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THIRTIETH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
WEDNESDAY, NOVEMBER 6, 2019

corporate counsel symposium

Master Class: The Latest Word in Class Actions

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Handouts

1. PowerPoint Presentation

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Overview and Agenda

- Trends in the Class Action Bar
- View from the Supreme Court – Limitations on Class Claims
  - Arbitration Agreements
  - Compelling "Class" Arbitration
  - Equitable Tolling
- Case Prerequisites
  - Personal Jurisdiction
  - Standing post-*Spokeo*
- Increased Scrutiny on Commonality and Predominance
- Settlement Agreement Trends

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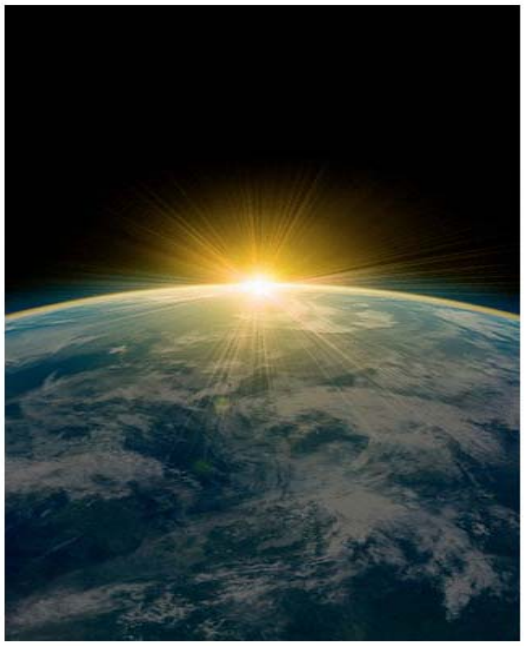
Trends – What's New (and What's Not)



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Class Action Trends – Number of Filings Per Year

	2017	2018	2019*
Total	11,961	12,043	10,786
Consumer Protection	6,391	6,530	5,702
Antitrust	2,082	1,988	1,919
Securities	1,904	2,004	1,927
Products Liability	433	438	405
ERISA	291	237	142
Employment	123	112	72

Source: LexMachina.
* Through late-October 2019

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Notable Cases

Primary Claim	Case
Data Breach	*Alleruzzo v. SuperValu Inc.*, 925 F.3d 955 (8th Cir. 2019)
Antitrust	*In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)
Securities	*Krukever v. TD Ameritrade Futures & Forex LLC*, 2018 U.S. Dist. LEXIS 92573 (S.D. Fla. 2018)
Products Liability	*Marshall v. Hyundai Motor America,* 2019 U.S. Dist. LEXIS 103764 (June 14, 2019)
ERISA	*Jander v. IBM,* 910 F.3d 620 (2d. Cir. Dec. 10, 2018), cert. granted, 2019 U.S. LEXIS 3791 (June 3, 2019)
Employment	*Kassman, et al. v. KPMG LLP*, 2018 U.S. Dist. LEXIS 203561 (S.D.N.Y. Nov. 30, 2018)

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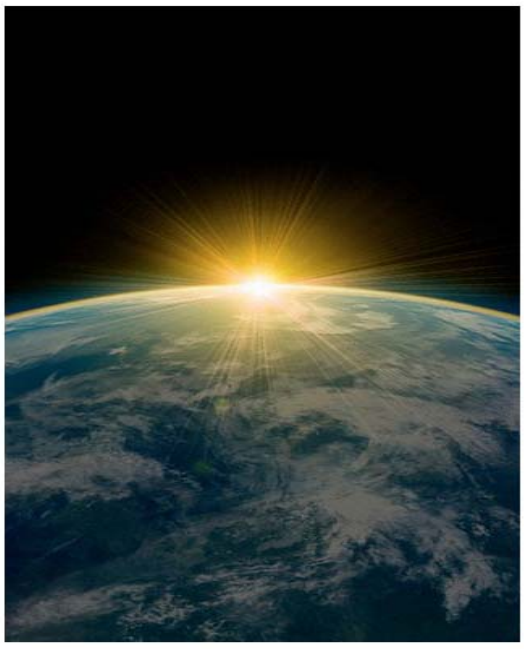
View From the Supreme Court

Limiting Class Claims



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Limitations on Class Claims Through Arbitration

- Reinforcement of arbitration provisions as a limit on class claims in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).
  - **Holding**: Under the FAA, agreements to arbitrate and express class waivers must be enforced and did not violate provisions of the NLRA. Thus, an employer is free to prohibit employees from pursuing work-related claims in a class or collective action.
  - **How it Got There:** Plaintiff filed a class action that the company failed to compensate him and other similarly situated employees overtime pay, and argued that the class and collective action waivers in Epic's agreements with employees violated the NLRA. Epic moved to dismiss and compel individual arbitration, and a Wisconsin federal district denied the motions. The Seventh Circuit affirmed.
  - **Takeaway:** Clear arbitration provisions are give substantial weight under FAA and trump other laws.

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Limitations On Class "Arbitration"

- Lights dimmed on class arbitration in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407(2019)
  - **Holding**: FAA does not permit a court to compel class arbitration *unless* the arbitration agreement clearly provides for it. The provision at issue did not provide "the necessary 'contractual basis' for compelling class arbitration."
  - **How it Got There**: District court compelled class-wide arbitration in response to employer motion to compel individual arbitration. Ninth Circuit affirmed on the basis that general provisions on class arbitration were ambiguous and contractual ambiguities were construed against Lamps Plus as the drafter.
  - **Takeaway:** Pro-arbitration principles remain strong and will favor individual arbitration unless an arbitration provision expressly authorizes class arbitration. As a result, many cases still pending, even where they do include express class or collective-action waivers, are expected to succumb to the *Lamps Plus* rule.

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Limitations on Class Claims – Equitable Tolling

- Equitable tolling under *American Pipe* does not extend to successive class actions in *China AgriTech v. Resh*, 138 S.Ct. 1800 (2018**)**
  - **Holding:** *American Pipe* equitable tolling only operates to toll the limitations periods for subsequent individual follow-on action, *not* class follow-on actions. In so holding, the Supreme Court made clear it had the power to limit the tolling rule that it created and no substantive right were implicated by tolling.
  - **How it Got There:** The Ninth Circuit held that successive class actions should be treated similarly to individual claims, permitting the "stacking" of successive class actions, relying on an earlier Supreme Court decision in *Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).
  - **Takeaway:** This decision should give businesses confidence that they will not face an endless string of class actions over the same conduct.

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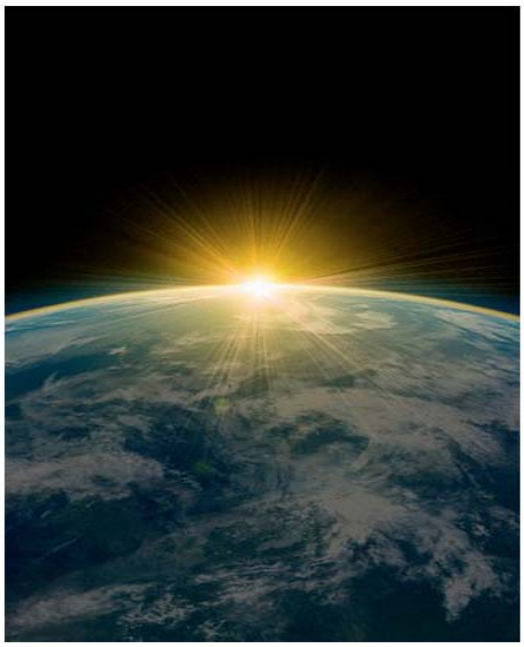
Case Prerequisites

Personal Jurisdiction and Standing



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BMS and Personal Jurisdiction

- In 2017, the Supreme Court decided in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), reshaping the landscape for mass tort litigation.
  - **Holding**: A state court could not assert specific jurisdiction over a non-resident plaintiff's claims against a non-resident defendant, *unless* the defendants' in-state conduct is connected to those claims.
  - **Potential impact on class actions**: Post- *BMS*, Defendants have argued that *BMS* prevents courts from exercising specific jurisdiction as to the claims of non-resident class members against a non-resident defendant. If successful, that application could effectively destroy nationwide class actions in jurisdictions other than where a defendant is subject to general jurisdiction.

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Applying *BMS* To Class Actions

- Divergent views of *BMS* impact on unnamed class members in class actions:
  - *McDonnel v. Nature's Way Prods*., 2017 U.S. Dist. LEXIS 177892 (N.D. Il. Oct. 26, 2017) Consumer class action where the class representative alleged non-resident defendant misrepresented a product purchased in Illinois. The Court found specific jurisdiction only as to claims of the named Plaintiff and other Illinois purchasers, but not claims of non-residents because they were not connected to the defendant's activities in Illinois.
  - *Fitzhenry-Russel v. Dr. Pepper Snapple Grp.*, 2017 U.S. Dist. LEXIS (N.D. Cal. Sept. 22, 2017). Consumer class action alleging misrepresentations about a product that the class representative purchased in California. The Court held it need only have specific jurisdiction over the defendant as to the named plaintiff's claims even if those plaintiffs represented a nationwide class.
- Circuit split on the horizon?

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Spokeo – Article III's Standing Requirements

- In *Spokeo v. Robins,* 136 S.Ct. 1540 (2016*),* the Supreme Court held that plaintiffs must allege some tangible or intangible "concrete harm" to establish Article III standing.
- Principle echoed in concurrence by Chief Justice Roberts in the class context: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*,136 S. Ct. 1036, 1053 (2016) (Roberts, C.J. concurring).
- Lower courts have struggled with what *Spokeo* means in practice when considering standing challenges in the class action space, particularly where the only harm is a statutory violation.

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Spokeo In Practice

- **Example**: The Google Photo "Face Off" in *Rivera v. Google,* Inc., 366 F. Supp. 3d 998 (N.D. Ill. 2018)
  - Dismissed a class suit alleging that Google violated the Illinois Biometric Information Privacy Act by creating and storing face templates based on pictures uploaded by Plaintiffs using GooglePhotos.
  - Plaintiffs had alleged they never gave consent, *but* testified they did not suffer information of any physical, financial, or emotion injury.
  - The Court held mere retention of private information was insufficient to meet *Spokeo's* standing requirements.

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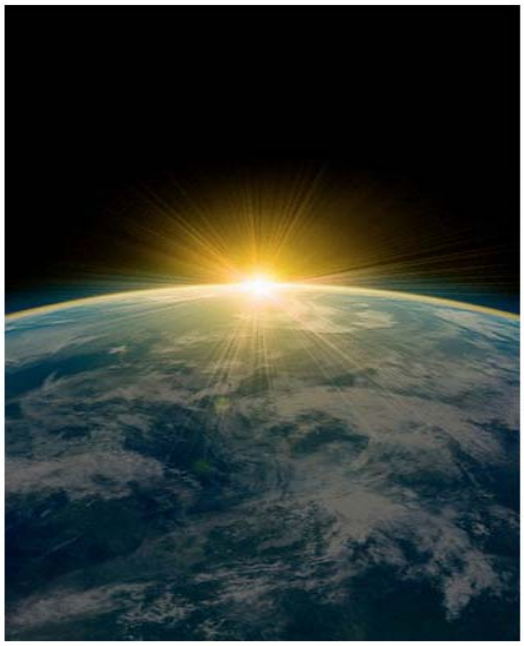
Increased Scrutiny on Commonality and Predominance



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Challenging Commonality and Predominance

- Under Rule 23(a), "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011).
- Rule 23(b)(3) requires "questions of law or fact common to class members predominate over any questions affecting only individual members."
- **Key questions**:
  - Can a class be certified with class members that have not suffered the same injury?
  - More specifically, can a class be certified with uninjured absent class members?
  - How do you show that individualized inquiries outweigh common ones?

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Not So Fast on Commonality – A Case Study

- *Peters v. Aetna et al.* (W.D.N.C. Mar. 29, 2019)
  - Plaintiff brought a putative class against Aetna and OptumHealth Care Solutions, Inc. under ERISA and RICO alleged a fraudulent scheme whereby insureds overpaid as a result of Aetna-Optum contracts put in place for certain services.
  - The Court, in denying class certification, found that Plaintiff's flawed methodology for determining class membership reflected a lack of commonality between class members.
  - The evidence indicated that, in the aggregate, the Aetna-Optum contracts at issue actually *saved* plans and their participants millions of dollars, and that some class members would actually be worse off under Plaintiffs' proposed methodology for determining class membership.
  - "A proposed class challenging conduct that did not harm – and in fact benefitted – some proposed class members fails to establish the commonality required for certification."

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The Uninjured Absent Class Member Problem

- Application varies by jurisdiction, but *Asacol* amplifies the uninjured absent class member problem for Plaintiffs on predominance:
  - *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)
    - The First Circuit reversed class certification where the district court found that Plaintiffs' proposed class and methodology would result in approximately ten percent of the class included having no injury at all.
    - The Court found that Plaintiffs failed to meet the predominance test because at class certification, they failed to offer a "reasonable and workable plan" for defendants to press genuine challenges to injury-in-fact at trial that would not cause individualized inquiries to overwhelm common issues.

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Predominance and Suitability - A Case Study

- *Luis v. RBC Capital Markets,* Case No.16-cv-3873 (D. Minn.)
  - Plaintiffs' case rested on a breach of contract theory where any damages would, by their nature, be tied to the suitability of the investment.
  - Plaintiffs' attempts to certify a class came after a change in class representatives and a morphing theory of liability.
  - In opposing class certification under the predominance test, RBC argued that FINRA regulatory guidance required that a suitability determination need be a highly individualized, fact-specific inquiry for each individual investor, citing similar cases such as *Fernandez v. UBS AG*, 2018 U.S. Dist. LEXIS 158225 (S.D.N.Y. Sept. 17, 2018).

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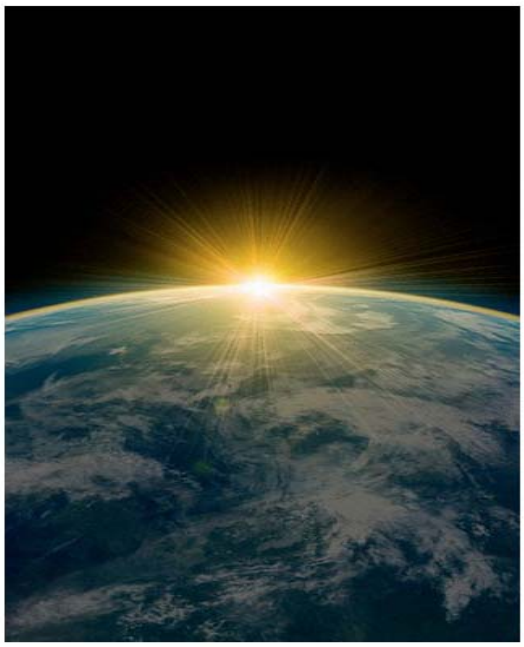
Settlement Trends



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Settlement Trends – Seeking Approval

- Reaffirming distinction between a settlement class and litigation class
  - *In re Hyundai & Kia Fuel Econ. Litig.,* 2019 U.S. App. LEXIS 17047 (9th Cir. June 6, 2019)
    - The Ninth Circuit *en banc* revived a $210 million settlement, holding the prior three-judge panel was wrong to vacate the settlement approved by the district court for failing to "rigorously analyze potential differences in state consumer protection laws."
    - In doing so, the Ninth Circuit realigned with other circuits in confirming that "the criteria for class certification are applied differently in litigation and settlement classes" and that "a class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable."

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Settlement Trends – Seeking Approval

- Prevalence of coupons as a class-wide settlement mechanism
  - Popular because issuance of coupons come at little cost to a defendant.
  - Courts criticize coupon settlements because they provide little value to class members, particularly those that are not willing to do business with the defendant again.
  - Safeguards to protect value of coupon settlements– unrestricted transferability, extended expiration dates, combination with a cash payment.
- *Cy pres* settlements have also gained popularity, but drawn criticism
  - A *cy pres* distribution is made to a non-party who is directed to use the fund for a charitable purpose.
  - Classic example of a challenge: in *Dennis v. Kellogg Co.*, 699 F.3d 858 (9th Cir. 2012), the Ninth Circuit rejected a $5.5M cy pres distribution of Kellogg food items to unidentified charities that feed indigents because there was no "driving nexus" between the charities and the false advertising claims.

QUESTIONS?