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Expert Analysis

What The Biden Presidency Means for Class Actions

By **Daniel Karon** (February 11, 2021, 5:00 PM EST)

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Make no mistake: Class actions are under attack. And despite former President Donald Trump's penchant for litigation, his administration didn't do anything to change that.

An uninviting class action landscape is bad for just about everybody. It's bad for victims whose rights are compromised; it's bad for well-behaving companies who lose sales, market share and profits to unpoliced cheaters; and it's bad for plaintiffs' lawyers and defense lawyers who make their living filing and defending these cases. The dearth of class actions only serves crooks bent on cheating their competitors and consumers.

But this unfair and ugly dynamic seems about to change. With Democrats now controlling Capitol Hill and the White House, adjustments could be underway to return fairness to the marketplace and provide protection to aggrieved consumers and businesses that follow the law.

Consumer Class Actions

In its first five years, the Consumer Financial Protection Bureau recovered more than $12 billion in restitution for consumers. But this occurred exclusively during the Obama administration.

In the first three years after Trump appointees Mick Mulvaney and Kathy Kraninger took over as CFPB director and acting director, respectively, the CFPB garnered a paltry $800

million.[1] The U.S. Consumer Product Safety Commission and Federal Trade Commission scaled back enforcement, too. Under the Trump administration, the CFPB focused on slashing regulations rather than promulgating them, leaving many agencies understaffed, toothless and ineffective.

With Rohit Chopra, former CFPB student loan ombudsman and FTC commissioner, set to take the CFPB's helm, the carnage that characterized Trump's CFPB is sure to end. Chopra is committed to fighting consumer fraud, high drug prices, unfair loan origination and servicing, and forced arbitration.

For President Joe Biden's part, we can expect him to reverse many of Mulvaney and Krasinger's rules and guidance policies. He can accomplish this through the CFPB's regulatory policy, without legislation. Biden's effort will involve such areas as rules governing overdrafts, requirements concerning debtors' communications with creditors, and readopting payday lending rules.

Amped-up CFPB enforcement also means state attorneys general will no longer need to fill the entire consumer protection space — a space left largely unoccupied on Trump's watch.[2] We can now expect enhanced collaboration between the CFPB and the states that will focus not only on corporate targets, but also on individuals.

The expected focus on individuals is, in part, in response to criticism of the U.S. Department of Justice and attorneys general for failing to adequately punish — and, accordingly, deter — individuals responsible for the 2008 financial crisis. Collaboration and coordination between, and across, federal and state agencies will benefit consumers and companies by leading to more organized and accountable case resolutions, including global settlements.

On the legislative front, forced arbitration could be on the chopping block. In 2010, the U.S. Supreme Court, in AT&T Mobility LLC v. Concepcion,[3] overruled the U.S. Court of Appeals for the Ninth Circuit and held that the Federal Arbitration Act preempts state laws that prohibit contracts from disallowing forced arbitration. Three years later, in American Express Co. v. Italian Colors Restaurant,[4] the high court ruled that forced-arbitration clauses ban class actions — even where a class action is the only way to prosecute a plaintiff's claim.

And in 2018, the court decided Epic Systems Corp. v. Lewis,[5] which held that employees must arbitrate their claims, even though the National Labor Relations Act — which Congress passed almost a decade after the Federal Arbitration Act — provides employees the right to a collective action.

The Supreme Court based these decisions on its interpretation of the FAA. A new Democratic-controlled Congress could statutorily override the FAA in standalone legislation. Congress could also attach legislative riders to larger omnibus packages, updating the FAA and clarifying its intention that arbitration was meant for equal players, not for large companies against consumers who often lack the time, aptitude and bargaining power to push back.

Indeed, in 2019, the U.S. House of Representatives — on a bipartisan basis — passed the Forced Arbitration Injustice Repeal Act. This far-reaching bill would have banned companies from requiring consumers and workers to resolve disputes in private arbitration.

But then-Senate majority leader Sen. Mitch McConnell, R-Ky., banished this bipartisan bill to the U.S. Senate's legislative graveyard, refusing to act on it. With a unified Congress supported by a Democratic president, consumers and well-behaving businesses have reason to hope this bill could become law.[6]

Increased enforcement of consumer laws will expose more corporate schemes. Where stepped-up enforcement results in fines, penalties or injunctions — and not restitution — class actions will undoubtedly follow. And if forced arbitration disappears, cases that would have been expelled to individualized arbitration — if even pursued at all — will mean even more class actions.

Antitrust Class Actions

Horizontal price fixing has long been a bipartisan concern. For instance, in 2019, Sen. Chuck Grassley, R-Iowa, and a bipartisan group of Judiciary Committee senators introduced legislation that would let the federal government act against price fixing by the Organization of the Petroleum Exporting Countries. Sens. Amy Klobuchar, D-Minn., Mike Lee, R-Utah, and Patrick Leahy, D-Vt., co-sponsored the legislation.

And just last year, in testimony before the Senate Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, then-Secretary of Agriculture Sonny Perdue announced that the U.S. Department of Agriculture had begun an investigation into suspiciously high beef prices. He expressed serious concern that meatpackers were paying lower prices for live cattle without passing the cost savings on to beef purchasers — leading to a historically high difference between prices for live cattle and wholesale boxed beef.

With Congress already onboard investigating and prosecuting horizontal conspiracies, where can we expect a Biden administration to focus its antitrust enforcement efforts? Even preceding Biden's ascension, bipartisan momentum was underway to expand antitrust enforcement against the tech industry and to update existing competition laws for the digital era.[7]

The recent violence at the Capitol only accelerated Congress's concern, as the events of Jan. 6 confirmed Big Tech's involvement in allowing the generation and posting of hateful and inflammatory rhetoric. Democratic control of the White House and Congress could hasten reforms to the laws governing big technology companies' business practices.

The consequence could be calls to break up some of these companies or require significant structural changes that would dilute their economic concentration and monopoly power. More immediately, because Democrats control both chambers, they will likely continue to call big tech executives to testify about industry competition.

Last year, House Democrats grilled executives from Apple Inc., Amazon.com Inc., Facebook Inc. and Google Inc. The Democrats' investigation led to a report that offered broad changes, such as making it illegal for Amazon and Google to promote their products over their competitors' products.

To the extent restitution is not part of the augmented DOJ and FTC scrutiny of, and litigation over, Big Tech's structure, business practices and product pricing, we can expect more class actions to emerge on behalf of competitors and consumers.

Workplace Class Actions

Biden has expressed support for legislative and regulatory proposals that would significantly change labor and employment law. With the Democrats in control, these changes could occur.

In 2020, the Supreme Court decided Bostock v. Clayton County, Georgia,[8] which held that Title VII's proscription against sex discrimination includes discrimination based on sexual orientation and gender identity. Still, Biden intends to sign the Equality Act within his first 100 days.

The act would prohibit, based on sexual orientation and gender equality, discrimination over employment, housing, education and public accommodation. Biden also supports expanding protections for pregnant, senior and disabled employees.

Biden is likewise opposed to pay disparity. He has pledged to sign the Paycheck Fairness act, also previously passed by the House. Under this act, only a bona fide factor other than sex — such as education, training or experience — could justify a pay difference between men and women who perform substantially equal jobs and work at the same company.

The act would also make it illegal for an employer to request a job candidate's salary history or use that data to decide whether to hire the candidate or to set the candidate's wages. Finally, the act would allow uncapped compensatory and punitive damages in private Equal Pay Act suits[9] and instruct that class actions under the EPA may proceed on an opt-out, rather than opt-in, basis.

Biden has also indicated his support for legislation protecting older workers by making it easier for them to demonstrate they were victims of workplace discrimination. Since the Supreme Court's 2009 Gross v. FBL Financial Services Inc.[10] decision, plaintiffs alleging age discrimination claims under the Age Discrimination in Employment Act have needed to prove that age was the but-for cause of their damages, as opposed to merely a motivating factor.

By contrast, other antidiscrimination laws, such as Title VII, allow a mixed-motive liability theory, where plaintiffs can prevail even if the characteristics the statute protects are not the exclusive reasons for their employers' actions. Legislation repealing this but-for standard would make it easier for employees to prove age discrimination claims — and more difficult for employers to defend against them.

What Lies Ahead

To the extent these legal changes create uniform new rights, we can expect plaintiffs and their counsel to resourcefully consider whether these new laws encourage classwide remedies — remedies that will protect victims, and competitors, from the scourge of unscrupulous companies bent on exploiting unfair laws that no longer exist.

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[1] See, e.g., Law360, Daniel R. Karon, CFPB's Payday Loan Protections Protect Big Business Too (Feb. 2, 2018) (describing Mulvaney's tepid approach to enforcement).

[2] See, e.g., Law360, Daniel R. Karon, After Trump's Policy Purges, Who Speaks For The Victims? (May 1, 2018) (describing the enhanced role of state attorneys general following Trump's gutting of the CFPB).

[3] 563 U.S. 333 (2011).

[4] 570 U.S. 228 (2013).

[5] 138 S.Ct. 1612 (2018).

[6] On Feb. 11, Rep. Hank Johnson, D-Ga., who was the FAIR Act's original sponsor in the 116th Congress, reintroduced the act, after which the House Judiciary Subcommittee held a hearing to consider the injustices of forced arbitration.

[7] See, e.g., the DOJ's lawsuit against Google to restore competition in search and search-advertising markets and the FTC's lawsuit against Facebook for maintaining its personal social networking monopoly through a course of anticompetitive conduct that leaves consumers with few choices for personal social networking and deprives advertisers the benefits of competition.

[8] 140 S.Ct. 1731 (2020).

[9] The Paycheck Fairness Act amends the Equal Pay Act, H.R. 7, Section 2 ("With a stronger commitment by these entities, increased information as a result of the Amendments this Act makes to the EPA, wage data, and more effective remedies, women will be better able to recognize and enforce their rights").

[10] 557 U.S. 167 (2009).