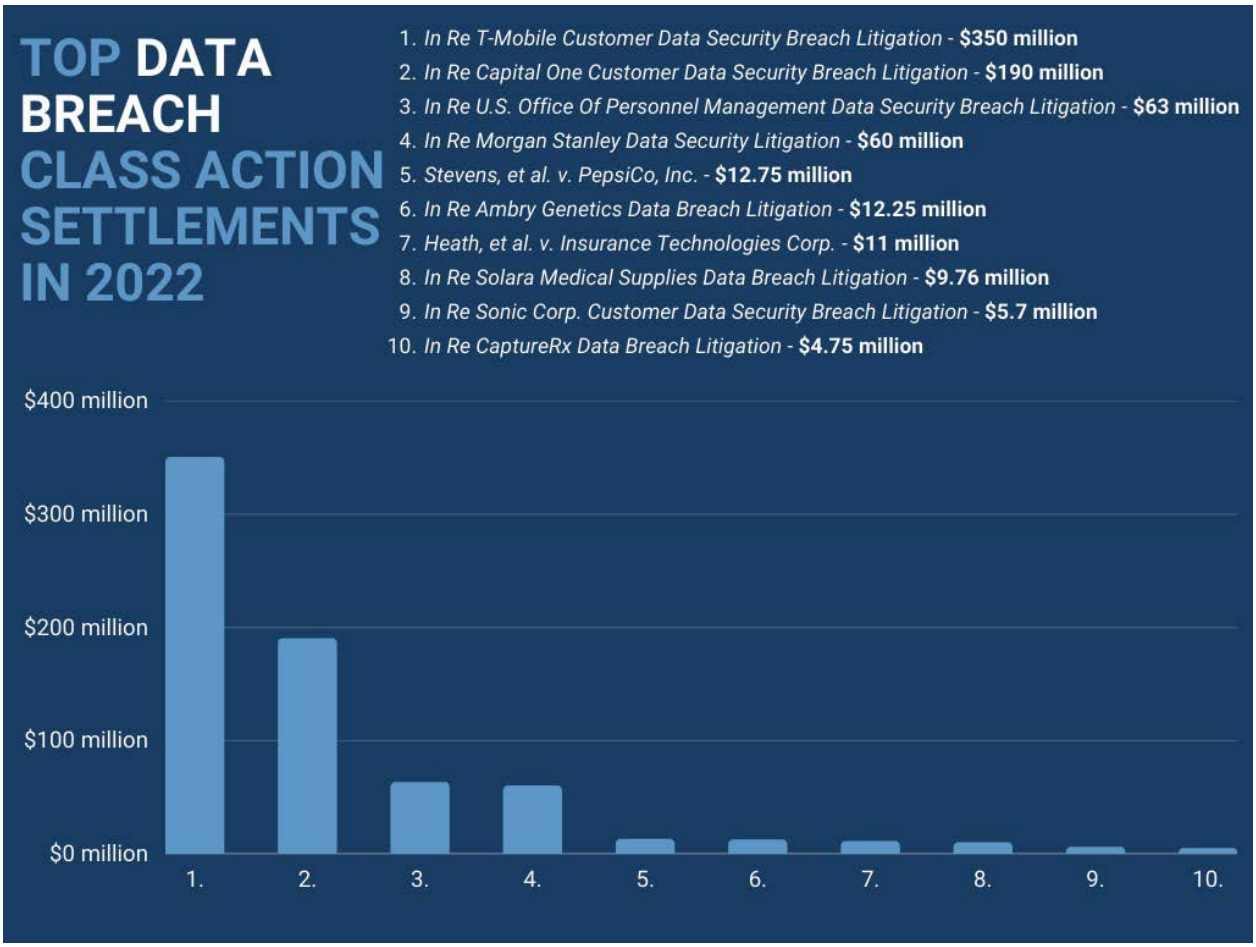
8. **$41 million – *Perks, et al. v. TD Bank, N.A.*, Case No. 18-CV-11176 (S.D.N.Y. May 3, 2022)** (final settlement approval granted in a class action alleging that defendant improperly charged improper funds fees).

9. **$24 million – *Parada, et al. v. City Of Riverside,* Case No. 1818642 (Cal. Super. Ct. May 2022)** (preliminary settlement approval granted in a class action alleging that a utility company was required to refund customers for general fund fees that allegedly violated state law).

10. **$14.3 million – *Corker, et al. v. Costco Wholesale Corp.*, Case No. 19-CV-290 (W.D. Wash. June 3, 2022)** (final settlement approval granted in a class action alleging that the company violated consumer protection laws by marketing coffee as originating in the Kona region).

Top Data Breach Class Action Settlements In 2022

Data breach class actions in 2022 were robust. The *T-Mobile* settlement at $350 million lead all settlements by a wide margin.



1. **$350 million – *In Re T-Mobile Customer Data Security Breach Litigation*, Case No. 21-MD-3019-BCW (W.D. Mo. July 26, 2022)** (preliminary settlement approval granted for a class action alleging that the company failed to prevent a data breach that affected 76 million Americans).

2. **$190 million – *In Re Capital One Customer Data Security Breach Litigation*, Case No. 19-MD-2915 (E.D. Va. Sept. 13, 2022)** (final settlement approval granted for a class action alleging that sensitive personal information of approximately 98 million Americans who had applied for Capital One credit cards had been stolen by a malicious criminal hacker from Amazon's AWS cloud where Capital One stored this information).

3. **$63 million – *In Re U.S. Office Of Personnel Management Data Security Breach Litigation,* Case No. 15-CV-1394 (D.D.C. Oct. 26, 2022)** (final settlement approval granted for a class action alleging that a data breach of the

defendants' systems compromised personal information of federal government employees and contractors, as well as certain applicants for federal employment).

4. **$60 million – *In Re Morgan Stanley Data Security Litigation,* Case No. 20-CV-5914 (S.D.N.Y. Aug. 5, 2022)** (final settlement approval granted for a class action settlement alleging claims that customers were subjected to data breaches that compromised their personal information due to the defendant's negligence).

5. **$12.75 million – *Stevens, et al. v. PepsiCo, Inc.,* Case No. 22-CV-802 (S.D.N.Y. Dec. 2, 2022)** (preliminary settlement approval granted for a class action settlement alleging claims that the defendant's timekeeping system was subject to a data breach causing an outage that resulted in employees not receiving all wages owed).

6. **$12.25 million – *In Re Ambry Genetics Data Breach Litigation,* Case No. 20-CV-791 (C.D. Cal. Oct. 5, 2022)** (preliminary settlement approval granted for a class action alleging claims that an email security breach compromised the information of hundreds of thousands of patients).

7. **$11 million – *Heath, et al. v. Insurance Technologies Corp*., Case No. 21-CV-1444 (N.D. Tex. Mar. 21, 2022)** (preliminary settlement approval granted for a class action settlement alleging claims that the companies put consumers at risk by failing to implement reasonable cyber security measures that resulted in a data breach in which their personal information was stolen).

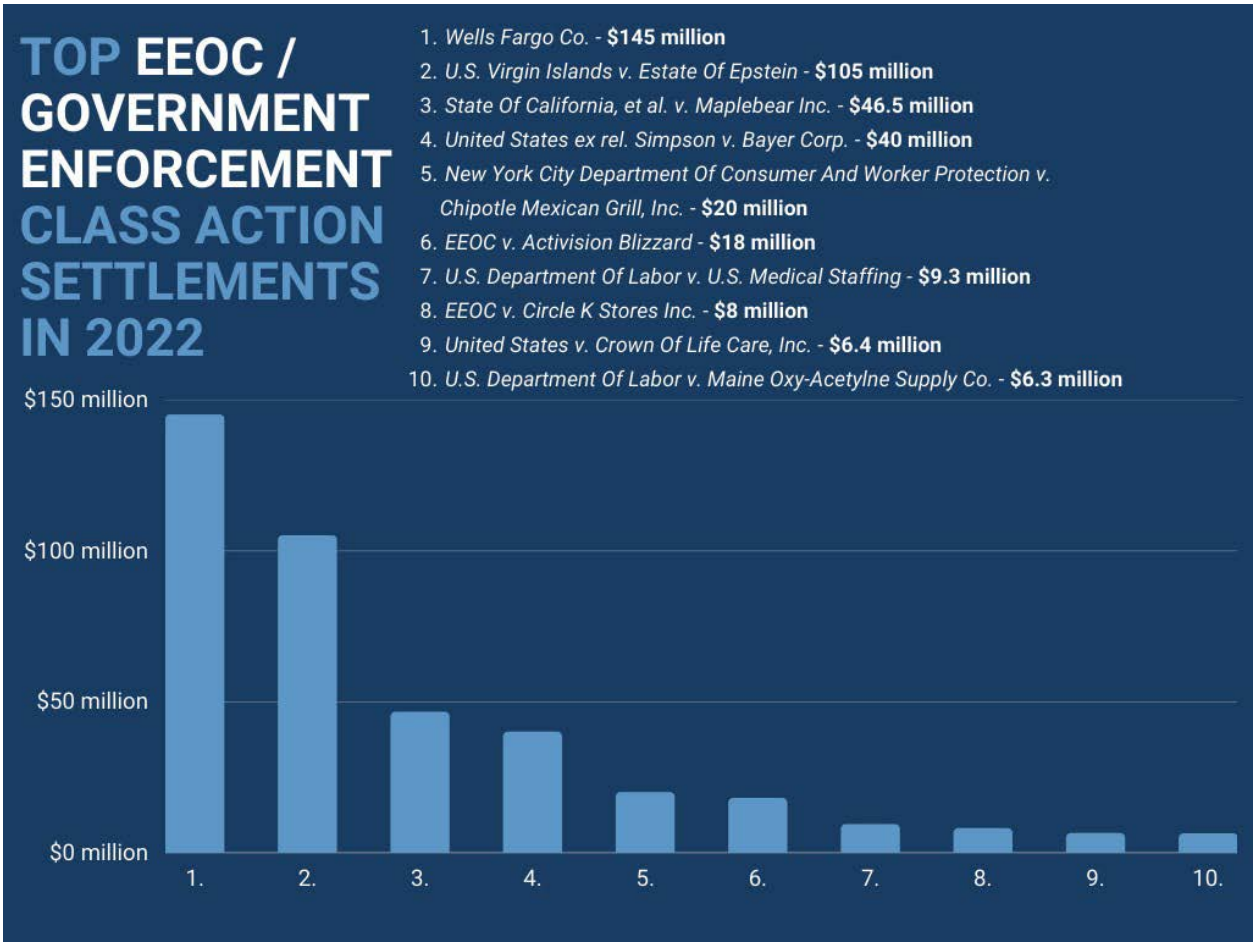
8. **$9.76 million – *In Re Solara Medical Supplies Data Breach Litigation*, Case No. 19-CV- 2284 (S.D. Cal. Sept. 12, 2022)** (final settlement approval granted for a class action settlement of claims alleging that a data breach compromised the plaintiffs' personal information).

9. **$5.7 million – *In Re Sonic Corp. Customer Data Security Breach Litigation*, Case No. 17-MD-2807 (N.D. Ohio Oct. 17, 2022)** (final settlement approval granted for a class action settlement of claims brought by a group of financial institutions to recoup losses they allegedly incurred from a 2017 data breach that compromised millions of credit and debit cards).

10. **$4.75 million – *In Re CaptureRx Data Breach Litigation*, Case No. 21-CV-523 (W.D. Tex. June 23, 2022)** (final settlement approval granted for a class action settlement of claims alleging that the company failed to protect consumer data from a 2021 data breach).

Top EEOC / Government Enforcement Class Action Settlements In 2022

The top ten settlements in government enforcement lawsuits totalled $403.2 million in 2022. This represented a significant increase - over a doubling - from 2021 when the top ten settlements totaled $146.38 million. This represented a slight increase from the 2020 total of $241 million, but a significant jump from the 2019 total of $57.52 million.



1. **$145 million – *Wells Fargo Co.* (DOL Sept. 12, 2022)** (the defendant agreed to settlement following an investigation which uncovered that Wells Fargo and GreatBanc caused employees' 401(k) plan to overpay for company stock).

2. **$105 million – *U.S. Virgin Islands, et al. v. Estate Of Epstein,* Case No. ST-20-CV-014 (V.I. Sup. Ct. Nov. 30, 2022)** (settlement agreement reached with estate to resolve claims relative to sexual abuse and order of proceeds to be distributed to a government trust).

3. **$46.5 million – *State Of California, et al. v. Maplebear Inc.*, Case No. 37-2019-48731 (Cal. Super. Oct. 10, 2022)** (settlement agreement reached for a class action alleging misclassification of gig workers as independent contractors).

4. **$40 million – *United States ex rel. Simpson v. Bayer Corp.,* Case No. 05-CV-3895 (D.N.J. Sept. 2, 2022)** (settlement reached to resolve allegations that the company violated the False Claims Act over three of its drugs).

5. **$20 million – *New York City Department Of Consumer And Worker Protection, et al. v. Chipotle Mexican Grill, Inc.*, No. 2018-94 (Office of Administrate Trials And Hearings, City Of New York Aug. 9, 2022)** (settlement agreement reached for a government enforcement action alleging violation of the New York City Fair Workweek Law).

6. **$18 million – *EEOC v. Activision Blizzard*, Case No. 21-CV-7682 (N.D. Cal. Mar. 30, 2022)** (approval of consent decree in EEOC lawsuit alleging sexual harassment and pregnancy discrimination).

7. **$9.3 million – *U.S. Department Of Labor v. U.S. Medical Staffing*, Case No. 22-CV-3540 (E.D. Pa. Sept. 26, 2022)** (judgment granted in DOL lawsuit alleging misclassification and denial of overtime compensation).

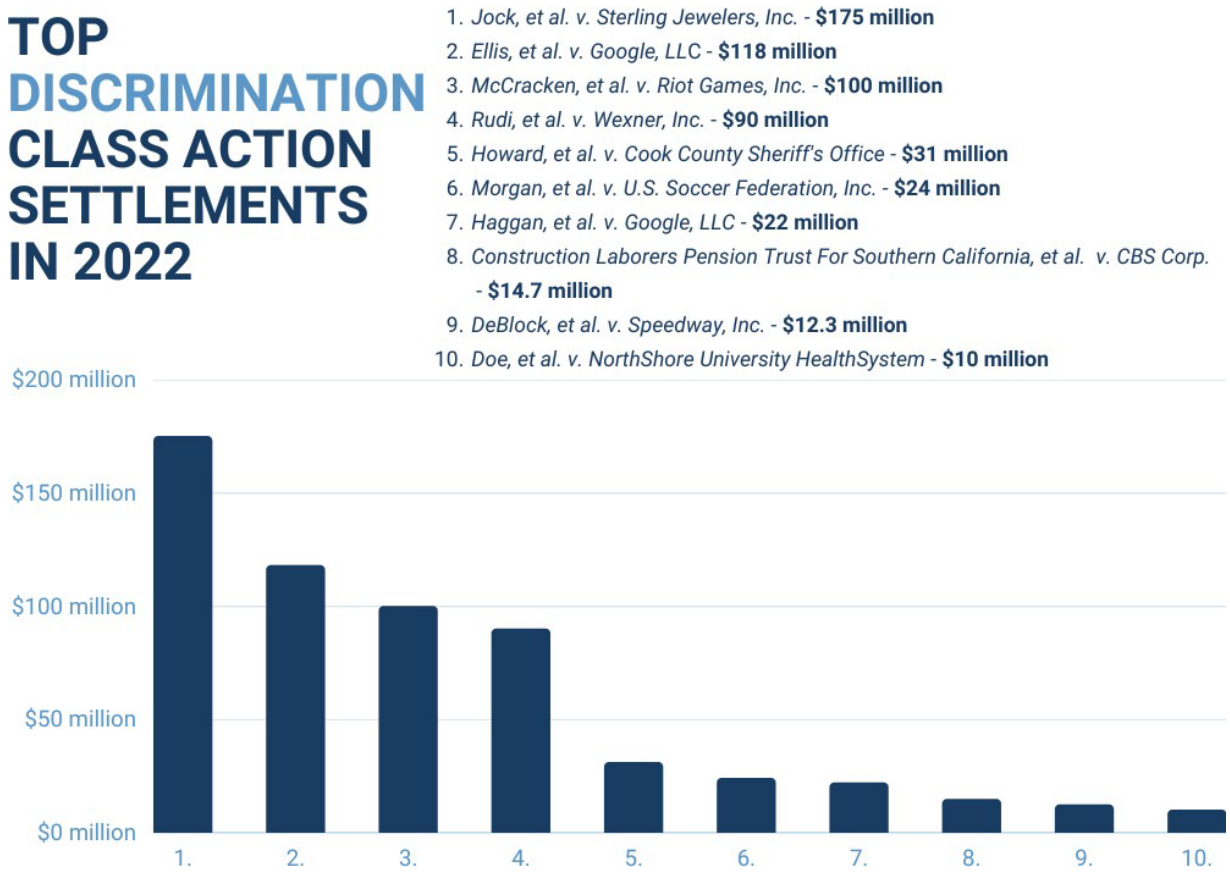
8. **$8 million – *EEOC v. Circle K Stores Inc.* (EEOC Nov. 29, 2022)** (settlement agreement reached following EEOC investigation of alleged discrimination against workers who were pregnant or had disabilities by not affording them reasonable accommodations).

9. **$6.4 million – *United States v. Crown Of Life Care, Inc.,* Case No. (E.D.N.Y. Mar. 25, 2022)** (settlement agreement reached for DOL lawsuit alleging misclassification of healthcare employees).

10. **$6.3 million – *U.S. Department Of Labor v. Maine Oxy-Acetylene Supply Co.,* Case No. 19-CV-176 (D. Me. Dec. 13, 2022**) (settlement approval granted for claims that the defendant violated the ERISA relative to the buy-back of an employee stock ownership plan).

Top Discrimination Class Action Settlements In 2022

In 2022, the top ten settlements were clustered in California (three settlements), New York (three settlements), Illinois (two settlements), Pennsylvania (one settlement), and Ohio (one settlement). The settlements emanated from nine gender discrimination class actions and one religious discrimination class action.



1. **$175 million – *Jock, et al. v. Sterling Jewelers, Inc.,* Case No. 11-160-655-11 (A.A.A. Nov. 15, 2022)** (settlement approval granted for a class action alleging gender discrimination in pay and promotions).

2. **$118 million – *Ellis, et al. v. Google, LLC*, Case No. CGC 17 561299 (Cal. Super. Ct. Oct. 25, 2022)** (final settlement approval granted for a class action alleging claims of gender pay discrimination).

3. **$100 million – *McCracken, et al. v. Riot Games, Inc.,* Case No. 18-STCV-2957 (Cal. Super. Ct. July 22, 2022)** (preliminary settlement approval granted for a class action alleging claims of sexual harassment and gender discrimination).

4. **$90 million – *Rudi, et al. v. Wexner, Inc.*, Case No. 20-CV-3068 (S.D. Ohio May 16, 2022)** (final settlement approval granted for class action claims alleging systemic sexual harassment).

5. **$31 million – *Howard, et al. v. Cook County Sheriff's Office*, Case No. 17-CV-8146 (N.D. Ill. Sept. 8, 2022)** (preliminary settlement approval granted for class action claims alleging sex discrimination).

6. **$24 million – *Morgan, et al. v. U.S. Soccer Federation, Inc.,* Case No. 19-CV-1717 (C.D. Cal. Aug. 12, 2022)** (preliminary settlement approval granted for class action claims of gender pay discrimination against female soccer players).

7. **$22 million – *Haggan, et al. v. Google LLC*, Case No. 518739/22 (N.Y. Super. Ct. June 30, 2022)** (settlement agreement reached for a class action settlement of claims alleging discrimination against women and employees of color by assigning them low job levels upon hire than those for which they were qualified).

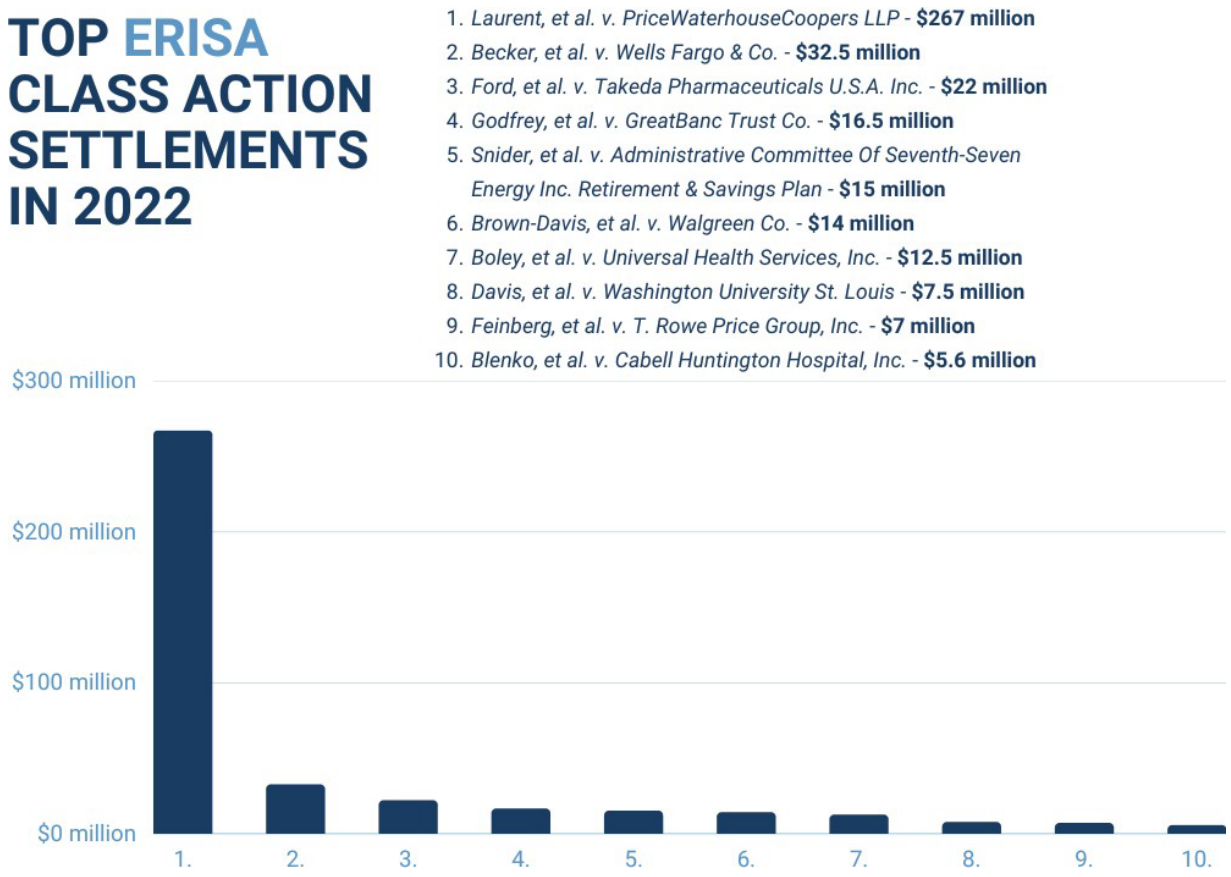
8. **$14.7 million – *Construction Laborers Pension Trust For Southern California, et al. v. CBS Corp.*, Case. No. 18-CV-7796 (S.D.N.Y. Apr. 15, 2022)** (settlement agreement reached for a class action settlement of claims alleging that sexual harassment by the company's CEO led to the decline in stock value).

9. **$12.3 million – *DeBlock, et al. v. Speedway, Inc.,* Case No. 20-CV-824 (E.D. Penn. May 31, 2022)** (settlement approval reached for a class action settlement of claims alleging gender pay discrimination against female general managers).

10. **$10 million – *Doe, et al. v. NorthShore University HealthSystem*, Case No. 21-CV-83 (N.D. Ill. Dec. 19, 2022)** (final settlement approval granted for a class action settlement of claims of religious discrimination in healthcare company's COVID-19 vaccine requirements).

Top ERISA Class Action Settlements In 2022

In 2022, the top ten ERISA settlements totaled $399.6 million.



1. **$267 million – *Laurent, et al. v. PriceWaterhouse Coopers LLP*, Case No. 06-CV-2280 (S.D.N.Y. Nov. 1, 2022)** (preliminary settlement approval granted in class action settlement of ERISA claims challenging various aspects of the company's pension benefits).

2. **$32.5 million – *Becker, et al. v. Wells Fargo & Co.*, Case No. 20-CV-2016 (D. Minn. Apr. 25, 2022)** (preliminary settlement approval granted in class action settlement of ERISA claims alleging the company favored its own funds in its 401(k) plan over less expensive, better performing alternatives).

3. **$22 million – *Ford, et al. v. Takeda Pharmaceuticals U.S.A. Inc.*, Case No. 21-CV-10090 (D. Mass. Nov. 15, 2022)** (settlement agreement reached in a class action of ERISA claims alleging that the company's 401(k) plan only provided underperforming and high-cost investment options).

4. **$16.5 million – *Godfrey, et al. v. GreatBanc Trust Co.*, Case No. 18-CV-7918 (N.D. Ill. Oct. 5, 2022)** (final settlement granted in class action settlement of ERISA claims alleging that company's corporate reorganization improperly reduced 401(k) plan participants' owners stake in the company).

5. **$15 million – *Snider, et al. v. Administrative Committee Of Seventy-Seven Energy Inc. Retirement & Savings Plan*, Case No. 20-CV-977 (W.D. Okla. Aug. 18, 2022)** (final settlement approval sought in class action settlement of ERISA claims alleging improper securities investments in a corporate entity).

6. **$14 million – *Brown-Davis, et al. v. Walgreen Co.*, Case No. 19-CV-5392 (N.D. Ill. Feb. 17, 2022)** (final approval granted for a class action settlement of ERISA claims from a group of retirees alleging mismanagement of the company's 401(k) plan).

7. **$12.5 million – *Boley, et al. v. Universal Health Services, Inc.*, Case No. 20-CV-2644 (E.D. Penn. Nov. 1, 2022)** (preliminary approval granted for a class action settlement of ERISA claims alleging the company mismanaged its 401(k) plan by filling it with expensive, actively managed funds).

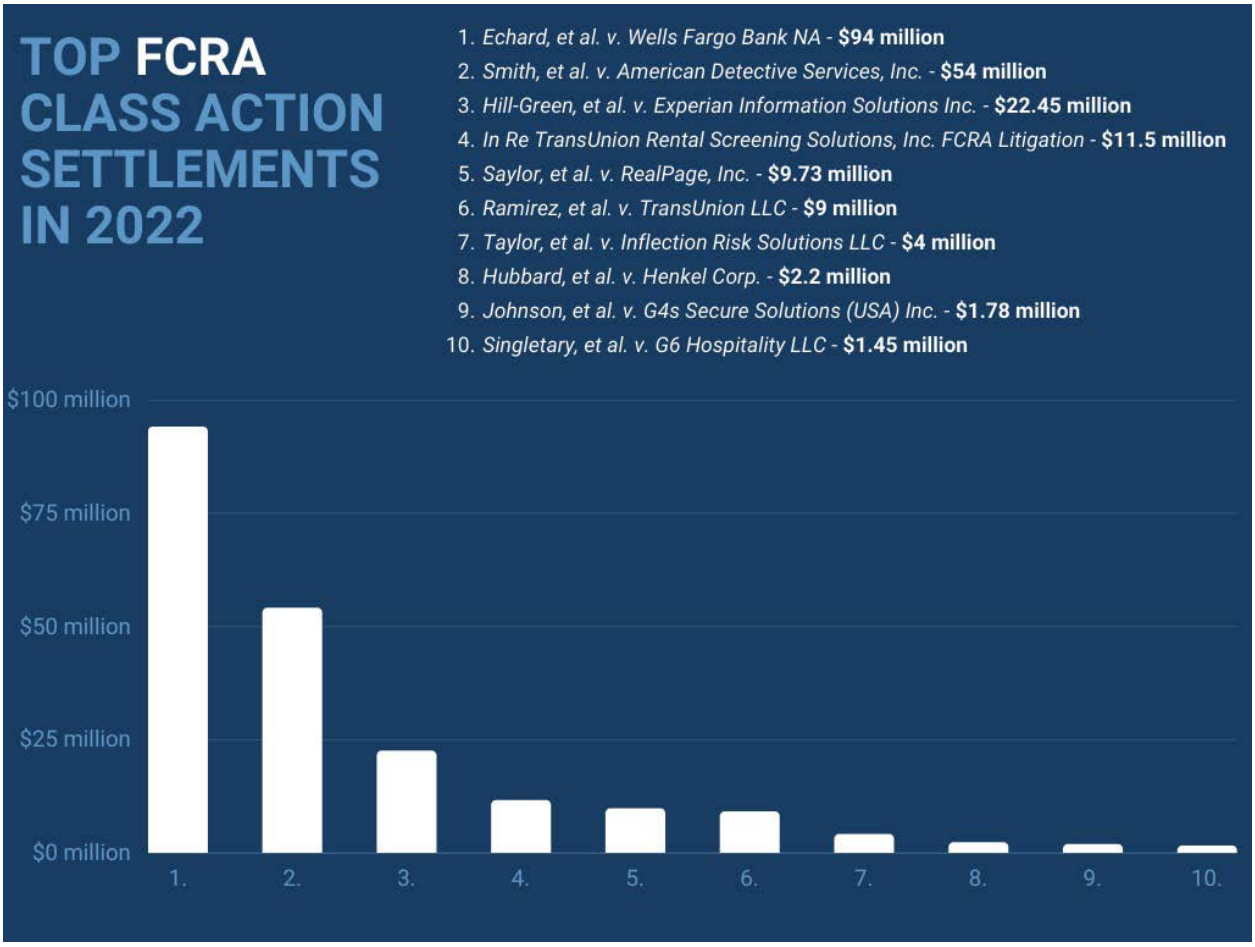
8. **$7.5 million – *Davis, et al. v. Washington University St. Louis*, Case No. 17-CV-1641 (E.D. Mo. Aug. 31, 2022)** (final approval granted for a class action settlement of ERISA claims alleging mismanagement of retirement funds).

9. **$7 million – *Feinberg, et al. v. T. Rowe Price Group, Inc.*, Case No. 17-CV-427 (D. Md. June 10, 2022)** (final approval granted for a class action settlement of ERISA claims alleging mismanagement of retirement funds).

10. **$5.6 million – *Blenko, et al. v. Cabell Huntington Hospital, Inc.*, Case No. 21-CV-315 (S.D. W.Va. Nov. 2, 2022)** (final approval granted for a class action settlement of ERISA claims alleging their health care plans would be terminated).

Top FCRA Class Action Settlements In 2022

In 2022, the top ten FCRA settlements totaled $210.11 million.



1. **$94 million – *Echard, et al. v. Wells Fargo Bank NA*, Case No. 21-CV-5080 (S.D. Ohio Sept. 9, 2022**) (settlement agreement reached in a class action settlement alleging the defendants sent mortgage borrowers into forbearance during the COVID-19 pandemic and damaged their credit ratings).

2. **$54 million – *Smith, et al. v American Detective Services, Inc.*, Case No. 22CN-CC00019 (Mo. Cir. Ct. Apr. 14, 2022)** (final settlement approval granted in a class action alleging that class members were denied employment prior to being provided copies of their consumer reports).

3. **$22.45 million – *Hill-Green, et al. v. Experian Information Solutions Inc.*, Case No. 19-CV-708 (E.D. Va. Sept. 29, 2022)** (final settlement approval granted in a class action alleging that the defendant used outdated and inaccurate information that had a negative bearing on creditworthiness).

4. **$11.5 million – *In Re TransUnion Rental Screening Solutions, Inc. FCRA Litigation*, Case No. 20-MD-02933 (N.D. Ga. Sept. 9, 2022)** (final settlement approval granted for a class action alleging that the defendant reported incorrect felony or misdemeanor convictions due to mismatched information in its database and failed to update records of landlord-tenant cases to include outcomes that were favorable to renters).

5. **$9.73 million – *Saylor, et al. v. RealPage, Inc.*, Case No. 22-CV-53 (E.D. Va. Sept. 21, 2022)** (final settlement approval granted in a class action resolving claims that defendant violated the Fair Credit Reporting Act by allowing incorrect sex offender registry data on tenant screening reports).

6. **$9 million – *Ramirez, et al. v. TransUnion LLC*, Case No. 12-CV-632 (N.D. Cal. July 19, 2022)** (final settlement approval granted in a class action alleging that the defendant violated the FCRA by labeling them as terrorists).

7. **$4 million – *Taylor, et al. v. Inflection Risk Solutions LLC*, Case No. 20-CV-2266 (D. Minn. Nov. 15, 2022)** (final settlement approval granted in a class action alleging that the defendant issued consumer reports which incorrectly reflected misdemeanor convictions as felonies and criminal offenses as violent).

8. **$2.2 million – *Hubbard, et al. v. Henkel Corp.,* Case No. 19-CV-4346 (N.D. Cal. July 25, 2022)** (final settlement approval granted in a class action alleging that the defendant improperly disclosed background checks).

9. **$1.78 million – *Johnson, et al. v. G4s Secure Solutions (USA) Inc.*, Case No. 21-CA-5587 (Fla. Cir. Ct. Sept. 28, 2022)** (final settlement approval granted in a class action alleging that the company's background check form failed to comply with disclosures and other requirements required by the federal FCRA).

10. **$1.45 million – *Singletary, et al. v. G6 Hospitality LLC*, Case No. 20-CV-270 (S.D. Cal. June 17, 2022)** (final settlement approval granted in a class action alleging that the company failed to obtain the proper background check authorization in violation of the Fair Credit Reporting Act).

Top FLSA / Wage & Hour Class And Collective Settlements In 2022

1. **$185 million – *Senne, et al. v. Office Of The Commissioner Of Baseball, et al.*, Case. No. 14-CV-608 (N.D. Cal. Nov. 23, 2022)** (final approval granted for a class action settlement of wage and hour claims alleging that baseball players were not paid minimum wage for spring training, extended season work, and off season training).

2. **$116 million – *Liang, et al. v. State Of Washington Department Of Social & Health Services*, Case No. 20-2-02506-34 (Wash. Super. Ct. Sept. 16, 2022)** (final settlement approval granted in a class action settlement of wage and hour claims alleging that the state failed to properly pay the wages owed to providers for in-home care services).

3. **$49.5 million – *Hootselle, et al v. Missouri Department Of Corrections*, Case No. 2ACCC-9 (Mo. Cir. Ct. Oct. 11, 2022)** (final settlement approval granted in a class action settlement of wage and hour claims alleging that corrections officers were not paid for all hours worked).

4. **$42 million – *Koshman, et al. v. Multicare Health System,* Case No. 20-2-15645-5 (Wash. Super. Ct. Aug. 9, 2022**) (final settlement approval granted in a settlement of wage and hour claims alleging meal and rest break violations).

5. **$38.5 million – *LaRue, et al. v. Great Arrow Builders, LLC*, Case No. 2019-10859 (Penn. Comm. Pleas Ct. Jan. 24, 2022**) (final settlement approval granted in a settlement of wage and hour claims alleging failure to pay overtime compensation).

6. **$35 million – *Evans, et al. v. Wal-Mart Stores Inc.*, Case No. 17-CV-7641 (N.D. Cal. Dec. 2, 2022)** (final approval granted for a class action settlement of wage and hour claims alleging that employees were not provided proper wage statements).

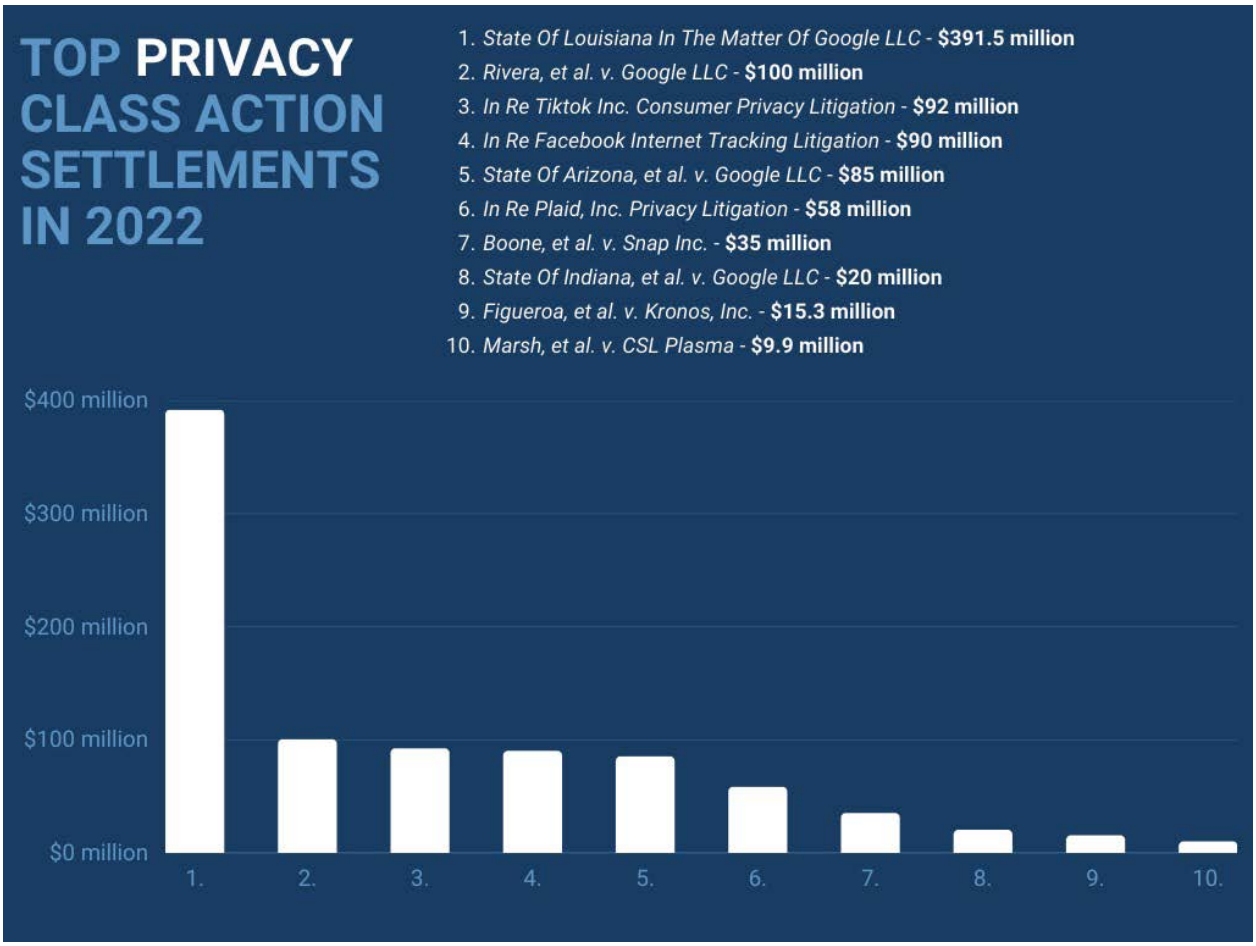
7. **$31.8 million – *In Re Postmates Classifications Cases*, Case No. CJC2005068 (Cal. Super. Ct. May 6, 2022)** (final approval granted for a class action settlement of wage and hour claims alleging that delivery drivers were misclassified as independent contractors).

8. **$30.5 million – *Frlekin, et al. v. Apple, Inc.*, Case No. 13-CV-3451 (N.D. Cal. Aug. 13, 2022)** (final approval granted for a class action settlement of wage and hour claims alleging that delivery drivers were misclassified as independent contractors).

9. **$23.15 million – *Giannoulis, et al. v. DIRECTV, LLC*, Case No. BC596668 (Cal. Super. Oct. 6, 2022)** (final approval granted for a class action settlement of wage and hour claims alleging that cable installers were misclassified as independent contractors).

10. **$23.1 million – *Noll, et al. v. Flower Foods Inc.*, Case No. 15-CV-493 (D. Me. Apr. 26, 2022)** (final approval granted for class action settlement of wage and hour claims alleging that distributor drivers were misclassified as independent contractors).

Top Privacy Class Action Settlements In 2022



1. **$391.5 million – *State Of Louisiana In The Matter Of Google LLC* (La. Cir. Ct. Nov. 9, 2022)** (settlement reached in a class action brought by the attorneys general of over 30 states to resolve allegations that Google tracks users' locations even after they believe they have turned off the tracking feature in violation of state privacy laws).

2. **$100 million – *Rivera, et al. v. Google LLC*, Case No. 2019-CH-00990 (Ill. Cir. Ct. Sept. 28, 2022)** (final settlement approval granted in a class action alleging violation of the Illinois Biometric Information Act).

3. **$92 million – *In Re Tiktok Inc. Consumer Privacy Litigation,* Case No. 20-CV-4699 (N.D. Ill. Aug. 22, 2022)** (final settlement approval granted in a class action alleging violation of the Illinois Biometric Information Act).

4. **$90 million – *In Re Facebook Internet Tracking Litigation,* Case No. 12-MD-2314 (N.D. Cal. Oct. 24, 2022)** (final settlement approval granted in a class action alleging that Facebook engaged in unlawful user tracking on non-Facebook websites).

5. **$85 million – *State Of Arizona, et al. v. Google LLC*, Case No. CV-2020-006219 (Ariz. Super. Ct. Oct. 4, 2022**) (preliminary settlement approval sought in a class action alleging that Google breached Arizona's Consumer Fraud Act by continuing to operate a "sweeping surveillance apparatus" to track users who opted out of the "location history" setting on Google's services).

6. **$58 million – *In Re Plaid, Inc. Privacy Litigation*, Case No. 20-CV-3056 (N.D. Cal. July 20, 2022)** (final settlement approval granted in a class action alleging that the company acted improperly when obtaining users' account login information).

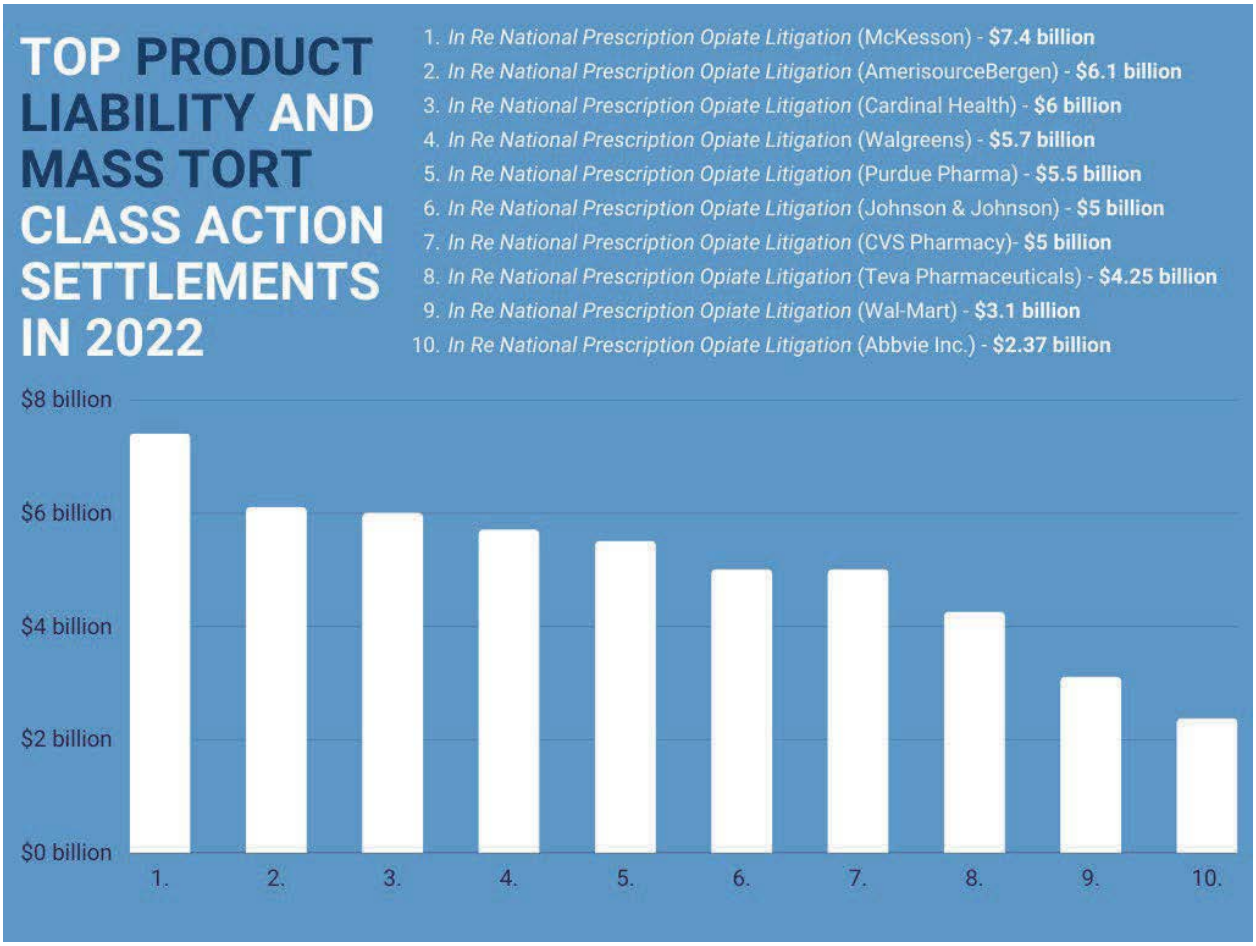
7. **$35 million – *Boone, et al. v. Snap Inc.*, Case No. 2022-LA-000708 (Ill. Cir. Ct. Nov. 17, 2022)** (final settlement approval granted in a class action alleging violation of the Illinois Biometric Information Privacy Act).

8. **$20 million – *State Of Indiana, et al. v. Google LLC,* Case No. 49-D01-2201-PL-2399 (Ind. Cir. Ct. Dec. 29, 2022**) (settlement approval sought in a government enforcement action alleging that Google breached Indiana law by collecting user location data and targeting them with advertisements).

9. **$15.3 million – *Figueroa, et al. v. Kronos, Inc.*, Case No. 19-CV-1306 (N.D. Ill. Feb. 11, 2022)** (settlement agreement reached in a class action alleging violation of the Illinois Biometric Information Privacy Act).

10. **$9.9 million – *Marsh, et al. v. CSL Plasma,* Case No. 19-CV-7606 (N.D. Ill. Dec. 8, 2022)** (final approval granted for a class action settlement of claims alleging violation of the Illinois Biometric Information Privacy Act).

Top Product Liability And Mass Tort Class Action Settlements In 2022



1. **$7.4 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with distributor McKesson to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

2. **$6.1 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with distributor AmerisourceBergen to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

3. **$6 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with distributor Cardinal Health to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

4. **$5.5 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Mar. 3, 2022)** (settlement agreement reached with 13 states

by OxyContin manufacturer Purdue Pharma to resolve claims that the company held to fuel the U.S. opioid epidemic).

5. **$5 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Feb. 25, 2022)** (settlement agreement reached with Johnson & Johnson, the consumer products and health company that manufactured generic opioid medications, to resolve the vast majority of the opioid lawsuits filed by state and local governmental entities).

6. **$5 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 2, 2022)** (settlement agreement reached with retail pharmacy Walgreens to settle all opioid claims against it by participating states, subdivisions and tribes).

7. **$4.9 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 2, 2022)** (settlement agreement reached with retail pharmacy CVS Pharmacy to settle all opioid claims against it by participating states, subdivisions and tribes).

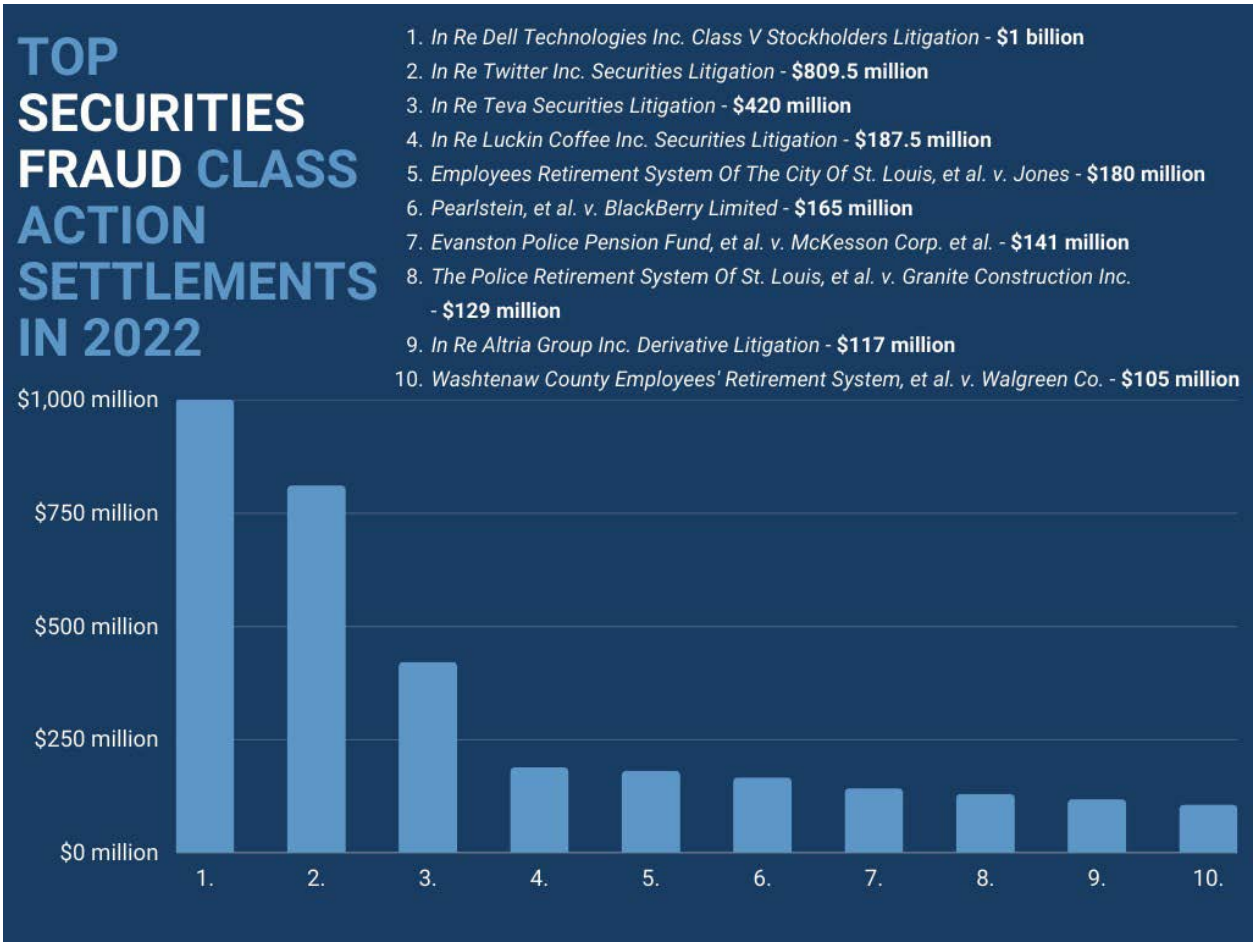
8. **$4.25 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 22, 2022)** (settlement agreement reached with Teva Pharmaceutical Industries to resolve thousands of lawsuits by U.S. state and local governments over the marketing of opioid painkillers).

9. **$3.1 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 15, 2022)** (settlement agreement reached with retail store Wal-Mart to resolve all opioid lawsuits and potential lawsuits by state, local, and tribal governments).

10. **$2.37 billion – *In Re National Prescription Opiate Litigation*, Case No. 17-MD-02804 (N.D. Ohio Nov. 22, 2022)** (settlement agreement reached with Abbvie Inc. to resolve thousands of lawsuits by U.S. state and local governments over the marketing of opioid painkillers).

Top Securities Fraud Class Action Settlements In 2022

The plaintiffs' class action bar successfully converted class certification rulings into class-wide settlement at a brisk pace. The top ten securities fraud class-wide settlements totaled $3.25 billion in the past year.



1. **$1 billion – *In Re Dell Technologies Inc. Class V Stockholders Litigation*, Csse No. 2018-0816 (Del. Chan. Ct. Nov. 16, 2022)** (settlement reached in a class action alleging claims that the defendants breached their fiduciary duties to the former holders of Dell Class V tracking stock).

2. **$809.5 million – *In Re Twitter Inc. Securities Litigation*, Case No. 16-CV-531 (N.D. Cal. Nov. 17, 2022)** (final settlement approval granted in a class action alleging claims that Twitter artificially inflated its stock price by misleading investors about user engagement).

3. **$420 million – *In Re Teva Securities Litigation*, Case No. 17-CV-558 (D. Ct. June 2, 2022)** (final settlement approval granted in a class action alleging claims by investors over an alleged conspiracy to fix generic-drug prices).

4. **$187.5 million – *In Re Luckin Coffee Inc. Securities Litigation*, Case No. 20-CV-1293 (S.D.N.Y. July 22, 2022)** (final settlement approval granted in a class action alleging claims that a short-selling firm released an anonymous report claiming Luckin fabricated financial performance metrics).

5. **$180 million – *Employees Retirement System Of The City Of St. Louis, et al. v. Jones,* Case No. 20-CV-4813 (S.D. Ohio Sept. 9, 2022)** (settlement reached in consolidated class actions alleging claims that the defendant paid millions to former Ohio House Speaker Larry Householder's political nonprofit in exchange for him promoting a bill to bail out the utility's affiliated nuclear power plants).

6. **$165 million – *Pearlstein, et al. v. BlackBerry Limited*, Case No. 13-CV-7060 (S.D.N.Y. Sept. 29, 2022)** (final settlement approval granted in a class action claiming the company hid poor sales numbers for its Z10 smartphone).

7. **$141 million – *Evanston Police Pension Fund, et al. v. McKesson Corp. et al.,* Case No. 18-CV-6525 (N.D. Cal. Nov. 4, 2022)** (settlement reached in a class action over allegedly false assertions about generic drug prices that the plaintiffs traced to a generic-drug price-fixing conspiracy).

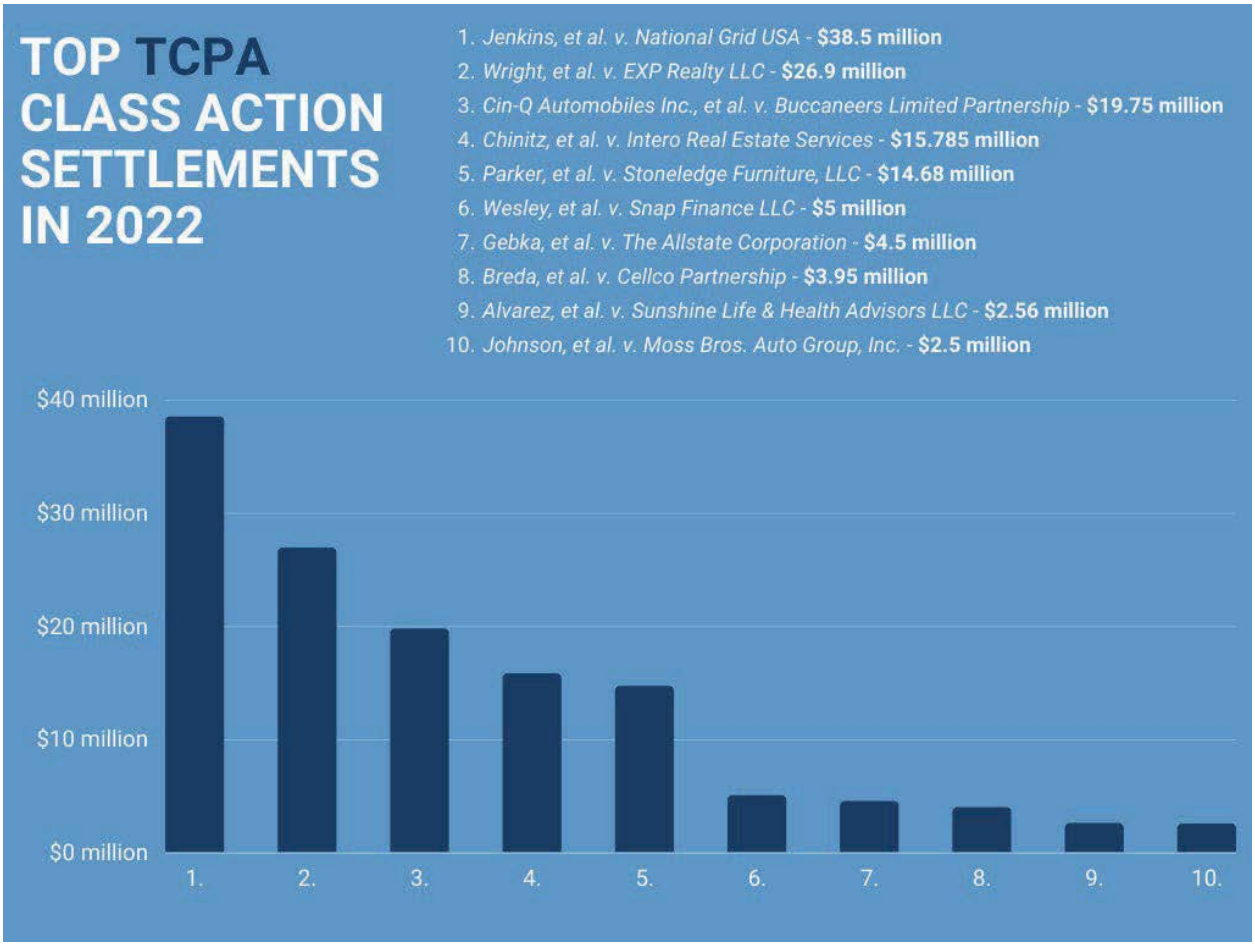
8. **$129 million – *The Police Retirement System Of St. Louis, et al. v. Granite Construction Inc.,* Case No. 19-CV-4744 (N.D. Cal. Mar. 17, 2022)** (final settlement approval granted in a class action alleging investment fraud).

9. **$117 million - *In Re Altria Group Inc. Derivative Litigation*, Case No. 20-CV-772 (E.D. Va. Oct. 26, 2022)** (preliminary settlement approval granted to securities fraud class action relative to ill-fated multi-billion dollar investments).

10. **$105 million - *Washtenaw County Employees' Retirement System, et al. v. Walgreen Co.,* Case No. 15-CV-3187 (N.D. Ill. Oct. 11, 2022)** (final settlement approval granted in a class action alleging claims the company misrepresented financial projections as it sought shareholder approval of its plan to complete an acquisition).

Top TCPA Class Action Settlements In 2022

There were several multi-million dollar class-wide TCPA settlements in 2022. Four of the 10 topped $15 million.



1. **$38.5 million – *Jenkins, et al. v. National Grid USA*, Case No. 15-CV-1219 (E.D.N.Y. June 24, 2022)** (final settlement approval granted in a class action alleging that the defendants made calls with automated dialers and/or prerecorded or artificial voice messages to cellular telephones).

2. **$26.9 million – *Wright, et al. v. EXP Realty LLC,* Case No. 18-CV-01851 (M.D. Fla. Oct. 26, 2022)** (final settlement approval granted in a class action alleging that the defendant targeted class members with unsolicited robocalls in violation of the TCPA).

3. **$19.75 million – *Cin-Q Automobiles Inc., et al. v. Buccaneers Limited Partnership,* Case No. 13-CV-1592 (M.D. Fla. Mar. 29, 2022)** (preliminary settlement approval granted in a class action alleging that the defendants sent unsolicited advertisements via fax).

4. **$15.785 million – *Chinitz, et al. v. Intero Real Estate Services*, Case No. 18-CV-5623 (N.D. Cal. Oct. 28, 2022)** (final settlement approval granted in a class action alleging that the defendant made unwanted calls on home phone lines when class members were on the do-not-call registry).

5. **$14.68 million – *Parker, et al. v. Stoneledge Furniture, LLC,* Case No. 21-CV-740 (M.D. Fla. July 6, 2022)** (final settlement approval granted in a class action alleging that the defendants sent unsolicited, autodialed text messages to class members in violation of the TCPA).

6. **$5 million – *Wesley, et al. v. Snap Finance LLC*, Case No. 20-CV-148 (D. Utah Sept. 28, 2022)** (preliminary settlement approval granted in a class action alleging that defendant routinely violated federal law by using an automatic telephone dialing system to call people who did not give consent).

7. **$4.5 million – *Gebka, et al. v. The Allstate Corp.*, Case No. 19-CV-06662 (N.D. Ill. Sept. 27, 2022)** (final settlement approval granted in a class action alleging that class members received multiple calls promoting Allstate despite being on the National Do Not Call registry).

8. **$3.95 million – *Breda, et al. v. Cellco Partnership*, Case No. 16-CV-11512 (D. Mass. May 2, 2022)** (final settlement approval granted in a class action alleging the defendant violated the TCPA with pre-recorded debt collection calls).

9. **$2.56 million – *Alvarez, et al. v. Sunshine Life & Health Advisors LLC,* Case No. 2021-020996-CA-01 (Fla. Cir. Ct. Nov. 7, 2022)** (final settlement approval granted in a class action alleging violation of the Florida Telephone Solicitation Act).

10. **$2.5 million – *Johnson, et al. v. Moss Bros. Auto Group, Inc.,* Case No. 19-CV-2456 (C.D. Cal. June 24, 2022)** (final settlement approval granted in a class action alleging the defendant made unsolicited prerecorded telemarketing messages to cell phones).

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