Major developments in class action litigation: what to watch for throughout 2019
Major developments in class action litigation for 2018 and so far in 2019

In 2018 and the first half of 2019, there were a number of important developments in class actions.

Among these developments:

1. The United States Supreme Court strengthens arbitration agreements and class action waivers generally
2. Courts grapple with the application of personal jurisdiction principles in class actions
3. Courts increase the focus on the impropriety of certificating a class that contains uninjured class members
4. Spokeo jurisprudence continues to evolve
5. The Supreme Court releases its highly anticipated decision in China Agritech v. Resh addressing equitable tolling under American Pipe
6. Five amendments to Rule 23 improve notice and settlement procedures
7. Global class actions and collective redress procedures continue gathering forces.

In this roundup of recent developments in class actions, we take a top-level look at class action litigation and consider the trends, issues, and strategies that businesses face in the months to come.
Supreme Court strenghtens arbitration

The relationship between class actions and arbitration remains a hot issue at the Supreme Court, where the trend in favor of arbitration continues. The appointment of Justice Brett Kavanaugh to the Supreme Court in 2018 adds an additional proponent to the Court for strict enforcement of the Federal Arbitration Act (FAA) and of parties’ agreements to arbitrate. This trend toward strict enforcement stretches back over a decade, with the Court repeatedly emphasizing the FAA’s “liberal federal policy favoring arbitration agreements,” as noted in the 2018 decision in *Epic Systems Corp. v. Lewis*). The Court remains skeptical of attempts to circumvent arbitration agreements including – attempts to avoid agreements that waive an individual’s right to bring a class or collective action.

Justice Kavanaugh’s first opinion for the Court, a unanimous decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, reaffirmed the principle that arbitration agreements must be enforced according to their terms. Under the FAA, parties may agree that an arbitrator will resolve all contract-related disputes, including “gateway” questions of whether a particular dispute is subject to arbitration. Some federal courts formerly recognized an exception to that rule: if an argument for arbitration was “wholly groundless,” then the court could resolve the gateway arbitrability question, even if the parties had contractually delegated it to the arbitrator.

In *Schein*, the Supreme Court disagreed, strictly interpreting the FAA, which does not contain a “wholly groundless” exception. Instead, the Court ruled that “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract;” even if the argument that the arbitration agreement applies to the dispute is without merit. In rejecting the “wholly groundless” exception, the Court also made clear that federal courts “may not engraft our own exceptions onto the statutory text” of the FAA.

In April 2019, the Supreme Court issued another pro-arbitration decision in *Lamps Plus, Inc. v. Varela*. (See our alert on the decision.) In *Lamps Plus, Inc.*, an employee filed a class action against his employer after a data breach caused the release of employees’ personal identifying information. The employer moved to compel individual arbitration under the employment contract. The district court denied the motion and ordered class-wide arbitration. The Ninth Circuit affirmed, holding that the contract’s general dispute resolution provisions ambiguous as to class arbitration and construing that ambiguity against the employer. In a 5-4 decision, the Supreme Court reversed.

Writing for the majority, Chief Justice John Roberts accepted the Ninth Circuit’s conclusion that the contract was ambiguous. But the majority held that this ambiguity could not provide “the necessary ‘contractual basis’ for compelling class arbitration.” The Court reiterated that class arbitration is both “markedly different from the ‘traditional individualized arbitration contemplated by the FAA,’” and “undermines the most important benefits of that familiar form of arbitration.” Accordingly, parties must explicitly state their intent to arbitrate claims on a class-wide basis.

These recent opinions are consistent with the Supreme Court’s decision from the prior term in *Epic Systems*, which held that employment agreements requiring individual arbitration and prohibiting class or collective actions must be enforced under the FAA. There, the Court underscored that the FAA mandates that courts must enforce the parties’ chosen arbitration procedures. Despite challenges to the enforcement of these procedures against individual employees, the Court noted that neither the FAA’s saving clause nor the National Labor Relations Act (NLRA) excuse enforcement of individual arbitration agreements in employment contracts. The FAA’s saving clause only applies to general contract defenses, and not those that interfere with fundamental attributes of arbitration. Similarly, the NLRA does not displace the FAA or make class and collective action waivers in employment agreements illegal.

Although this decision falls within the employment context, it demonstrates the Court’s approach to interpreting the FAA and enforcing arbitration agreements more generally, foreshadowing the more recent decisions in *Schein* and *Lamps Plus*, which continue the Supreme Court’s trend in enforcing arbitration agreements and class action waivers generally.
Nationwide settlement classes: Ninth Circuit eliminates the circuit split and overrules *In re Hyundai*, explicitly recognizing the distinction between the analysis of a settlement versus a litigation class

On June 6, 2019, an *en banc* panel of the Ninth Circuit revived a settlement valued at approximately $210 million in the *In re Hyundai & Kia Fuel Economy Litig.*, overturning a prior January 2018 decision that had attracted much attention. The prior, controversial decision involved a divided three-judge panel, which vacated a nationwide class action settlement because the district court “did not rigorously analyze potential differences in state consumer protection laws” before certification of a settlement class.

*In re Hyundai* is a putative class action brought by consumers who allege that Hyundai overstated the fuel efficiency of its vehicles in violation of consumer protection statutes and common law contract and tort duties. Hyundai argued that differences in states’ consumer protection statutes precluded class certification. The district court tentatively agreed, primarily because of the differences in remedies and intent requirements among states.

Before the class certification ruling was final, however, the parties negotiated a settlement for a single nationwide settlement class, which the district court certified after concluding that an extensive choice of law analysis “was not warranted in the settlement context,” because the impact of variations in state law, if any, could be assessed at the final fairness hearing.

The divided Ninth Circuit panel vacated and remanded, holding, in relevant part, that the district court abused its discretion when it failed to conduct a choice-of-law analysis or rigorously review variations in state law as part of its predominance analysis before certifying the settlement class.
In a vigorous dissent, Judge Jacqueline Nguyen argued that the majority’s decision conflicted with long-standing precedents within the Ninth Circuit and from other federal appellate courts, which hold that “a nationwide class action cannot be decertified simply because there are differences between state consumer protection laws” (internal quotation marks omitted). Judge Nguyen feared that, by imposing a heightened choice-of-law burden, the majority had dealt “a major blow to multistate class actions.”

The June 6 en banc decision, written by Judge Nguyen, reinstated the settlement and brought the Ninth Circuit back in line with other circuit courts of appeal. This reversal is important, as it reinforces the differences in analysis between certification of a litigation class versus a settlement class. As the Ninth Circuit noted, “The criteria for class certification are applied differently in litigation and settlement classes.” Whereas in a litigation class, a court must consider manageability at trial, in a settlement class, “manageability is not a concern” because “by definition, there will be no trial.” As a result, “A class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individual individualized issues that would make a trial unmanageable.” This recognition reinforces the conclusion that there are cases in which a settlement class is proper, even where a litigation class would not be appropriate.

As to the choice of law issues potentially presented by the laws of 50 states, the court found that “. . . no objector argued that differences between the consumer protection laws of all 50 states precluded certification of a settlement class. Consequently, neither the district court nor class counsel were obligated to address choice-of-law issues beyond those raised by the objectors, and we will not decertify a class action for lack of such analysis.” Applying the proper settlement class analysis, the court found the settlement class appropriately certified.
In our last annual update, we discussed the Supreme Court’s ruling in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County (BMS)*, a 2017 decision that rejected an expansive view of specific personal jurisdiction and limited the ability of out-of-state plaintiffs to participate in mass actions. (See our 2018 handbook.) The Supreme Court did not clarify how its ruling may apply to out-of-state plaintiffs in a class action, and lower courts have diverged sharply on how, if at all, *BMS* applies to class actions. Unless forthcoming rulings from the circuit courts harmonize these divergent rulings, this issue is likely to end up back at the Supreme Court.

Two primary legal questions have emerged for courts applying *BMS* to a class action: (1) does *BMS* apply where the court’s subject matter jurisdiction is based on a federal question instead of diversity? and (2) does *BMS* apply to unnamed class members?

There is general agreement among lower courts that *BMS* applies where a court’s subject matter jurisdiction is based on diversity. Several courts in California, however, have held that *BMS* is inapplicable where jurisdiction is based on a federal question. These courts argue that the federal courts represent the same “federal sovereign,” not individual state sovereigns, and as a result the jurisdictional due process analysis for a federal question – which is controlled by the Fifth Amendment – does not involve the same interstate sovereignty concerns that were analyzed under the Fourteenth Amendment in *BMS*. Furthermore, courts argue that *BMS* is inapplicable where Congress has created a federal claim to address nationwide harms.

How does *Bristol-Myers* affect class actions?

Divergent opinions in the lower courts

In our last annual update, we discussed the Supreme Court’s ruling in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County (BMS)*, a 2017 decision that rejected an expansive view of specific personal jurisdiction and limited the ability of out-of-state plaintiffs to participate in mass actions. (See our 2018 handbook.)

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Other district courts, including several in the First, Sixth, and Seventh Circuits, have rejected this distinction. These courts argue that unless a federal statute permits nationwide service of process, BMS applies with equal force to a federal question case because the Federal Rules of Civil Procedure limit a district court's jurisdiction to the same reach as a state court in that district, and therefore the due process analysis is effectively the same under the Fifth and Fourteenth Amendments. Courts have also argued that it is difficult to imagine the due process analysis would be different under the Fifth versus Fourteenth Amendments; therefore, they argue, BMS applies regardless of the basis for jurisdiction.

In contrast, district courts from the Sixth and Seventh Circuits that have applied BMS to absent class members argue that BMS articulates a straightforward due process analysis that applies to all plaintiffs. Furthermore, these courts have held that the Supreme Court’s concerns about federalism in BMS suggest the Court would bar nationwide class actions in forums other than where the defendant is subject to general jurisdiction and that applying a different due process analysis to absent class members would violate the Rules Enabling Act.

The stakes are high in resolving these questions. A rule that precludes absent class members with no connection to the forum from effectively destroying nationwide class actions in jurisdictions other than where a defendant is subject to general jurisdiction. While this result could make it more difficult for plaintiffs to mount class action challenges, it could also lead to a splintered process of class actions involving the same defendant and claims being filed in multiple forums.

No federal appeals court has yet interpreted BMS’s impact on unnamed class members, but the Fifth and DC Circuits may hear cases presenting these issues this year. In the meantime, divergent rulings on BMS create the potential for forum shopping between districts that typically rule BMS applies to class actions (such as Illinois) and those that typically rule the opposite (such as California). Greater consistency in BMS’s application will be a key development to watch for as 2019 progresses.

Once a court determines that BMS’s analysis could apply to a case given the subject-matter jurisdiction, it must next determine whether BMS should apply to unnamed class members. Here too courts across the country have diverged sharply.

Courts that reject the application of BMS to unnamed class members focus on the difference between class actions and mass actions. They argue: precedent does not require the citizenship of unnamed class members to be taken into account when assessing personal jurisdiction for a class action; Rule 23 provides additional due process protections for defendants that are not present in a mass action; Rule 23 is a valid exercise of congressional authority in shaping federal court jurisdiction; and the federalism concerns in BMS are not present where a court properly exercises jurisdiction over a defendant in a nationwide class action permitted by Rule 23.
Circuit courts continued to grapple with two significant questions in 2018 when evaluating predominance under Rule 23: (1) can individual issues be certified under Rule 23(c)(4) even if a claim as a whole cannot be certified? and (2) can a class be certified that contains uninjured absent class members?

**Issue certification.** A 2018 Sixth Circuit decision furthered a circuit split regarding whether individual issues can be certified under Rule 23 even when the plaintiffs’ claim as a whole does not satisfy Rule 23’s predominance requirement. Under Rule 23(c)(4), a court can certify “particular issues” rather than an entire claim, permitting individual issues within a case to be resolved on a class-wide basis. The Sixth Circuit in *Martin v. Behr Dayton Thermal Products LLC* held that certification of certain liability-stage issues was appropriate, even where the court agreed that the liability stage of the case as a whole could not be certified under Rule 23 because common issues did not predominate.

The Sixth Circuit argued (in our view incorrectly) that this approach was appropriate because: (1) requiring predominance to be satisfied first would render Rule 23(c)(4) “superfluous”; (2) the broad view was more in line with the language of Rule 23; and (3) Rule 23's superiority requirement ensures issue certification is not abused and used for minor or insignificant issues.

The Fifth and Eleventh Circuits have endorsed a contrary view and the Third and Eighth Circuits have adopted a superiority-focused approach. The Fifth Circuit held that Rule 23(c)(4) is only a "housekeeping rule" and cannot overcome the requirement that a cause of action as a whole
whole satisfy the predominance requirement. The court also worried that analyzing predominance on individual issues would lead to “automatic certification in every case where there is a common issue,” which cannot have been the intent of Rule 23.

Uninjured class members. In his concurrence in *Tysons Foods*, Chief Justice Roberts stated that “Article II does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” Not surprisingly, then, federal courts continue to decline to certify classes that contain uninjured class members. The First Circuit discussed this issue in detail in *In re Asacol Antitrust Litigation*, where the court reversed an order certifying a class of indirect purchasers of the anti-inflammatory drug Asacol because “there are apparently thousands [of class members] who in fact suffered no injury” and the “need to identify those individuals will predominate and render an adjudication unmanageable.” The First Circuit’s opinion reinforces the importance of evaluating the number of uninjured plaintiffs and their potential impact on class certification.

The plaintiffs in *Asacol* allege the defendants violated state antitrust laws by intentionally pulling one pharmaceutical from the market and replacing it with a similar pharmaceutical whose patent protection ran years longer, thereby delaying the market entry of a competing generic pharmaceutical. The plaintiffs and defendants both introduced expert testimony to establish what percentage of customers would have switched to the generic product if it had been available. The district court found that, even according to the plaintiffs’ expert, approximately 10 percent of customers would not have switched to the generic (and thus would not have been injured). The district court certified the plaintiff class, holding that the number of potentially uninjured plaintiffs was *de minimis*, and accepted the plaintiffs’ proposal that a claims administrator could remove uninjured persons from the class at a later stage.

The First Circuit reversed. The court held that injury-in-fact was an element of each plaintiff’s case in an antitrust claim and that, because injury-in-fact could not be established by class-wide evidence, the individual determinations necessary to establish an injury for each plaintiff would predominate over common issues. The court rejected the plaintiffs’ proposal that a claims administrator could weed out uninjured plaintiffs, noting the plaintiffs presented no concrete plan for this process and that it would deprive the defendants of their constitutional right to challenge the claims of individual plaintiffs. In addition, the First Circuit found that the case would be unmanageable if the defendants were required to challenge thousands of plaintiffs at trial.

In rejecting class certification in *Asacol*, the court was clear that in any class action, the defendant must have the ability to press “genuine challenges” to allegations of injury-in-fact and the district court must ensure there is a “workable plan” to exercise this ability that protects the defendant’s constitutional rights.

Other federal appellate courts have likewise recognized that the presence of uninjured class members should defeat class certification. The Second Circuit has held that a class must be defined in such a way that anyone within it would have standing. The Third, Fifth, DC and Eighth Circuits have also declined to certify a class with uninjured members on standing or predominance grounds. The Seventh Circuit has held a class should not be certified if “a great many” members are uninjured, and the DC Circuit has held that certification is inappropriate if more than a *de minimis* number of class members were not injured. These thresholds, however, have not been explicitly defined.

*Asacol* is an important reminder that defendants should vigorously challenge classes that contain uninjured class members and of the constitutional and manageability challenges posed by such putative classes.
China Agritech and zombie cases

In June 2018, the Supreme Court issued a highly anticipated decision in China Agritech v. Resh, holding that equitable tolling under American Pipe “does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.” This decision resolved a circuit split and clarified that American Pipe tolling applies only to follow-on individual actions. (See our alert on the decision.)

American Pipe tolls the statute of limitations during the pendency of a class action until certification is denied. Following denial, absent class members can take advantage of the tolled limitations period to file their own action involving the same subject matter as the underlying case.

Some circuits previously held this tolling also applied to subsequent class actions, but the Supreme Court disagreed and found that the “efficiency and economy of litigation that support tolling of individual claims” did not support “untimely successive class actions.” The Court held that efficiency requires competing class claims to be filed as early as possible, allowing a district court to select the best named plaintiff with the full array of potential class representatives and class counsel present. This process results in the class question only being litigated once “at the outset of the case.”

The Court also emphasized that equitable tolling typically requires plaintiffs to demonstrate that they have been diligent in pursuing their claims, but a putative class representative that files a complaint only after the statute of limitations has expired could not qualify as “diligent.” In the same vein, the Court was concerned that if it expanded American Pipe to include successive class suits, the statute of limitations “could be limitless.” In comparison, the time for an individual to file a follow-on case is finite, “extended only by the time the class suit was pending.” The Court held that “[e]ndless tolling of a statute of limitations is not a result envisioned by American Pipe.”

The Court’s ruling is a significant win for defendants, eliminating the ability of plaintiffs to bring what the US Chamber of Commerce called “zombie cases.”

Lower courts since China Agritech have rejected several attempts by plaintiffs to turn the decision in their favor. For example, in one case, the plaintiffs opposed a motion to dismiss absent class members arguing that these individuals would be materially prejudiced because a class action in another jurisdiction would be time barred under China Agritech. The Court rejected this argument, holding that while the plaintiffs may be correct about the consequences, it did not override the explicit ruling of China Agritech. Likewise, another court denied a motion to intervene after finding the existing class representative was not adequate, and rejected the intervenor’s argument that absent class members would be prejudiced absent intervention because the underlying statute of limitations had expired. In both decisions, the district court emphasized that absent class members remained free to file follow-on individual actions.

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Three years after the Supreme Court’s landmark ruling in Spokeo, there is still significant disagreement among the lower courts about how the ruling should be applied. (See our alert.) While Spokeo’s core holding appears to require a concrete and particularized injury to establish standing, some lower courts have interpreted Spokeo in a way that permits standing where a plaintiff suffered no harm other than the violation of a statutory provision.

Two statutes where defendants have generally have good success dismissing cases are the Fair and Accurate Credit Transactions Act (FACTA), a statute that prohibits retailers from printing more than the last five digits of a credit card on a transaction receipt, and the Cable Communications Policy Act (CCPA), which requires cable operators to destroy personally identifiable information which is no longer needed. Cases brought under either statute have generally failed to plead that information was disclosed to a third party and as a result the courts have held that the consumer suffered no concrete harm. In the past two years the Second, Seventh, Third, and Ninth Circuits have affirmed dismissal of FACTA claims and both the Seventh and Eighth Circuits have affirmed dismissal of CCPA claims.

Circuit courts have been more mixed in their handling of claims under the Telephone Consumer Protection Act (TCPA) and Video Privacy Protection Act (VPPA), the latter of which prohibits “[a] video tape service provider [from] knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider.” The Third, Ninth, and Eleventh Circuits have found a concrete harm under the TCPA where, for example, a plaintiff suffered wasted time and expense receiving unwanted calls and faxes, or under the VPPA because protected information was disclosed to third parties, even if there is no other showing of a concrete harm.

Standing after Spokeo: the lower courts still disagree
One Ninth Circuit opinion argued the right to privacy under the VPPA was “a substantive right . . . that suffers any time a video service provider discloses otherwise private information.” (Emphasis in original.) These rulings appear at odds with Spokeo’s directive that a plaintiff demonstrate a “real” and not “abstract” injury. In contrast, the Eighth Circuit found no standing in a TCPA case where the fax sender allegedly failed to include an opt-out notice, holding that the plaintiff suffered no actual harm where it did not object to receiving the fax in the first place.

Cases involving the Fair Credit Reporting Act (FCRA), the statute at issue in Spokeo, demonstrate the same inconsistencies in Spokeo’s application. Decisions from the Third, Fourth, and Seventh Circuits found no harm sufficient to confer standing where a consumer was able to exercise his or her rights under the FCRA despite alleged inaccurate or incomplete information in a credit report, or where alleged incomplete consumer disclosures resulted only in “a statutory violation completely removed from any concrete harm or appreciable risk of harm.” In contrast, the Third, Seventh, Ninth, and DC Circuits found standing in situations where the plaintiff arguably suffered no actual injury, such as where a defendant allegedly failed to provide the consumer with a copy of a credit report, disclosed personal information without authorization, or failed to provide required consumer disclosures. The lack of consensus demonstrates the difficulty circuit courts continue to experience when determining what counts as a concrete injury.

New cases also continue to test the boundaries of what can be a concrete injury. In December 2018, a district court in Illinois dismissed a lawsuit alleging that Google violated the Illinois Biometric Information Privacy Act (BIPA) by creating and storing “face templates” based on pictures uploaded to Google Photos. The plaintiffs alleged they never gave consent for Google to create and use face templates. The court, however, held that mere retention of private information, on its own, is not a concrete injury and the plaintiffs testified that they did not suffer any physical, financial, or emotional injury as a result of Google’s alleged conduct. But on January 25, 2019, the Illinois Supreme Court held that a violation of BIPA on its own, without additional evidence of harm, is sufficient to allege a claim. The ruling is not binding on a federal court interpreting federal standing law, but the decision may lead plaintiffs to file more BIPA cases in state court in an attempt to escape the standing question.

Data breach cases are another evolving area of law for Article III standing. These cases require an analysis of both Spokeo and the Supreme Court’s holding in \textit{Clapper v. Amnesty International USA}, which held that standing was proper where a future injury is “certainly impending” or there is a “substantial risk” harm will occur.

Courts in data breach cases diverge on the question of whether a plaintiff can demonstrate standing where stolen information has not been used and there is only the risk of future identity theft. The Supreme Court has never ruled directly on this issue and many had hoped that it would have the opportunity to do so in the \textit{Zappos} data breach case. In 2018, the Ninth Circuit held that a plaintiff class comprised of Zappos.com customers whose information was disclosed in a data breach had pled standing despite the fact the class members’ stolen information had not been used. The defendant filed a petition of \textit{certiorari} which presented the issue, but on March 26, 2019, the Supreme Court denied cert.

Many were also hopeful that the Supreme Court would clarify Spokeo in its review of \textit{Frank v. Gaos}. That case involved the propriety of \textit{cy pres} relief but, during oral argument, the Supreme Court surprised counsel by asking whether the plaintiff had sufficient Article III standing to bring the case at all. Justices John Roberts, Elena Kagan, Neil Gorsuch, Stephen G. Breyer, and Samuel A. Alito appeared to question whether standing existed, and the Court later requested supplemental briefing on the issue. On March 20, 2019, the Supreme Court vacated and remanded the case to the Ninth Circuit to decide the standing issues “[b]ecause there remain substantial questions about whether any of the named plaintiffs has standing to sue in light of our decision in \textit{Spokeo, Inc. v. Robins}, 578 U. S. ___ . . . .”

\textbf{One final strategy note:} In the wake of Spokeo, defendants frequently have removed cases from state to federal court with the intention of then moving to dismiss for lack of Article III standing. One court, however, sanctioned a defendant for removing to a federal court and then arguing that the federal court lacked jurisdiction. Such removal could remain appropriate, however, where, for example, one is removing to then transfer the action to a related case in another federal court.
Halliburton II: class certification and the price of securities

In 2014, the Supreme Court, in Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II), allowed securities fraud defendants to oppose a motion for class certification even if a security is traded in an efficient market by rebutting the fraud-on-the-market presumption of reliance of Basic v. Levinson. This may be done by showing that defendants’ alleged false or misleading statements did not impact the price of the security. If so, the link between the misrepresentations and the price is severed; even if investors purchasing a security relied on a price set by an efficient market, they did not do so in reliance on the misrepresentations.

Some Halliburton II, challenges have failed, but five cases in the last 15 months provide guidance on how they might succeed.

The first case, from November 2017, Waggoner v. Barclays PLC, supported plaintiffs in allowing at the class certification stage a theory known as “price maintenance.” This theory allows a misrepresentation to have price impact even if a stock price does not increase by a statistically significant amount when a misrepresentation is made, provided that a certain set of conditions exist – usually, as in Waggoner, where the price already was inflated above its “true” value because the market had a false understanding of key facts about the issuer, the misrepresentation affirmed those facts, and the price later declined by a statistically significant amount after the market learned that the truth was contrary to what defendants had represented.

Waggoner, however, also held that the ultimate standard on price impact is the preponderance of the evidence. This holding reinforces a point in Basic v. Levinson and Halliburton II: defendants may present at class certification any evidence that severs the link between the alleged misrepresentation and the market price, even if that evidence might also be relevant to a defense on the merits (such as truth-on-the-market) or an element of a claim (such as loss causation).
Two recent district courts recognized this right in denying class certification. Ohio Public Employee Retirement System v. Federal Home Loan Mortg. Corp. reasoned that the question of whether “the alleged misrepresentation did not actually affect the market price of the stock is a question of fact, to be judged based on all the evidence.”

In Grae v. Corrections Corp., rebutted price impact by showing that the stock price had not reacted when the facts about a private prison company’s practices were disclosed in a scathing government report. The court rejected the plaintiffs’ argument that it was improper to consider at the certification stage whether the report (and a later government decree which did cause a price decline) was a “corrective disclosure” because that is an issue reserved for loss causation, reasoning: “It is difficult to imagine how one could perform a price impact analysis in a price maintenance case without considering the threshold issue of whether the relevant event or disclosure was, in fact, corrective of the alleged fraud.”

On remand, the district court again certified the class. It decided that the class period disclosures of conflicts did not contain the details of the adverse information disclosed at the end of the class period sufficient to sever the link under Basic.

However, on December 11, 2018, in Goldman Sachs Group, Inc. v. Arkansas Teachers Retirement Sys., the Second Circuit granted defendants’ Rule 23(f) petition, brought on two principal grounds: the price maintenance theory cannot be stretched to allow price impact based on the routine, generalized statements about business practices and conflict controls at issue in the case; and the district court did not consider the evidence as to whether the adverse disclosures at the end of the class period revealed the falsity of the earlier challenged statements and caused the stock price declines.

Finally, in In re Finisar Corp. Securities Litigation, in which DLA Piper represents defendants, class certification was denied for lack of price impact. In December 2017, the court found that the alleged misrepresentation did not cause the stock price to increase by a statistically significant amount when made, and that the price maintenance theory did not apply because the complaint did not allege that the stock price had been inflated prior to the misrepresentation. The court also held that favorable analyst reports issued after the misrepresentation constituted new information that severed the link under Basic. On May 24, 2019, the court denied plaintiff’s renewed certification motion, as it did not present any evidence that could not have been presented earlier and on the same grounds found in the prior order, on which the court elaborated.
State court Securities Act class actions: the “Paranoid Theory of Legislation”

The cases discussed above involve federal law claims because securities class action litigation is exclusively a matter of federal law. This is a product of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which was enacted in response to the Private Securities Litigation Reform Act of 1995 and which precludes securities fraud-like claims from being brought as class actions under state law.

In 2018, in a unanimous Supreme Court rejected an attempt to extend SLUSA past its state law proscription. Cyan, Inc. v. Beaver County Employees Retirement Fund rejected the defendants’ argument that SLUSA removed the jurisdiction of state courts to adjudicate class actions asserting claims under the federal Securities Act of 1933.

Cyan is an end, not a beginning; it is not likely to have an impact.

Cyan tried to construe a poorly drafted statute. SLUSA added Section 16(b) to the Securities Act, which “completely disallows (in both state and federal courts) sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security’s purchase or sale.” SLUSA also added two “conforming amendments” to the jurisdictional section of the Securities Act, Section 22(a), including an “except clause” that cross-references Section 16(b) and “expresses a caveat to the general rule ... that state and federal courts have concurrent jurisdiction over all claims to enforce the 1933 Act.”

The Court found, for a variety of reasons, that the “except clause” did not eliminate state court jurisdiction over class actions brought under the federal Securities Act statute. (State courts never had jurisdiction over any securities fraud claims brought under the federal Securities and Exchange Act.) In so doing, the Court introduced a new concept one might call the Paranoid Theory of Legislation.

The Cyan defendants’ best argument was that it was not necessary for Congress to amend Section 22(a) at all if SLUSA was limited to eliminating state law class actions; that already had been accomplished in Section 16(b), and hence the except clause would be superfluous unless it addressed (and eliminated) state court jurisdiction over federal law claims.

The Court agreed this was “an indubitable puzzle,” akin to a parent telling her child “you may have fruit after dinner, except for lollipops.” The plaintiffs opined that Congress meant to deal with class actions containing both Securities Act and state law claims, but the Court replied: “Truth be told, we are not sure whether Congress had that issue in mind.” The Court instead speculated that Congress was worried that a mistaken state court judge would miss the obvious and keep state law claims in a class action case rather than dismiss those claims as required by SLUSA because Securities Act claims also were in the case. More likely, the Court continued, Congress could have enacted the except clause as the ultimate fail-safe device, designed to safeguard the Section 16(b) state law class action bar come whatever might. After all, Congress has been known to legislate in a hyper-vigilant way even about matters not particularly doubtful, and if there ever was a time to be hyper-vigilant it was in SLUSA, because the impetus behind its enactment had been the plaintiff bar’s success in bypassing the Reform Act.

Cyan is an end, not a beginning; it is not likely to have an impact. Cyan did not change the law as it had existed from 1933 to 1998; as the Court explained, the except clause was an unlikely candidate to upend the state court jurisdiction that had existed from the beginning of the Securities Act, a radical change that would be “the very opposite of a minor tweak” when Congress does not “hide elephants in mouseholes.” (Or, in the words of the fictional Lt. Aldo Raine: “Long story short, we hear a story too good to be true, it ain’t.”) Cyan also did not change post-1998 SLUSA law in most jurisdictions: California state courts and the Northern District of California (where many IPOs have been challenged) were on the plaintiffs’ side, and only a few judges had ruled otherwise. And it is unlikely, at least today, that Congress will return to this issue and legislate Securities Act class actions out of state court.
Amendments to Rule 23 – improved notice and settlement procedures

In 2018, there were five significant amendments to Rule 23, which:

1. permit notice of class certification or proposed class settlement by e-mail or other electronic means
2. establish criteria to grant preliminary approval of class settlements
3. standardize the criteria to grant final approval of class settlements
4. change the procedure for making and resolving settlement objections to reduce meritless or vexatious objections and
5. clarify that interlocutory appeals under Rule 23(f) are not available for preliminary settlement approval orders.

First, the amendments expand the method of providing notice to class members beyond traditional US mail and state that “notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.”

This is a positive development. E-mail and text messages, either individually or in combination, are often as (or more) effective and less expensive than US mail for providing notice.

Second, the amendments establish for the first time a uniform standard for granting preliminary approval to class action settlements. To obtain preliminary approval under the new rule, parties must provide the court with “sufficient” information to demonstrate that it is “likely” the court will be able to (1) approve the proposed settlement under the newly-amended standards for final approval, and (2) certify the class for purposes of the settlement.

This welcome clarification should help courts and parties in evaluating preliminary settlement submissions.

Third, the amended rule standardizes the elements a court should consider when evaluating whether a settlement is “fair, reasonable, and adequate,” and granting final settlement approval. The new amendments establish four “core” issues that a court must evaluate before granting final approval: (1) the class representatives and class counsel have adequately represented the class; (2) the proposal was negotiated at arm’s length; (3) the relief provided for the class is adequate; and (4) the proposal treats class members equitably relative to each other.

Fourth, the amendments aim to combat meritless objections to class settlement by prohibiting any “payment or other consideration” to anyone in connection with “forgoing or withdrawing an objection” or “forgoing, dismissing, or abandoning an appeal from a judgment approving the [settlement],” unless the court approves the payment after a hearing. The amendments also eliminate the current requirement for court approval to withdraw an objection. This is another positive change that should reduce the proliferation of “professional objectors.”

Finally, the amendments specify that an interlocutory appeal of a class certification ruling under Rule 23(f) cannot be taken from an order granting or denying preliminary approval of a class settlement. Any request for an appeal under Rule 23(f) must wait for an order granting or denying class certification.

As a whole, the amendments both modernize and streamline current procedures, and we believe the amendments will be a positive change.
The Supreme Court unanimously held that the 14-day deadline to petition a circuit court for interlocutory appeal of a class certification decision under Rule 23(f) could not be equitably tolled. In Nutraceutical Corp. v. Lambert, the district court granted a motion to decertify, and 10 days after the decertification order (but within the 14 days to appeal under Rule 23(f)), the plaintiff informed the court at a status conference that he intended to file a motion for reconsideration. The court told the plaintiff to file the motion within 10 days, which would be 20 days after the decertification order. Within the 10 days, the plaintiff filed his motion, which the court denied, and the plaintiff then appealed under Rule 23(f). The Ninth Circuit found that the petition seeking an appeal was timely because the plaintiff had requested permission to file a motion to reconsider within the 14-day period under Rule 23(f), even if the motion itself was not filed until 20 days after the decertification order.

The Supreme Court reversed, holding that while Rule 23(f) is "nonjurisdictional," it is a "mandatory" claim-processing rule and therefore not subject to equitable tolling. The Court explained that nonjurisdictional rules can be waived or forfeited by an opposing party, but where a claim-processing rule is mandatory and enforced by an opposing party, the court cannot waive the deadline because a party has "been diligent, reasonably mistaken, or otherwise deserving." Whether a rule is mandatory depends on the text of the rule. Here, the Supreme Court focused on Fed. R. App. P. 26(b), which states that a court of appeals "may not extend the time to file . . . a petition for permission to appeal." Because Rule 23(f) permits just such a petition, the Court concluded that the "Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist."

The takeaway is that any party considering an interlocutory appeal under Rule 23(f) must ensure that it files its petition seeking permission to appeal with the appeals court within 14 days of the entry of the class certification order.
Supreme Court holds counterclaim defendants cannot remove class actions to federal court under CAFA

In *Home Depot USA v. Jackson*, the Supreme Court held that a counterclaim defendant cannot remove a case to federal court under either the federal removal statute (28 USC 1441(a)), or the Class Action Fairness Act (CAFA) (28 USC 1453(b)).

In *Home Depot*, Citibank originally sued George Jackson in state court to collect a debt arising out of a purchase Jackson made on a Home Depot credit card. Jackson denied Citibank's allegations and filed third-party class action claims against Home Depot and Carolina Water Systems for inducing homeowners to buy water treatment systems at inflated prices. Citibank then withdrew its claim against Jackson, leaving Home Depot, Carolina Water Systems, and Jackson (as the counterclaim plaintiff) as the only remaining parties. Home Depot attempted to remove the case to federal court, but the Supreme Court affirmed the decisions of the district court and Fourth Circuit in remanding the case to state court.

The Supreme Court held that a counterclaim defendant can never qualify as a “defendant” entitled to remove a case under the federal removal statute. The Court noted that the federal statute permits only the removal of “civil actions,” and when evaluating whether a federal court has original jurisdiction over a civil action, the court must examine the parties as set forth in the plaintiff’s complaint. A “defendant” under the statute is therefore only the named defendant(s) in a plaintiff’s complaint, not a counterclaim defendant added to the case at a later date.

The Court further held that this conclusion was not affected by CAFA’s language permitting removal by “any defendant” to a “class action.” The Court held that CAFA “did not expand the types of parties eligible to remove a class action” beyond those permitted in the federal removal statute. Rather, the provisions of CAFA that use “any defendant” only eliminate certain procedural limitations to removal in the class action context. For example, CAFA eliminates the restriction that removal is improper if “any defendant” is a citizen of the state in which the action is brought, and permits “any defendant” to remove a class action without obtaining the consent of all defendants as is required in a non-class action case.

A lengthy dissent from four justices argued that denying removal in this situation would permit defendants to use the removal statute as a “tactic” to keep class actions in state court. The majority was unpersuaded, and held that if any abuse exists, it is the role of Congress and not the courts to amend the statute. For the time being, the Court’s opinion forecloses the ability of counterclaim defendants to seek removal of class actions – or any action – to federal court.

CAFA eliminates the restriction that removal is improper if “any defendant” is a citizen of the state in which the action is brought, and permits “any defendant” to remove a class action without obtaining the consent of all defendants as is required in a non-class action case.
Class action litigation is no longer solely a domestic affair. Indeed, the proliferation of class action and collective redress procedures around the globe has given rise to “global class actions.”

A “global class action” may take several forms. It may be a set of parallel class or collective actions, premised on the same facts, but adjudicated in more than one jurisdiction. Or it may refer to aggregate litigation in a single jurisdiction which includes claimants from foreign jurisdictions.

In 2018 and early 2019, global class actions and collective redress proceedings continued to spread at a rapid pace. Many jurisdictions have either enacted or plan to enact collective redress procedures – some similar to US-style class actions, and some distinct.

Since our last annual update, the European Union has approved rules to harmonize collective redress procedures across its member states, to allow consumers in the EU to join forces in cross-border litigation. The rise of global class actions adds to the already considerable challenges faced by transnational business operations. As foreign jurisdictions continue to develop new class action or collective redress procedures, we see at least three specific areas that warrant attention.

First, procedure is power. Companies must be keenly aware of and concerned with the particular class action and collective redress procedures in each jurisdiction where they do business or where their products are sold. Such procedures vary widely from jurisdiction to jurisdiction in terms of who has standing to sue, the allowable scope of suit, available remedies, and whether plaintiffs are required to opt-in or may opt-out of proposed litigation.
For example, in the United States, a class action will be maintained only if “the class is so numerous that joinder of all members is impracticable.” Numerosity is not required in many jurisdictions that have adopted collective redress procedures. Also, many jurisdictions do not permit a collective action on behalf of unnamed plaintiffs, whereas the presence of unnamed class members is a core feature of US class action procedure.

These procedural differences, and differences like them, impact the types of suits companies may face and whether a judgment in one forum may be given preclusive effect in another. In a remarkable opinion in the Southern District of New York, the district court analyzed the availability of claim aggregation procedures in the United Kingdom, France, Germany, Austria, and the Netherlands. It did so for two reasons. First, pursuant to Rule 23, the court needed to assess whether or not maintaining a US class action with foreign claimants was the “superior” method of redressing plaintiffs’ claims. Second, the court wanted to ensure that its judgment would be given preclusive effect in the foreign jurisdictions at issue. If the procedure employed in the US action was either at odds with the foreign law or contrary to international “public policy,” the court rightly feared its judgment would carry no weight in those jurisdictions. Ultimately, the court concluded that the US action would be “recognized and enforced in” France, the United Kingdom, and the Netherlands. But the court’s judgment would not be enforced in Germany or Austria. As this case demonstrates, foreign procedure may be analyzed in a domestic class action not only for the purpose of certifying a class, but to determine the enforceability of judgments abroad.

Second, parties to global class actions must be concerned with the availability and cost of discovery. As Justice Stephen G. Breyer put it, “discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle” disputes. This is especially true in global class action litigation, where discovery is increasingly not cabined by geographic boundaries as plaintiffs routinely utilize the discovery procedures either ratified by the Hague Evidence Convention, or permitted by 28 U.S.C. § 1782.

Understanding the scope of potential discovery obligations is critical to developing a successful strategy to pursue and defend litigation. Transnational discovery implicates many other considerations, including the privilege rules of the nations and the data privacy laws of those nations (including but not limited to the EU’s recently-implemented General Data Protection Regulation, or GDPR). Companies involved in such matters should be aware of the procedures and obligations in each relevant jurisdiction, and should consider involving counsel who can appropriately safeguard protected data.

Third, to assess properly the risk of litigation, parties to a global class action must understand how litigation may be financed in jurisdictions around the world. Third-party litigation finance companies are already active in many jurisdictions – particularly, but not exclusively, those jurisdictions where plaintiffs’ lawyers are not permitted to finance collective or class litigation themselves.

Under the “American rule,” absent a statute or private agreement to the contrary, each party bears its own costs, regardless of the outcome. Conversely, however, most other jurisdictions now employing class or collective action procedures provide no mechanism for sharing costs among class members, and they require fee shifting based on outcome. In fact, in some jurisdictions, a class representative must post a security bond against adverse costs. For this reason, rules related to litigation financing could greatly increase the risk of litigation and impact the preferred fora in which actions may be litigated.

There are some who believe that the class action mechanism is dying a slow death. Among their ranks is Justice Elena Kagan, who recently wrote that “to a hammer everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action ready to be dismantled.”

But even if Justice Kagan is correct, and the usefulness of Rule 23 is slowly diminishing, the explosion of foreign class or collective action procedures has affirmed that aggregate litigation will remain a part of the global legal landscape for the foreseeable future. Indeed, a recent decision in the UK permitted a £14 billion collective action to proceed against MasterCard, creating a procedural roadmap that may spur additional collective actions.
About our Class Action practice

Class action lawsuits are filed with increasing frequency in today's business world. The class action device allows plaintiffs' lawyers to file complaints that claim to redress a supposed wrong on behalf of groups of aggrieved investors, shareholders or consumers. Everything from a natural disaster to a company merger to an everyday event like an advertisement for a new consumer product may serve as the trigger. These cases may involve thousands, even millions of putative plaintiffs in numerous jurisdictions within the US and even globally – seeking millions or billions of dollars in damages or injunctive relief that may strike at the heart of your company's business.

As your business defends itself against these lawsuits, you may find yourself simultaneously managing curious regulators and aggressive legislators, in addition to the plaintiffs' lawyers. In this high-stakes atmosphere, DLA Piper's class action defense lawyers can help.

We are proud that we have more than 100 class action litigators throughout the US who regularly defend many of the world's leading corporations against putative class actions in state and federal courts nationwide. Our clients depend on us to anticipate emerging threats, develop effective strategies that respond to the nuances of a particular suit, defeat claims at an early stage through strategic motions to dismiss, craft a narrow focus for discovery where possible to control costs, act to prevent class certification by pre-emptive motions to deny class certification or otherwise, employ Daubert motions to block or limit testimony, craft economical settlements when necessary, or defeat the case at trial. We also consult with our clients proactively to identify and mitigate potential class action risks, including drafting arbitration or class action waiver provisions and advising on business issues before litigation occurs.

Because class actions often require multi-faceted defense strategies, we work with our colleagues who are former Assistant US Attorneys and regulators and our esteemed Government Affairs partners to coordinate and manage concurrent regulatory, law enforcement, and Congressional investigations. Leveraging our global platform, we also work closely with our colleagues in the many other jurisdictions where class actions and collective redress are taking root, among them Canada, the United Kingdom, the European Union, and Australia, when there are parallel or threatened class or collective actions overseas. Finally, we maintain close relationships with top subject matter experts in a variety of substantive fields.

Our clients include global corporations in virtually every industry sector, and we have significant experience defending clients in class action litigations alleging many diverse types of claims, including consumer protection, unfair competition, false advertising, antitrust, RICO, securities, employment, insurance, banking and financial services, technology, and privacy. Our robust experience also extends to the many statutory claims around which class actions often revolve, involving such legislation as the Fair and Accurate Credit Transactions Act, the Telephone Consumer Protection Act, the Electronic Funds Transfer Act, the Fair Debt Collection Practices Act, California's Unfair Competition Law and Consumers Legal Remedies Act, the Children's Online Privacy Protection Rule (COPPA), the Song-Beverly Credit Card Act, and state health services statutes.

Our class action lawyers have been named among the world's most prestigious by such respected lawyer-ranking publications as Chambers USA and The American Lawyer.