

# Assessing an Action-Packed Year in Class Action Law

Court decisions this year will affect the viability and settlement of nationwide class actions, TCPA cases, statutory damages class actions, removal of securities class actions and more

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This year has seen significant developments in the field of class action litigation. Last year's *Bristol-Myers* decision has created a growing split as to the viability of a large number of nationwide class actions. The D.C. Circuit issued its long-awaited decision in the *ACA International* case, significantly altering the landscape for Telephone Consumer Protection Act litigation. *Spokeo's* impact on standing challenges continues to wind its way through courts across the country. The U.S. Supreme Court and appellate courts have also issued significant decisions on related topics, including the judicial approval of nationwide class action settlements, the tolling of statutes of limitations during the pendency of class actions, and state court jurisdiction over securities class actions. This article highlights at a high level the year's most noteworthy developments in this field and offers insights for their likely impact for litigants and practitioners.

## Split on 'Bristol-Myers'

In 2017, the U.S. Supreme Court held in *Bristol-Myers Squibb v. Superior Court* that a California court



lacked jurisdiction over the claims of nonresidents where *Bristol-Myers* was not a "citizen" of California and the nonresident claims lacked any connection to California. Since *Bristol-Myers* was decided, defendants have argued that the decision should similarly bar nationwide or multistate class actions where the defendant is not subject to general jurisdiction. District courts have diverged on this question, and the split has only continued to deepen over the past year as additional decisions have come out. This issue will surely continue to work its way through the federal

courts of appeals in the coming year, and could potentially have a major impact on the continued viability of nationwide and multistate class actions.

### **TCPA Cases**

In March, the U.S. Court of Appeals for the D.C. Circuit released its long-awaited *ACA International v. Federal Communications Commission* decision, which reviewed the validity of a 2015 FCC order that had broadly interpreted the statutory language of the TCPA.

The decision set aside the FCC's interpretation of "automatic telephone dialing systems," including rejecting the interpretation that they included all equipment with the potential capacity (not just present capacity) to perform certain statutorily specified functions, reasoning in part that such a broad interpretation would cover everyday devices like personal smartphones. The decision also set aside the FCC's one-call safe harbor, under which a caller may contact the reassigned number of a previously consenting party one time without violating the TCPA, because the FCC could not justify a one-call limit that may or may not give the caller notice that a number was reassigned. The D.C. Circuit upheld the FCC's rule that a called party may revoke consent at any time through any reasonable means, orally or in writing, that clearly expresses a desire not to receive further messages. The decision also upheld the exemption of certain nontelemarketing health care calls from the TCPA's general ban.

The *ACA International* decision has already impacted numerous cases and opened the door for further interpretive issues, including before the FCC, which has sought and received comment on the impact of the decision. In particular, a consensus has begun to emerge among the courts of appeal that *ACA International* vacated the FCC's interpretation of dialing systems, but the courts have differed thus far in their interpretations of the statutory definition. In addition, courts and the FCC are considering whether

and to what extent individuals can revoke consent to receive communications when that consent was given in a bilateral contract.

### **Grappling With 'Spokeo'**

Since the Supreme Court issued its decision in *Spokeo v. Robins*—holding that plaintiffs asserting claims based on statutory violations must nonetheless satisfy Article III's "concrete injury" requirement—district and circuit courts across the country have grappled with the decision's impact on class actions arising under various statutes.

Over the past year, courts have continued to find a lack of Article III standing for certain Fair and Accurate Credit Transactions Act violations that were not shown to increase the risk of identity theft. For instance, in February the Ninth Circuit joined the Second and Seventh circuits in holding that failing to truncate credit card expiration dates on receipts by itself does not give rise to Article III standing. The Ninth Circuit similarly held in March that taxi companies' alleged printing and distributing credit card receipts containing the first digit and final four digits of a consumer's credit card number was not a harm sufficient to give consumers Article III standing.

On the other hand, this year's case decisions generally have continued to find injuries in fact for violations involving invasion of privacy under the TCPA, even without a showing of tangible harm. Recent decisions have also continued the trend of finding standing where personal information was improperly disclosed in violation of a privacy statute. This last area is likely to develop further in the coming year with the rise of data breach litigation.

Also of note this year is a Seventh Circuit opinion holding that the existence of Article III standing is a prerequisite for removal to federal court, and thus, where a case is removed and the court finds that the plaintiff lacks standing, the proper course is remand to state court rather than dismissal for lack of subject-matter jurisdiction.

## Nationwide Settlement Rejection

Under Ninth Circuit precedent, material differences in state law can overwhelm common issues and preclude predominance for a single nationwide class. In *In re Hyundai and Kia Fuel Economy Litigation*, a three-judge panel of the Ninth Circuit applied this precedent in vacating a nationwide settlement, holding that the district court failed to undertake the required predominance analysis in granting settlement approval. The panel's decision thus injects additional complexity into settlement negotiations and increases the burden on parties and courts in analyzing requests for approval of nationwide settlements.

Subsequent decisions indicate that approval of nationwide settlements remains possible. In July, for example, the Ninth Circuit affirmed the \$10 billion settlement in the Volkswagen "Clean Diesel" litigation, noting that, unlike in *Hyundai*, the district court had provided a thorough predominance analysis. Notably, the Ninth Circuit has agreed to rehear the *Hyundai* decision en banc. Oral argument occurred in September and the court's decision was pending at press time.

## Tolling Individual Claims

Under *American Pipe and Construction v. Utah*, the pendency of a class action was held to toll the statute of limitations for class members' claims that could be separately asserted. On June 11, the U.S. Supreme Court clarified in *China Agritech v. Resh* that the *American Pipe* doctrine does not extend to successive class actions. In *China Agritech*, shareholders filed a putative class action alleging securities fraud. The named plaintiffs had been absent members of two nearly identical putative class actions where

class certification was denied. Under *China Agritech*, putative class members hoping to file their own class action after the limitations period are out of luck.

## State Court Jurisdiction

Based on the Supreme Court's decision in *Cyan v. Beaver County Employees Retirement Fund*, issuer defendants, such as newly public companies, will likely have to defend themselves in state court against class action suits brought under the Securities Act of 1933. In addition to holding that state courts have jurisdiction over class actions alleging violations of only the Securities Act, the court further held that the Securities Litigation Uniform Standards Act of 1998 prohibits defendants from removing such cases to federal court. Subsequent district court decisions have clarified, however, that the act's anti-removal provision do not bar defendants from removing cases under other statutes, such as the Class Action Fairness Act.

The developments discussed here are wide-ranging in their impact, affecting the viability and settlement of nationwide class actions, TCPA cases, statutory damages class actions, removal of securities class actions, and more. In the next year, district and circuit courts will continue to grapple with these topics. The Supreme Court also recently granted review of a case involving removal under the Class Action Fairness Act. In short, the next year promises to deliver additional significant developments in the field of class action litigation.

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