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TWENTY-SEVENTH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
THURSDAY, NOVEMBER 10, 2016

Stay Classy! Emerging Trends in Class Action Litigation

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Program Materials are available on www.dorsey.com at https://www.dorsey.com/newsresources/events/event/2016/11/corporate-counsel-symposium-2016

1. PowerPoint Presentation
2. *Spokeo Set to Resolve Lingering Questions Over Constitutional Standing*, Gabrielle Wirth and Eric Troutman, Dorsey & Whitney LLP (February 12, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/02/spokeo-set-to-resolve
3. *"Abusive" Development – Recent Applications of the Prohibition against Abusive Acts and Practices*, Nicholas A. J. Vlietstra and Brent Ylvisaker, Dorsey & Whitney LLP (June 10, 2015) https://www.dorsey.com/newsresources/publications/client-alerts/2015/06/abusive-development--recent-applications-of-the-

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Thursday, November 10, 2016

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Claims Made and Cy Pres Settlements

- **Claims Made Settlement**
  - **Unclaimed funds revert to defendant**
  - **Take rates in most consumer class actions are very low**
- **Cy Pres Settlement**
  - **"cy pre comme possible"**
  - **Distributing leftover class funds to third party charities**
  - **Appellate courts have been somewhat skeptical of this practice**
  - **Must be demonstrably infeasible to further compensate the class**
  - **Charity's purpose must be closely tied to objectives of lawsuit**

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Cy Pres Settlements

- Class counsel's incentives for cy pres settlement
  - Fee award typically based on percentage of common fund
  - Favorable publicity
- Several courts have excluded cy pres distribution when calculating class counsel's fees
- Lack of well-defined standards
- Rule 23 subcommittee declined to add a provision governing use of cy pres

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ADA Website Accessibility Lawsuits

- Title III of Americans with Disabilities Act
- Over 100 lawsuits filed in 2015-16
- Primarily against companies in retail and restaurant sectors
- Five law firms have filed most of the lawsuits
- Most lawsuits filed in Pennsylvania, New York and California
- DOJ has delayed issuing guidelines

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CFPB Arbitration Rule and Its Implications

- **Federal Arbitration Act (1925) – intended to remedy "widespread judicial hostility" to arbitration**
  - **Courts must place arbitration agreements on equal footing with other contracts**
  - **Beginning in 1990s, more common inclusion of mandatory arbitration clauses, including "no-class" clauses in consumer financial contracts**
  - **Followed by development of state laws and judicial decisions hostile to consumer arbitration and no-class clauses**

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CFPB Arbitration Rule and Its Implications

- ***AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011)**
  - **No-class clauses in consumer arbitration provisions were deemed "unconscionable" under California law**
  - **Courts were divided on state law barriers to the enforceability of no-class provisions in arbitration clauses**
  - **SCOTUS in 5-4 decision holds that FAA preempts state law that would prohibit the enforcement of a consumer arbitration clause with a no-class provision**

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CFPB Arbitration Rule and Its Implications

DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010)

- **Prohibition on arbitration clauses in most residential mortgage loans after June 1, 2013**
- **Created the CFPB and directed it to study and report on the use of pre-dispute arbitration agreements "in connection with the offering or providing of consumer financial products or services"**
- **Empowered the CFPB to "prohibit or impose conditions or limitations on the use of" such arbitration agreements if "in the public interest and for the protection of consumers"**

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CFPB Arbitration Rule and Its Implications

- **The primary concerns of the CFPB explained in its proposal:**
  - **(1) That arbitration agreements limit aggregate relief to consumers**
  - **(2) That arbitration agreements prevent consumers from filing and participating in consumer finance class proceedings**
  - **(3) That when arbitrations occur, the potential for consumer harm is "significant" if agreements are administered "in biased or unfair ways"**
- **The proposal contains two elements:**
  - **Prohibit application of arbitration agreements to class cases in court**
  - **Require submission to the CFPB of arbitral disputes (i.e., claims in arbitration) and awards and potentially publish those disputes and awards on the CFPB's website**

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Impact of CFPB Arbitration Rule

- **Class actions by the numbers….**
- **CFPB research shows that 6,042 more class actions may be filed against 53,000 businesses in the first five years**
- **Commentators project:**
  - **An additional 1,200 class actions a year, and**
  - **$100 million/annually in legal fees**

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And How About Consumer Benefit?

- **Fact v. fiction**
  - **The best way to resolve consumer disputes is not through class actions**
- **Arbitration rule subordinates consumer interests to class action lawyers' interests, in economic terms**
  - **CFPB states consumers will receive $342 million a year in payments from new class action settlements**
  - **However, of 251 class actions studied by the CFPB, on average each consumer was paid $32**
  - **And…. 87% of class actions studied resulted in $0 to consumers**

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CFPB by the Numbers

- **$11.7 billion ordered in relief to consumers by CFPB enforcement actions**
- **$347 million relief provided to consumers as a result of CFPB supervisory actions**
- **930,700: Complaints CFPB has handled as of July 1, 2016**
- **$0 awarded to consumers' lawyers in CFPB actions**

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Projected Repercussions

- **Tacit invitation to plaintiffs' attorneys to study CFPB case blueprints and design private suits accordingly**
- **"Deputizing" the class action bar**
- **Potential analogy: CFPB relationship to state attorneys general v. CFPB relationship to class action bar**
- **More to come**

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In the Meantime, Projected Repercussions:

- **Besides leveraging CFPB case strategy to design claims, class action counsel can (and already have) used CFPB's investigations to extract evidence for use in private class action suits**
- **This is true, despite substantial information-sharing protocols between CFPB and other regulators**
- **Class action counsel receive a "free pass" to circumvent these restrictions**

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A Potential Misfire For the CFPB?

- **Recent case study: *Frank LLP v. CFPB*, No. 1:16-cv-02105 (D.D.C.)**
- **FOIA Complaint filed October 21, 2016 – eleven months after the CFPB consent order on a related matter, *In re Portfolio Recovery Assocs., LLC,* No. 2015-CFPB-0023 (Sept. 8, 2015)**

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Class Counsel's Strategy

- **FOIA action to aid plaintiffs' counsel in litigating separate private action**
- **Underlying action, *Toohey et al. v. Portfolio Recovery Assocs., LLC et al*., No. 1:15-cv-08098-GD (SDNY), alleged FDCPA violations**

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Class Counsel's Strategy

- **"Records and information in the CFPB's possession that pertain to the CFPB's findings against PRA and its attorneys *constitute evidence that would greatly strengthen the claims of the plaintiff and putative class action* in *Toohey*." FOIA Compl. ¶ 10.**
- **"The CFPB has repeatedly refused to provide Plaintiff with access to any of the documents responsive to Plaintiff's FOIA request." ¶ 12.**

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Public v. Private Enforcement

- **CFPB arbitration study had found:**
  - **Public enforcement activity was preceded by private activity 71% of the time**
  - **In contrast, private class action complaints were preceded by public enforcement activity 36% of the time**
  - **The unwritten message**

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Public v. Private Enforcement

- **Reviewed federal agencies with authority to pursue consumer financial protection:**

CFPB	FTC
DOJ Civil Division	HUD
DOJ Civil Rights	NCUA
FDIC	OCC
FRB	OTS

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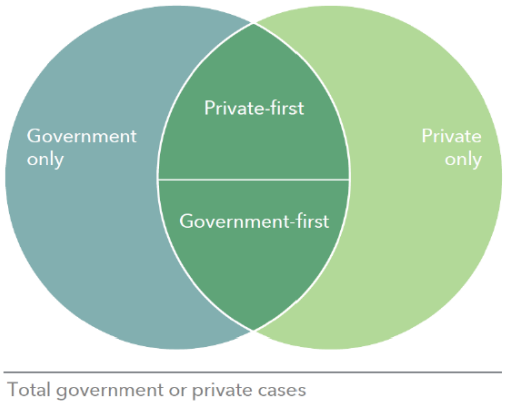
Public v. Private Enforcement

FIGURE 1: SAMPLE VENN-EULER DIAGRAM OF OVERLAP ANALYSIS



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However, Based on the CFPB Study:

1) **CFPB did not identify a complete universe of public or private actions during the observation period**
2) **Inability to conclude "causation" as a result of "correlation," e.g., where overlaps exist, it was not possible to conclude that the first action helped trigger the second. In any given case "there may or may not be a causal relationship"**
4) **"[O]ur search was only one-way."**

   If the CFPB began a search with a public enforcement action, the CFPB would stop looking for a matching private class action when it found one that was filed before the public action. CFPB did not search for *another* public enforcement action that may have preceded both cases.
5) **"[O]ur analysis is not intended to address whether later-filed cases…..do or do not have merit."**

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Timing of Study:

- **Study focused on data from January 1, 2008 to December 31, 2012**
- **Apples to apples? Not really**

Everyone's Favorite Case- *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)

- **Question presented: does the violation of a statute automatically give rise to Article III standing?**
  - **No! An "injury in fact" is required even where a person sues to vindicate a statutory right.**
- **The violation of *some* but not all statutes necessarily cause harm– the trick is to guess which ones. (Fun!)**
  - ***Issue* is whether there is a "gap" between the harm identified by Congress and the protections afforded by the statute.**
  - ***If there is a gap,* then bare allegations of a statutory violation are <u>not</u> sufficient to establish Article III standing.**
  - ***If there is not a gap,* then bare allegations of a violation of the statute <u>are</u> sufficient to establish Article III standing.**

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) WHY DOES IT MATTER?

- **Because people bring terrible no-damage class actions all the time seeking statutory recoveries and attorneys fees for conduct that causes no harm**
  - **Billions in potential exposure for conduct that did not hurt anyone**
- **Common examples:**
  - **FCRA**
  - **TCPA**
  - **FDCPA**
  - **FACTA**
  - **ADA**
  - **State Privacy Statutes**

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) THE BASICS

- **At the pleading stage a party must "clearly allege" each element of Article III standing**
  - **(1) suffered an injury in fact,**
  - **(2) that is fairly traceable to the challenged conduct of the defendant, and**
  - **(3) that is likely to be redressed by a favorable judicial decision.**
- **Injury in fact requires "an invasion of a legally protected interest" that is *both* "concrete and particularized."**
- **And—per *Spokeo*—a "concrete" injury is one that causes *de facto* (real life) harm.**

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) SO WHAT DID THE SUPREME COURT DO?

- **The Ninth Circuit had found that the Plaintiff alleged a violation of *his* "legally protected interest" under FCRA and then stopped.**
- **Supreme Court says this is insufficient because the Ninth Circuit did not do what it is required to do—determine whether the specific conduct at issue caused a "concrete" *de facto* (real life) harm.**
- **Simple analysis employed:**
  - **There's a gap: "[a] violation of one of the FCRA's procedural requirements may result in no harm" *Spokeo*, at 1550.**
  - **Ergo: "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation" of the FCRA. *Id*.**

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) CAN I USE *SPOKEO* TO DEFEAT CERTIFICATION?

- **YES—USING THE FIVE POINT DORSEY PLAN**
- **First, remember that each separate violation is a separate claim requiring separate standing showing.**
- **Second, consider what the "actual harm" standard might be in the context of the statutory violation.**
- **Third, think of all the reasons why the harm Congress "elevated" in enacting the statute is not *necessarily* caused when the statute is violated.**
- **Fourth, using the identified gap and actual harm standard argue that harmed consumers cannot be identified absent individualized review. (Circuit-specific!)**
- **Fifth, identify proper *mechanism* to challenge standing.**
  - **E.g., 12(b)(1)—facial v. factual? Motion for more Definite Statement? Motion to strike class allegations? MSJ?**

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) WAR STORY—*TILLMAN V. ALLY FINANCIAL*

Bogus TCPA Class Action

- **Challenge to the pleadings**
  - **Motion to dismiss**
  - **Motion to strike class allegations**
- **Motion to Stay Discovery**
  - **Scope of discovery impacted by viability of class allegations**
- **Result: class discovery *stayed* after magistrate took a "preliminary peek" at dispositive motions and found the "meritorious"**

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Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) CURRENT LAY OF THE LAND?

- **FDCPA – probably no gap for most provisions**
  - ***Mahala A. Church v. Accretive Health, Inc*., No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016)**
- **FCRA – definitely a gap (*Spokeo* says so)**
- **FACTA – probably no gap**
  - ***Guarisma v. Microsoft Corporation***
- **TCPA – undetermined (but *of course* there's a gap)**
  - **No gap: *Aranda v. Caribbean Cruise Line, Inc*. 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016)**
  - **Gap: E.g., *Romero v. Dep't Stores Nat'l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL 4184099, at *3 (S.D. Cal. Aug. 5, 2016)**

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TCPA Class Actions
Scary As Ever

- **Number of class cases up in 2016**
- **Settlement dollars bigger than ever**
- **Billions of dollars on the line in these cases**
- **Still a divide between "multi-source" and "single-source" class actions in terms of certifiability**
- **But courts continue to follow *Jamison* and put evidentiary burden *on defendants* at certification stage**
- **FCC's Omnibus did industry few favors**
  - **Wrong number class actions**
  - **Revocation class actions**
  - **ACA appeal has given industry some hope**

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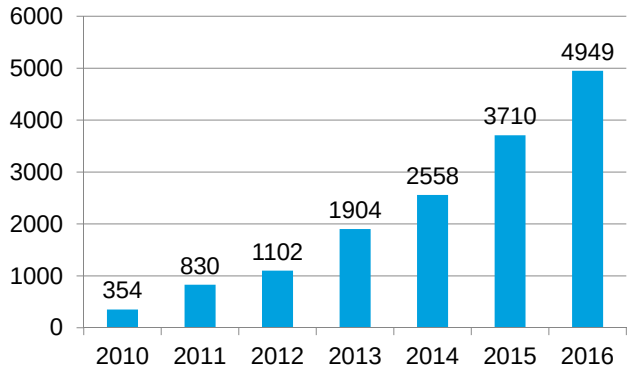
Number of TCPA Suits 2010-2016*



TCPA lawsuit filings appear to be obeying Moore's Law.

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*2016 estimated using YTD data

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OMNIBUS EFFECT?

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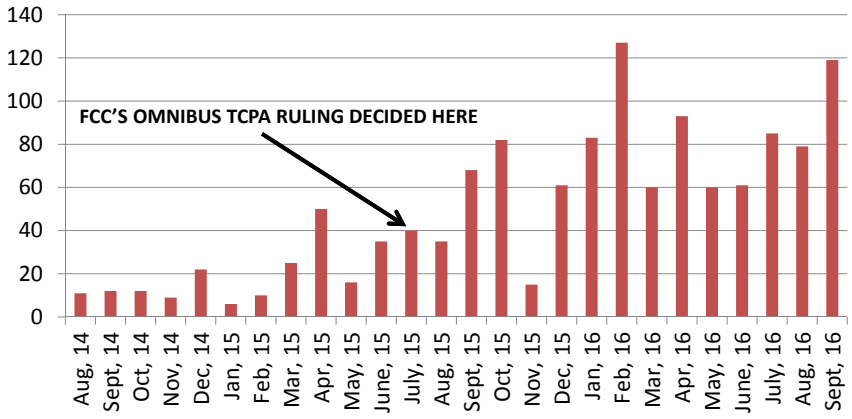
TCPA Class Action Filings August 2014-September 2016



Before Omnibus: Avg. of **20.6** TCPA Class Action Filings Per Month
Since Omnibus: Avg. of **73.4** TCPA Class Action Filings Per Month

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TCPA Class Actions
What Can You Do?

- **Always challenge class definitions up front**
  - **Remember that the scope of discovery is determined by breadth of class**
  - **Plaintiff's favorite game is to start broad and then certify a smaller class down the line—don't let them get away with it!**
- **Bi-furcate, Tri-furcate or Stay Discovery**
- **Bring dispositive motions early (and often)**
- **Leverage *Spokeo***
  - **Remember 5-part Dorsey plan**
- **And always assume that YOU will have the evidentiary burden at certification**
  - **"substantial percentage" test**

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Trial?!? Seriously?!?

- **Few empirical studies of how often class actions go to trial**
- **Widely-assumed they are less likely to proceed to trial**
- **Is this actually the case?**
- **Is the trial rate trending upwards?**