

The
HOSPITALITY LAW
CONFERENCE

Strategies for Managing Class
Actions in the Hospitality Industry

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Leads KCO's commercial, financial services, and consumer finance litigation practice groups.

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CLASS ACTION LITIGATION

Class Action Litigation

Question

How does this make you feel?

Class Action Litigation

High Anxiety!



Class Action Strategy

- Background: The modern-day class action under Rule 23 was developed in 1966 with good intent.
 - Efficiency and economies of scale
 - Enforce civil rights laws

Class Action Strategy

- **Main Risk Areas for Class Actions in the Hospitality Industry**

- **Employment/Wage-Hour Cases**

- Promotions, Lay-offs, Hiring practices
- Time clock, tip pools/gratuities/service charges, overtime classification, meal periods, reimbursement

- **Consumer-based Cases**

- Deceptive trade practices – hidden fees, price gouging
- Anti-trust – price fixing
- Privacy – CIPA

- **ADA**

- Premises – drive-by cases, pool lifts
- Websites – room/accessibility descriptions, vision impaired access

Class Action Strategy

- **Successful and Practical Defense Strategies**

- CAFA Removal? For cases filed in state court, immediately calculate whether removal is an option under the Class Action Fairness Act (“CAFA”): \$5 million in controversy and minimal diversity.
- ID Defective Claims: Identify claims that are legally defective and cannot be fixed by amendment (e.g., claims for which there is no private right of action, such as Labor Code Section 204) for potential motion to dismiss.

Class Action Strategy

- **Practical Advice for Class Cases: Initial Steps (Cont'd)**

- Supreme Court Pleading Standards: If in federal court, evaluate whether the complaint satisfies the pleading standard required pursuant to the U.S. Supreme Court's *Iqbal* and *Twombly* decisions. If not, consider filing a motion to dismiss.

- Bifurcation? Attempt to bifurcate individual liability issues and class issues in 26(f) report or by motion to limit discovery and position the Company for an early summary judgment motion.

Class Action Strategy

- Practical Advice for Class Actions (Cont'd)
 - Develop Facts that Defeat or Undermine Class Claims:
 - Review relevant policies and conduct attorney-client privileged interviews of the plaintiff's supervisors to identify individualized issues that preclude establishing class or group liability through common evidence.
 - Focus on plaintiff's idiosyncratic behaviors or practices that violate lawful policies and make it impossible to determine liability on class-wide basis.
 - Identify potentially disqualifying issues with the plaintiff or counsel (such as improper solicitation or violation of confidentiality orders) to defeat adequacy or establish conflicts of interest with the putative class members in class actions.

Class Action Strategy

- **Practical Advice for Class Cases: Initial Steps (Cont'd)**

- Bankruptcy: Check for bankruptcies in which the claims asserted in the class case were not listed as an asset.
- Dispositive Motions: Consider filing an early dispositive motion
- Strategic Declarations: Conduct declaration gathering only after nailing down the specifics of the plaintiff's claims and after the plaintiff moves for class certification to ensure you know exactly what you need from the declarations.

Navigating Joint Employer Challenges

- Joint employer claims offer a way to create or expand a class claim
- Both the FLSA and many state laws impose liability for wage and hour violations on “employers,” and an employee can be employed by multiple “employers” at the same time for purposes of determining liability.
- Joint employer claims often arise in the staffing and franchise contexts.

Class Action Strategy

- Some Good News

- Class Action Arbitration Waivers are Enforceable

- California's Recent Changes to PAGA law

- Stricter standing requirements (employee must have personally suffered the alleged violation)

- Penalty caps now in place incentivize employers to regularly conduct audits

- Penalties unavailable for “derivative” violations absent showing of willfulness

Class Action Strategy

- Some Other Good News

- Since *TransUnion LLC v. Ramirez* (594 U.S. 413) (2021), standing is getting a closer look. String of “tester” (Deborah Laufer) cases wherein the Courts required a “downstream injury in addition to denial of information” *Acheson Hotels, LLC v. Laufer* (1st Cir. Ct.)
 - Laufer has single-handedly created a circuit split
 - Appeal dismissed as moot when she voluntarily dismissed her claims. See 601 U.S. 1 (2023)
 - BUT: Justice Thomas would say “she lacks standing.”

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WE APPRECIATE YOUR
TIME AND ATTENTION!

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Thank you!