

Morgan Lewis

Hot Topics in Consumer Class Actions

Kent M. Roger

Partner

Litigation,
Business and Corporate Disputes,
Intellectual Property,
Healthcare,
Antitrust

San Francisco

Phone: 415.442.1140

Fax: 415.442.1001

Email: kroger@morganlewis.com

Education

University of California, Hastings College of the Law, 1980, J.D.
University of California, Berkeley, 1977, A.B.

Kent M. Roger is the leader of the Litigation Practice Group in the San Francisco office. He focuses his practice on complex business dispute litigation involving a wide range of areas, including contract, intellectual property, unfair competition, healthcare and antitrust.

Mr. Roger has extensive experience counseling and representing clients in the financial institutions industry in matters relating to lender liability, workout and operations. He has regularly obtained summary dispositions on behalf of his financial institution clients in contract, lender liability and federal preemption matters, many resulting in reported appellate decisions.

Mr. Roger is an experienced trial lawyer and has tried numerous cases to juries and the bench on behalf of plaintiffs and defendants. Mr. Roger tried two cases on behalf of claimants of a \$10 billion failed life insurer, obtained a multi-million-dollar judgment on behalf of a banking regulator against executives of a failed trust company and recently obtained a \$45 million jury verdict for compensatory and punitive damages on behalf of a well-known sports representation agency.



Bar Admissions
California

Honors & Affiliations
Member, American Bar Association

Member, Bar Association of San Francisco

Member, San Francisco Bank Attorney Association

Listed, *Northern California Super Lawyer* (2006)

Molly Moriarty Lane

Partner

Litigation,
Business and Corporate Disputes,
Trade Secret Litigation,
Alternative Dispute Resolution,
Class Actions,
Healthcare,
False Advertising Litigation,
Technology ,
Telecommunications

San Francisco

Phone: 415.442.1333
Fax: 415.442.1001
Email: mlane@morganlewis.com

Education

University of San Francisco School of Law, 1990, J.D.
University of California, Los Angeles, 1987, B.A.

Molly Moriarty Lane is a partner in the Litigation Practice. She focuses her practice on complex litigation across a range of industries, including the technology, financial services and healthcare sectors. Her representations include business disputes involving breach of contract, fraud, breach of fiduciary duty, UCC, unfair business practices, trade secrets, and corporate governance.

Through her practice as a litigator in Northern California's Silicon Valley, Ms. Lane has developed significant experience with both large and small clients and her representations have included many complex issues within the technology sector. She has extensive experience with pre-litigation counseling and litigation avoidance and has also tried several cases to verdict. In addition, she has represented a number of Fortune 500 clients in class actions alleging breach of contract, fraud, conversion and violations of California Business & Professions Code section 17200.

Ms. Lane is admitted to practice in all California State courts, the U.S. District Court for all districts in California, and the U.S. Court of Appeals for the Ninth Circuit.



Bar Admissions California

Honors & Affiliations
1999 Recipient, William Griffin Mentoring Award

2002 Recipient, John J. Meehan Alumni Fellow Award, USF School of Law

Member, American Bar Association

Member, State Bar of California

Member, San Francisco Bar Association

Member, Santa Clara County Bar Association

Board of Governors,
University of San Francisco School of Law

LITIGATION PRACTICE

Over 600 litigators throughout the firm combine the highest levels of substantive knowledge, industry experience and courtroom savvy to help meet the litigation needs of global businesses. We handle the entire range of issues associated with dispute resolution, with a special emphasis on the coordination of national litigation, class actions and other complex business and corporate litigation, and we have an active trial practice. Ten of our lawyers are fellows of the American College of Trial Lawyers. Thirty four lawyers listed in the 2007 edition of *The Best Lawyers in America*.

SUBPRACTICES

Product Liability and Toxic Tort

Our Product Liability and Toxic Tort Practice draws upon the substantive knowledge of more than 50 lawyers who have had significant experience in this area for many years. We offer clients developed and recognized expertise in a variety of industries and a wide range of products, including pharmaceuticals, chemicals, asbestos, blood products, carpets, lead, latex, breast implants, contaminated food products, medical devices, building and construction products, and automatic fire sprinklers.

Intellectual Property

Recently recognized by *IP Law & Business* as one of the leading patent litigation practices, attorneys in this area combine the technical depth and courtroom skills of a patent litigation boutique with the case-management skills and resources of a sophisticated global law firm. With close to 150 intellectual property professionals, we assist Fortune 500, mid-sized and startup companies with their intellectual property needs.

Business and Corporate

We represent many well-known companies in a wide range of matters, from single-issue disputes to complex, multiparty cases and "bet the company" class-action litigation. We have significant experience representing the financial services industry and an extensive record of success handling major fraud and corporate disputes.

Securities

Our securities litigation team includes nearly 40 lawyers who previously worked at the Securities and Exchange Commission (SEC), the former Chief Litigation Counsel for the SEC's Division of Enforcement and many others who joined us after distinguished careers at the Department of Justice, the SEC and other federal agencies. Our securities enforcement lawyers enjoy a national reputation for excellence.

Corporate Investigations and White Collar Practice

Our Corporate Investigations and White Collar Group has a truly national presence, including experienced former prosecutors and trial lawyers on the east and west coasts, consisting of some of the most highly

respected criminal and regulatory defense lawyers in the country. Our attorneys have expertise in virtually every area of criminal and regulatory government enforcement, including securities fraud, healthcare enforcement and litigation, antitrust violations, tax fraud, environmental crimes and Foreign Corrupt Practices Act (FCPA) violations, among others.

Insurance Recovery

Our lawyers manage liability by maximizing and preserving the value of insurance assets in a cost-effective manner. We also advise on the procurement of insurance, the creation of captives and finite risk vehicles, and the insurance aspects of mergers and acquisitions, corporate restructurings and reorganizations.

Environmental

More than 100 lawyers throughout the firm offer exceptional client service in virtually every area of environmental law, including private party environmental litigation, toxic tort defense, complex multiparty Superfund cases, defense of state and federal enforcement actions, citizen suits, claims against insurance carriers, governmental investigations and grand jury proceedings.

International and Transactional Arbitration and Litigation

We address the full range of arbitration-related issues that end up in litigation, as well as significant international litigation that arises independently of arbitration. In addition to representing clients in arbitration proceedings, we advise on ad hoc arbitral proceedings. Our lawyers have served as counsel, advocates, arbitrators and speakers in many international investment arbitrations among private investors and governments in Asia, Europe and North America regarding International Centre for Settlement of Investment Disputes proceedings.

Appellate and Special Issues

Recognized for the quality of their amicus briefs and successful arguments before the U.S. Supreme Court, our lawyers appear regularly in state and federal appellate courts throughout the country. Our appellate advocates consult frequently with lawyers throughout the firm on strategy and procedural issues and conduct moot courts for clients and other lawyers.

Major Clients of the Litigation Practice

AG Edwards	FirstEnergy	Prudential
Alcon	Hewlett-Packard	Rabobank
Apollo Advisors	JP Morgan Chase	Reliance Electric
Bayer Healthcare	Korean Air	Rite Aid Corp.
Chelsea Property Group	Kraft Foods	SAP
Chevron	L.G. Philips LCD	SunGard
Cisco Systems Inc.	Lehman Brothers	Tyco
Citigroup	Merck	UBS
Credit Suisse	Merrill Lynch	Unilever
Daiichi Pharmaceuticals	Nationwide	USG
Deutsche Bank	Neurochem	Wal-Mart
Exelon Corporation	Pepsi Americas	Wells Fargo Bank NA
ExxonMobil	Pfizer	Western Mac Arthur Co.
Fidelity	Philips	

Representative Matters

Alcon In *LADARVision Litigation*, we served as national coordinating counsel for litigation, FDA and media-related issues concerning Alcon's LADARVision excimer laser system, used for LASIK eye surgery. This has involved defending claims by practicing physicians attempting to avoid per-procedure royalty obligations to Alcon by asserting a variety of alleged product defects; to-date successfully dissuading plaintiffs' class action counsel from filing suits on a class-wide basis; and defending personal injury actions by LASIK patients.

Daiichi On August 1, 2006, United States District Judge William Bassler entered judgment on behalf of firm clients Daiichi Pharmaceutical Co., Ltd. and Daiichi Sankyo Inc. finding that defendants Apotex Inc. and Apotex Corp. would infringe Daiichi's U.S. Patent No. 5,401,741 (the "741 patent") if Apotex were permitted to launch a generic version of Daiichi's patented Floxin Otic medicine. The judge rejected all of Apotex's defenses of invalidity and unenforceability, and adopted all of the reasoning submitted by the Morgan Lewis team. This case is a significant pharmaceutical patent litigation win prosecuted under the Hatch-Waxman Act.

Deutsche Bank Securities Class action alleging that securities purchased from affiliate had been researched by Deutsche Bank Securities and defending Deutsche Bank Securities in claims of fraud in connection with sales of interest in Deutsche Bank's exchange funds

InterTrust Represented InterTrust in a patent infringement suit involving more than 150 patent claims relating to InterTrust's digital rights management technology. The court adopted all 30 of InterTrust's claim constructions after a Markman hearing, denied Microsoft's motion for summary judgment, and entered a verdict of infringement and validity in favor of InterTrust. Thereafter, the case settled with Microsoft paying \$440 million to license InterTrust's technology.

J.P. Morgan Chase In July, Morgan Lewis achieved a significant appellate victory for client J.P. Morgan Chase in a breach of contract case involving Chase Manhattan Bank's credit card division dating back to 2001. The Court of Appeals for the Third Circuit affirmed the district court's previous decision on all issues.

Nationwide Life Insurance Co. of America Class action alleging that Nationwide violated the federal securities laws by purportedly failing to disclose information about other products it offered when it sold flexible premium adjustable variable life insurance

Pfizer Morgan Lewis is a member of the "virtual law firm" that represents Pfizer in national litigation regarding hormone replacement products (HRT Litigation). This litigation includes thousands of cases in federal and state courts; we are defending over 800 state courts cases filed in Philadelphia. In July, Jim Pagliaro and Emily Lawrence were promoted to the HRT National Trial Team, allowing Morgan Lewis to be even more involved in this litigation. The Philadelphia trials, which are expected to begin in September 2006, will be among the first handful of thousands of cases nationwide to be tried and will help set the strategy for the rest of the litigation.

Philips We defended Philips against 1500 personal injury claims by current and former employees of a light bulb manufacturing facility in West Virginia who alleged deliberate exposure by their employers to more than 30 substances, resulting in hundreds of different claimed injuries, including cancer and neurologic injury. Ten trial plaintiffs were scheduled for trial in April 2006, but we won a motion for summary judgment that cancelled the trial. Plaintiffs have indicated that they will appeal

Rite Aid Corporation Our lawyers successfully obtained three denials of class certification in three separate state court class action lawsuits filed against Rite Aid arising out of a May 2003 nationwide recall of the prescription drug Lipitor.

The Charles Schwab Corporation Morgan Lewis obtained a significant victory for The Charles Schwab Corporation in the Delaware Supreme Court. The case was a putative class action in which four former Wit Capital customers brought claims for breach of contract, breach of fiduciary duty, negligent misrepresentation, fraud, negligence, and violations of the Delaware Consumer Fraud Act against Wit Capital.

Western Mac Arthur Company Morgan Lewis has obtained extraordinary litigation results for Western Mac Arthur, a former asbestos insulation products installer and distributor. These results were recently capped off by a \$1.15 billion settlement with Hartford, which represents only a portion of the \$2.2 billion recovered for this client.

Consumer Class-Actions

- Definition of “Consumer class-action”
- Increase in Consumer class-actions
- Broader Array of Challenged Conduct

Morgan Lewis

Arbitration, Choice-of-Law, and Class- Action Waiver Provisions

Contract Terms Intended To Limit Class-Action Risk

- Arbitration clauses with a waiver of class-action litigation rights.
- Choice-of-law clauses establishing law of the consumer's home state or place of purchase as the governing law.

Arbitration Clause With Class-Action Waiver

- You are waiving your right to serve as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants, in any lawsuit filed against us and/or related third parties.
- The arbitrator shall not conduct class arbitration; that is, the arbitrator shall not allow you to serve as a representative, as a private attorney general, or in any other representative capacity for others in the arbitration.

State of the Law: Class-Action Waivers

- On challenge, typically, only unenforceable if procedurally and substantively unconscionable.
- Procedural - addresses the process of making the contract.
 - *Bargaining power of the parties*
 - *Conspicuousness and comprehensibility of the contract language*
 - *Presence or absence of a meaningful choice*
- Substantive – addresses the contract terms themselves.
 - *Commercial reasonableness of the contract terms*
 - *Purpose and effect of the terms*
 - *Allocation of the risks between the parties*
 - *Public policy concerns*

State of the Law: Class-Action Waivers

- Most of the recent court decisions hold that class-action waivers are unconscionable.
- Courts typically strike the waiver, but enforce the remainder of the arbitration clause.
- The result is a class-action arbitration.

Class-Action Waivers: California

- Supreme Court found class arbitration waiver unconscionable.
 - *Discover Bank v. Boehr*, 113 P.3d 1100 (Cal. 2005)
- Determinative factors were:
 - *Clause in a consumer contract of adhesion;*
 - *Dispute between parties predictably involved small amounts of damage; and*
 - *Party with the superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.*

State of the Law: Class-Action Waivers

- Some courts continue to enforce class-action waivers.
- Favorable decisions are more dependent upon state policy than contract or waiver language.
- Number of favorable vs. unfavorable states is about equal.
- Most favorable states are not class-action hot spots.

Class-Action Waivers: Choice-of-law Clauses

- One strategy for dealing with uncertainty on class-action waivers is to specify the governing law.
- Courts have enforced choice-of-law clauses specifying the law of a state that enforces class-action waivers.

Class-Action Waivers: California

- Jones v. Citigroup Inc. (Cal. Ct. App.) – class-action waiver enforced under South Dakota choice-of-law provision.
- Discover Bank v. Boehr (Cal. Ct. App.) – class-action waiver enforced under Delaware choice-of-law provision.
- Cardenas v. Chase Manhattan Bank USA, N.A. (Cal. Ct. App.) – class-action waiver enforced under Delaware choice-of-law provision.
 - *But see Aral v. EarthLink Inc. (Cal. Ct. App.) – class-action waiver and Georgia choice-of-law provision rejected.*

Nationwide Class-Actions: Choice-of-law Clauses

- Certifying a nationwide class remains prime threat.
- Plaintiffs' lawyers less interested in certifying statewide classes.
 - *Defendants more willing to try statewide class-actions.*
 - *Less return on investment.*
- Statewide class-actions typically filed in just a few large states.

Nationwide Class-Actions: Choice-of-law Clauses

- CAFA has not eliminated nationwide consumer class threat.
- Federal courts apply choice-of-law principles of forum state.
- Several states willing to apply one state's law to all consumers nationally, (Oklahoma, New Jersey, Illinois, and Minnesota).

Nationwide Class-Actions: Choice-of-law Clauses

- Insert governing law provision in contract or on website to specify that law of consumer's home state governs any dispute.
- Provides less certainty, but reduces risk of nationwide class certification.
- Subject to unconscionability challenge similar to class-action waiver clauses.

Morgan Lewis

Mechanisms to Curtail Class-Actions

Typical Class Certification Pattern for Damages Claims Under Fed. R. Civ. P. 23(b)(3)

- Plaintiffs file *pro forma* class certification motion, stressing “commonality” of questions: (1) whether defendant(s) engaged in conduct alleged; and (2) whether that conduct violates some statutory/common law/contractual duty of broad applicability.
- Defendants oppose based on individualized nature of, *inter alia*, causation and damage issues.
- Claims may also present individual issues regarding statute of limitations, standing, etc.
- Courts granting certification often do so on the expressed assumption that methods to resolve individual issues will be developed at some later stage of litigation.

2003 Amendments to Rule 23

- Fed. R. Civ. P. 23(c)(1)(B):
- An order certifying a class must define the class and the class claims, issues, or defenses . . .
- Fed. R. Civ. P. 23(c)(2)(B):
 - . . . *The notice must concisely and clearly state in plain, easily understood language:*

“the class claims, issues, or defenses”

Limited Issue Certification Under Rule 23

- Fed. R. Civ. P. 23(c)(4):

When appropriate (A) an action may be brought or maintained as a class-action with respect to particular issues . . .

- Advisory Committee Note, 1966 Amendments to Rule 23, regarding Rule 23(c)(4)(A):

For example, in a fraud or similar case, the action may retain its “class” character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Chiang

- Rule 23(c)(4)(A):

“Both imposes a duty on the court to insure that only those questions which are appropriate for class adjudication be certified, and ... gives ample power to treat common things in common and distinguish the distinguishable.”

Chiang v. Veneman, 385 F.3d 256 (3d Cir. 2004).

McCoy

. . . The proper substantive inquiry for an appellate tribunal reviewing a certification order for Rule 23(c)(1)(B) compliance is whether the precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis are readily discernible from the text, either of the certification order itself, or of an incorporated memorandum opinion.

Wachtel v. Guardian Life Ins. Co., 453 F.3d 179, 185 (3d Cir. 2006).

CAFA “Local Controversy”

- On CAFA’s “local controversy” exception to federal jurisdiction under 28 U.S.C. § 1332(d)(4)(A)(i)(III):

“[I]f the [CAFA] defendants engaged in conduct that could be alleged to have injured consumers throughout the country or broadly throughout several states, the case would not qualify for this exception, even if it were brought only as a single-state class-action ...

Kearn v. Ford Motor Co., 2005 WL 3967998 (C.D. Cal.), quoting S. Rep. No. 109-14 at 40-41.

Morgan Lewis

Data Privacy Class-Actions

Introduction: The Problem

- Increased ability to store personal data
- Gathered from websites and POS
- Benefits for consumers
- Vulnerable to attack at network or physical level
- High profile security breaches

The Legal Question

- Can a company that maintains personal information about consumers be held liable for a third party's theft of that information in a class-action or similar procedure?

Sources of Potential Liability

- Federal Trade Commission (FTC)
- Collective actions by state Attorneys General
- Traditional Consumer class-actions

FTC Action 2000 - 2004

- First enforcement actions in 2000
- Targeted at privacy policies under FTC Act
- Consent decrees
 - *Some fines*
 - *Mostly remedial measures*

FTC Action Since 2004

- Now going beyond privacy policies
- Requires “reasonable measures” to protect data
- Many settlements; few FTC Decisions
- Using both FTC Act and Fair Credit Reporting Act
- No reported legal challenges

State Attorneys General

- Individual state laws
- Collective actions by attorney general
- Fines, injunctive relief, and attorneys' fees

Laws Enforceable by State AGs

- Breach notification laws in 31 states
- Some states *require* privacy policy
- State law on unfair or deceptive trade practices

Consumer Class-Actions

- Follow-on to government action
- Many actions filed; most settled
- Little established law

Defenses to Class Certification

- No federal law with private right of action
- State laws vary; few have private right of action
- No class-wide damages
- Individual reliance issues

U.S. Congressional Efforts

- Recent Federal laws introduced:
 - *Notification laws with private right of action*
 - *“Privacy Bill of Rights”*
 - *Privacy Rights and Oversight for Electronic and Commercial Transactions (PROTECT)*
- PROTECT bill – if passed in current form – would provide:
 - *Private right of action for damages*
 - *Statutory damages*
 - *Attorneys’ fees for prevailing plaintiffs*

Answer to the Legal Question


Can a company that maintains personal information be held liable for the theft of that information by a third party?

Answer: The law is far from settled, but will likely continue to evolve given the public pressure for political answers. Government enforcement mechanisms have imposed some liability. Consumer class-actions face many obstacles, but some have forced expensive settlements.

What Can You Do?

- Develop and follow privacy policy
- Technical best practices
- Crisis management for breaches

Morgan Lewis



San Francisco
Palo Alto

Los Angeles
Irvine

Chicago

Pittsburgh
Harrisburg

Dallas

Miami

Boston
New York
Princeton
Philadelphia
Washington