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GREATER PHILADELPHIA

"We Got Sued Over *WHAT?!*"

Recognizing and Reducing Your Class Action Risks

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April 24, 2019 In-House Counsel Conference

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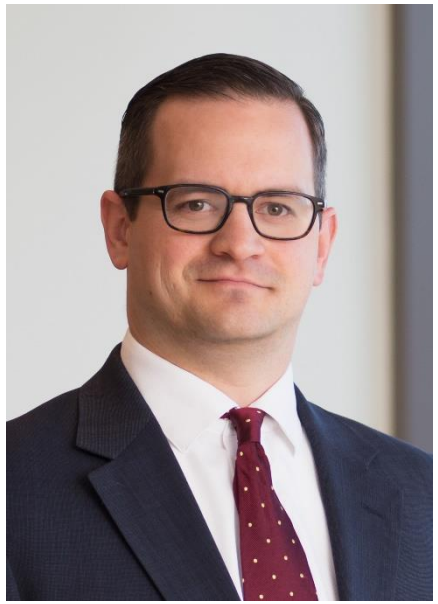

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ACC Association of Corporate Counsel
GREATER PHILADELPHIA

A (BRIEF) HISTORY OF THE "GOTCHA" CLASS ACTION

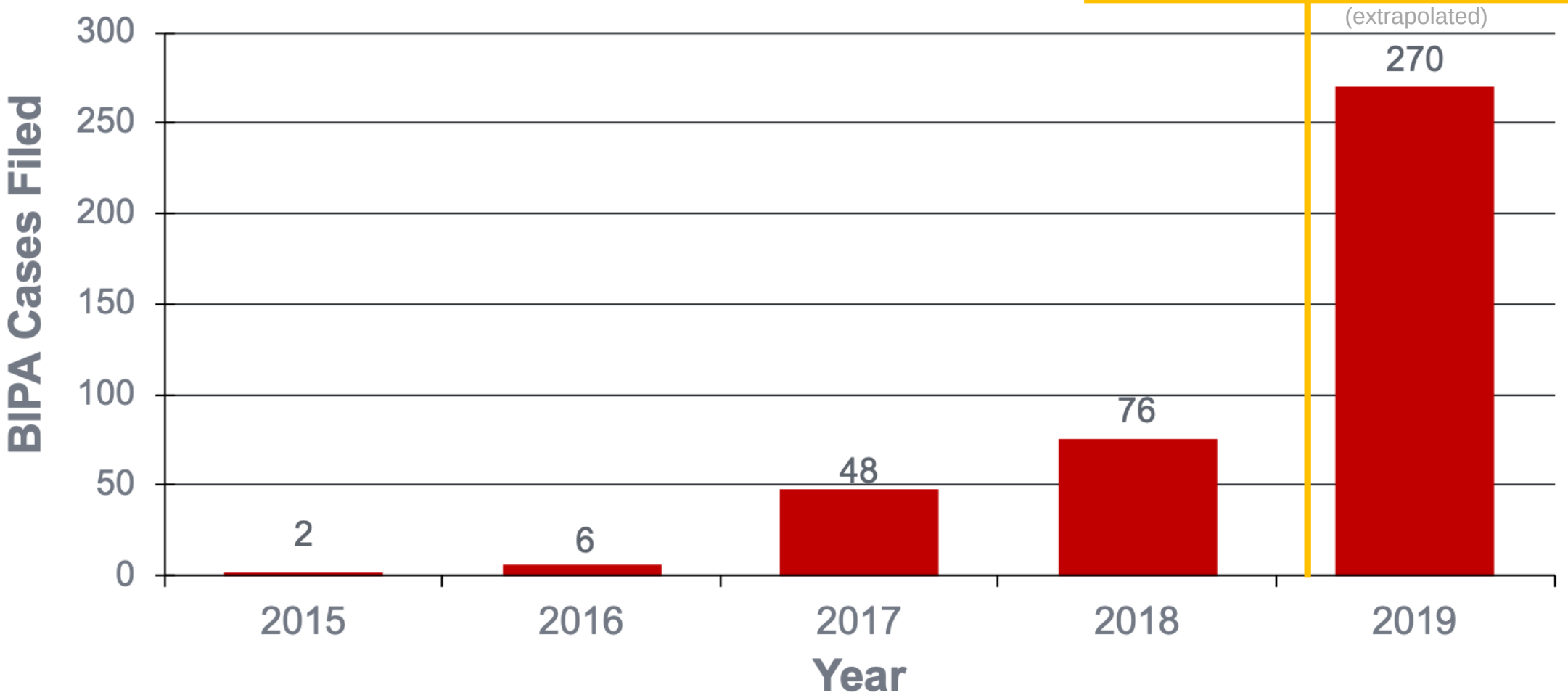
Philadelphia Is A Magnet Jurisdiction

Class Actions Filed 2018

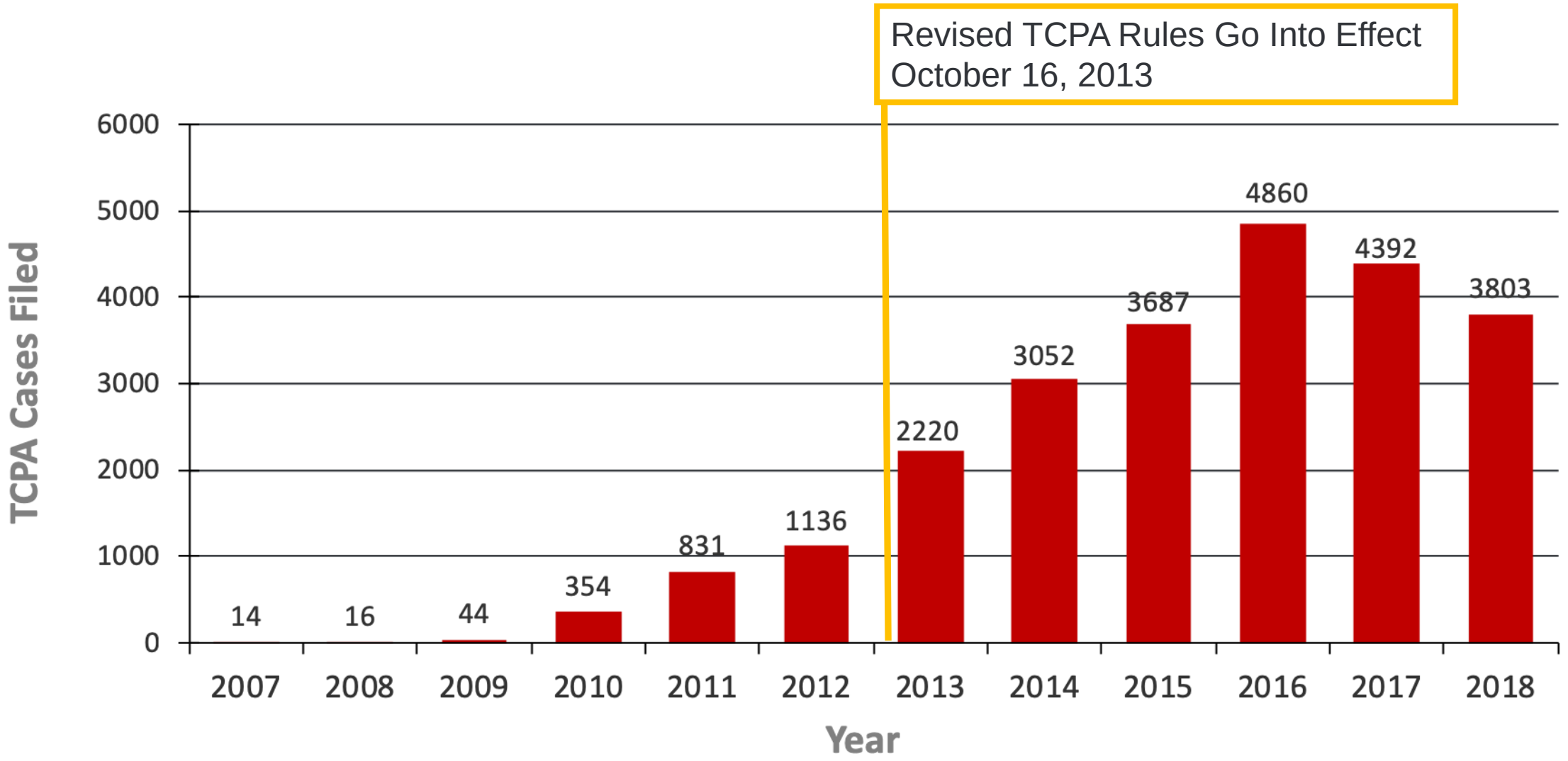
S.D. New York	**2,182**
E.D. New York	**1,401**
C.D. California	**770**
N.D. California	**545**
S.D. Florida	**537**
D. New Jersey	**420**
N.D. Illinois	**409**
M.D. Florida	**319**
S.D. California	**204**
E.D. Pennsylvania	**201**

Cases Are Being Filed Early . . .

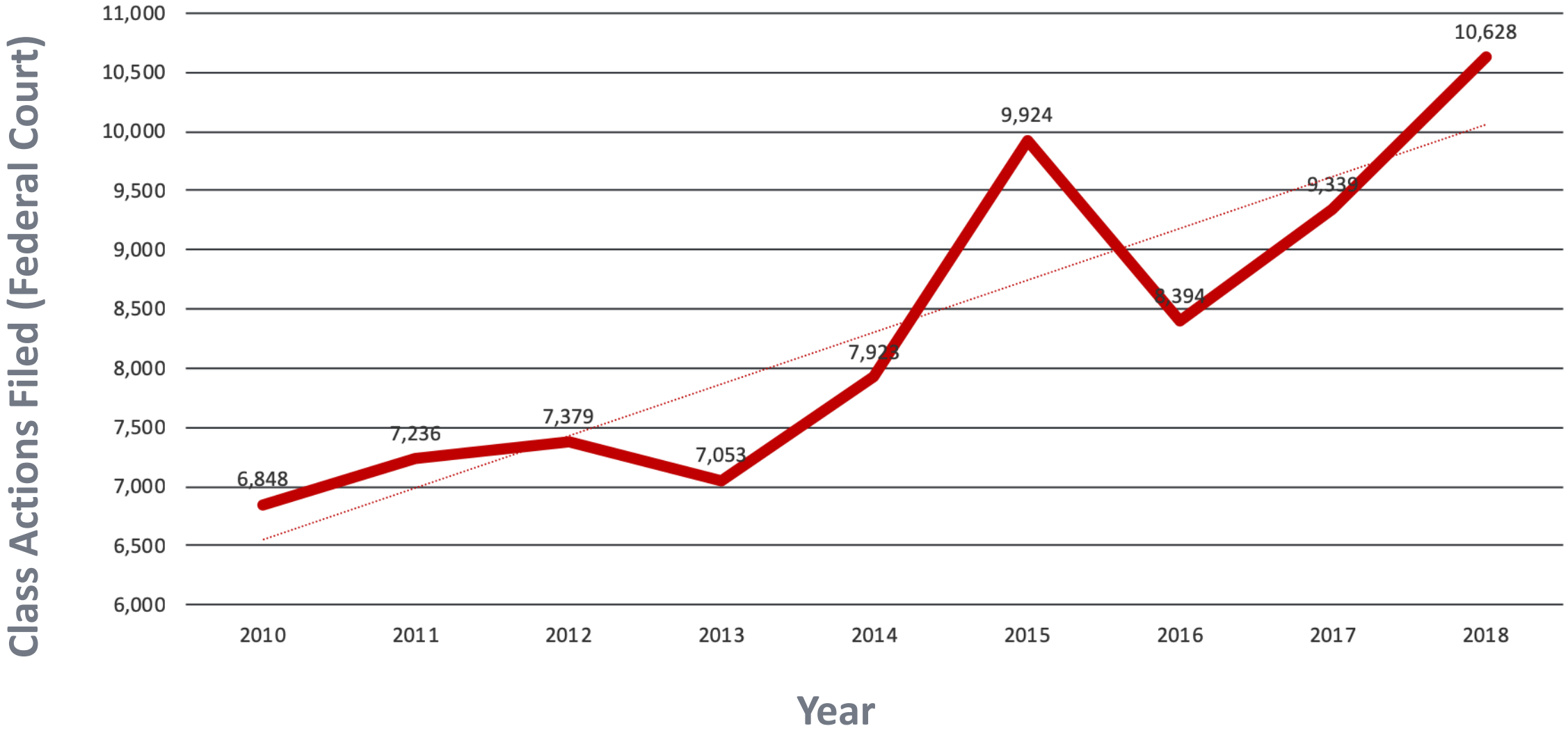
Rosenbach v. Six Flags Entm't Corp. (Ill. Jan. 25, 2019)



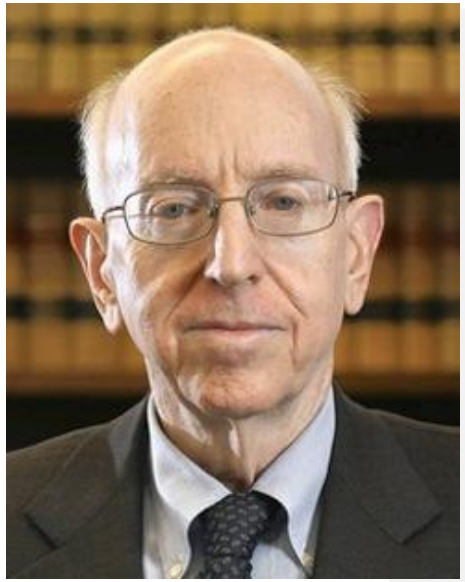
Cases Are Being Filed Early . . . (cont.)



. . . And Often


Class Actions Filed (Federal Court)
11,000
10,500
10,000
9,500
9,000
8,500
8,000
7,500
7,000
6,500
6,000
6,848
7,236
7,379
7,053
7,923
9,924
8,394
9,339
10,628
2010
2011
2012
2013
2014
2015
2016
2017
2018
Year

Plaintiffs Are . . . Tactical



> The cost of discovery to a defendant has become in many cases astronomical. . . . If no similar costs are borne by the plaintiff . . ., the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.

Plaintiffs Are . . . Tactical (cont.)

> Even in the mine-run case, a class action can result in potentially ruinous liability. A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims.

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that [it] may find it economically prudent to settle and to abandon a meritorious defense.

Plaintiffs Are . . . Adaptable

2005

CAFA
"The district courts shall have … jurisdiction" if "the matter in controversy exceeds … $5,000,000 … and is a class action…"

2007

Bell Atlantic v. Twombly
Allegations must "nudge" a claim "across the line" from *possible* to *plausible*

April 2011

AT&T Mobility v. Concepcion
"States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

June 2011

Wal-Mart v. Dukes
"What matters to class certification…is not the raising of common 'questions'—even in droves—but, rather the capacity… to generate common *answers* …"

2013

Comcast v. Behrend
"[Plaintiffs'] model falls far short of establishing that damages are capable of measurement on a classwide basis."

Plaintiffs Are . . . Adaptable (cont.)

Statute	Actual Damages	Statutory Damages	Attorneys' Fees
FCRA	✓	$100 - $1,000 (if willful)	✓
FACTA	✓	$100 - $1,000 (if willful)	✓
FDCPA	✓	$1,000 (capped)	✓
TCPA	✓	$500 - $1,500	✗
BIPA	✓	$1,000 - $5,000	✓
TCCWNA	✓	$100	✓
CCPA	✓	$100 - $750	✗

Plaintiffs Are . . . Resourceful

Based upon our research and information obtained from Google Analytics, it appears that your website has been visited by at least 40,000 New Jersey residents during the last four years; please ensure that all records of your website visits are preserved.

Since each New Jersey visitor during the class period is entitled to recover at least $300.00 from you, we believe that your liability to the class in this matter would exceed $12,000,000.00.

Plaintiffs Are . . . Social

Plaintiffs Are . . . Professional

Q. Why do you have so many cell phone numbers?

A. I have a business suing offenders of the TCPA…. It's what I do.

Q. So you're specifically buying these cell phones in order to manufacture a TCPA lawsuit? In order to bring a TCPA lawsuit?

A. Yeah.

…

Q. Okay. So you're -- what do you mean by there's a depression in Florida?
Why are you selecting a Florida number?

A. I knew that people had hardships in Florida, that they would be usually defaulting on their loans or their credit cards.

AVOIDING GOTCHA CASES: THE USUAL SUSPECTS

Suspect #1: The FCRA

The FCRA regulates a wide range of conduct. Insofar as an employer's use of consumer reports is concerned, it has three primary requirements:

- **15 U.S.C. § 1681b(b)(2)(A)(i):**
  "a clear and conspicuous disclosure …, in a document that consists solely of the disclosure, that a consumer report may be obtained"
- **15 U.S.C. § 1681b(b)(2)(A)(ii):**
  "the consumer has authorized in writing . . . the procurement of the report"
- **15 U.S.C. § 1681b(b)(3)(A):**
  "before taking any adverse action . . . the person … shall provide . . . a copy of the report" and "a description in writing of the rights of the consumer"

Case Study: *Groshek v. Time Warner*

I am in possession of … screen shots of every phase of your On Boarding process …, which established beyond a shadow of a doubt that [you] willfully violated the FCRA….

"The best case scenario for [you] is that [you] settle[] . . . [and] obtain[] my strict confidentiality…. Make no mistake about it, I have all of the leverage in this situation and [you have] none.

Best Practices →

- Provide stand-alone notice
- Obtain written permission (can include on notice form)
- Before taking adverse action, provide report and summary of rights, and allow time for applicant to review and dispute/clarify
- Properly dispose of reports/data
- Consult state and local laws
- Be cautious when receiving information from screening vendors
- Conduct regular audits and training of business/vendors
- Require vendors to have insurance and provide indemnification

Suspect #2: The FACTA

- FACTA is an amendment to the FCRA.
- FACTA prohibits printing "more than the last five digits of the card number or the expiration date" on receipts that are printed at the point of sale. 15 U.S.C. § 1681c(g).
- FACTA's truncation requirement is "a bomb that has already exploded or is so sure to explode that it needs diffusing." *Grimes v. Rave Motion Pictures*, 552 F. Supp. 2d 1302 (N.D. Ala. 2008)

Case Study: *Leysoto v. Mama Mia I*

A plaintiff alleges that a mom-and-pop pizzeria unknowingly violated FACTA by printing too much information on receipts:

Actual damages:	$0.00
Defendant's net worth:	$40,000.00
Statutory damages sought:	$46,000,000

Best Practices →

- Routinely test registers and terminals
- Conduct regular audits and training of business/vendors (e.g. point-of-sale supply, software, and service)
- Maintain records of compliance checks
- Require vendors to have insurance and provide indemnification

Suspect #3: The FDCPA

The FDCPA prohibits certain debt-collection practices:

- Improper hours for phone contact
- Failure to cease communication (outside of litigation) upon written request
- Failing to cease communication upon request for validation
- Repeated phone calls with intent to annoy, abuse, or harass
- Communicating with consumers at work
- Contacting consumers known to be represented by counsel
- Misrepresentation or deceit
- Publishing consumer's name or address on a bad debt list
- Seeking unjustified amounts
- Threatening arrest or legal action that is not permitted
- Abusive or profane language
- Communication with third-parties discussing nature of debts
- Contact by embarrassing media
- Reporting or threatening to report false credit information

Suspect #3: The FDCPA (cont.)

The FDCPA also requires other practices:

- Identifying yourself in each communication as a debt collector
- Notifying consumer in first communication that information will be used in collection effort
- Giving the name and address of the original creditor upon timely, written request
- Notifying the consumer of his/her right to dispute the debt, in part or in full
- Providing verification of the debt, upon timely written request
- Filing a lawsuit in a proper venue, if debt collector chooses to initiate litigation

Case Study: *Huebner v. Midland Credit Mgmt.*

> The majority of cases that I see ... are brought by a handful of the same lawyers ..., who seize on the most technical alleged defects ..., often raising claims of 'confusion' or 'deception' regarding practices as to which no one, not even the least sophisticated consumer, could reasonably be confused or misled. The instant case ... goes beyond anything that the Court has seen. It represents a deliberate and transparent attempt by a sophisticated debtor to entrap a collection company into a technical violation.

Best Practices →

- Maintain and preserve detailed records of how a debt is serviced
- Conduct regular audits and training of business/vendors
- Require vendors to have insurance and provide indemnification
- Monitor the CFPB customer complaint database

Suspect #4: The TCPA

- **Calls and Texts:**
  Generally requires consent to make autodialed or prerecorded/artificial voice calls to cell phones and prerecorded/artificial voice calls to residential landlines.
- **Fax Advertisements:**
  Generally requires prior express invitation or permission or an established business relationship and strictly compliant opt-out notices.
- **Do-Not-Call:**
  Requires that businesses observe the National Do-Not-Call Registry and maintain internal do-not-call lists for telemarketing calls.

Case Study: “Revocation of Consent” Cases

Standard

- STOP
- END
- QUIT
- CANCEL
- UNSUBSCRIBE

Reasonable?

- “Take my contact info off please”
- “I want to stop this service thank you”
- “Please discontinue any further messages”
- “I don’t want these messages anymore.”
- “I would like the text messages to stop can we make this happen.”
- “I’ve changed my mind and don’t want to receive these anymore”

Best Practices →

- Obtain proper consents
- Maintain records of consent
- Assess the need to use an ATDS
- Consider alternatives to collection calls
- Monitor the national Do-Not-Call Registry
- Maintain a company-specific Do-Not-Call List
- Conduct regular audits and training of business/vendors
- Identify wireless and (to the extent possible) recycled numbers
- Require vendors to have insurance and provide indemnification
- Review customer-facing contracts for consent, arbitration, etc.
- Make consent part of a bargained-for exchange to the extent possible

Suspect #5: Biometrics

BIPA's Requirements:

- Informed written consent for collection and disclosure
- Publicly available policy on retention and destruction
- Security of data storage
- Prohibits selling or profiting

BIPA's Damages Provisions:

- Actual damages or $5,000 for intentional or reckless violations
- Actual damages or $1,000 for negligent violations
- Attorneys' fees and costs

Case Study: *Santana v. Take-Two Interactive*

Obama Is Now Free To Dunk All Over *NBA 2K17*

Now that his term is up and he's off into the sunset, Barack Obama, the 44th President of the United States of America, has enough spare time to pursue the NBA career he's always dreamed of.

Case Study: *Santana v. Take-Two Interactive*

- Plaintiffs accepted the T&Cs: "Your face scan will be visible to you and others you play with and may be recorded or screen captured during gameplay."

- Plaintiffs placed their faces 6-12 inches away from a camera, for 15 minutes, for an "invasive" photoshoot.

- Still, Plaintiffs alleged that Take-Two collected, disseminated, and stored their biometric data "without their consent."

Best Practices →

- Evaluate how your business and its vendors collect and use biometric data from employees and consumers
- Obtain written and informed consent prior to collection and use, setting forth the specific purpose and length for which the data will be used and held
- Develop written policy to govern collection, use, retention and deletion
- Update incident response plan to include biometric data that, if exposed, would trigger notice requirements
- Update consumer-facing privacy policies
- Monitor BIPA developments and other proposed legislation

Suspect #6: The ADA

Title III of the ADA prohibits discrimination in any "place of public accommodation":

- "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation…."
  42 U.S.C. § 12182(a) (Title III of ADA)
- "Place of public accommodation" means a place operated by a private entity whose operations affect commerce and that falls within at least one of 12 types of establishments (including schools, merchants, etc.).
- Individuals may obtain injunctive relief and attorneys' fees.
- DOJ may obtain monetary damages, equitable relief, and/or civil penalties.

The ADA: Does it Apply to Websites?

- “Place of public accommodation” means a place operated by a private entity whose operations affect commerce and that falls within at least one of 12 types of establishments (including schools, merchants, etc.).
- There is a split in authority and a lack of clear guidelines from regulators:
  - **9th, 3rd, 11th Circuits:** Websites are not places of public accommodation unless there is a nexus between the goods and services sold on the site and an actual physical brick-and-mortar location.
  - **1st and 7th Circuits:** Websites are places of public accommodation regardless of a nexus to a physical location.
  - **The DOJ:** The Obama-era DOJ took the position that the ADA applies and began rulemaking process in July 2010. The Trump-era DOJ withdrew the proposed rulemaking on 12/26/2017.

Best Practices →

The *de facto* standard for website accessibility and compliance is World Wide Web Consortium's (W3C) Web Content Accessibility Guidelines 2.0 (WCAG), Level AA. Its suggestions include:

- Make websites compatible with various assistive technologies
- Make content more readable and understandable
- Make all functionalities available via keyboard
- Use text alternatives for non-text content
- Use captions for multimedia content

Suspect #7: Automatic Renewal Laws

Cal. Bus. & Prof. Code § 17602(a)

Requirements:

- Clearly and conspicuous disclosure of the “terms” of an automatic renewal or continuous service offer, and affirmative consent
- Retainable acknowledgement of terms and cancellation policy
- Retainable and clear and conspicuous notice of material changes
- July 1, 2018 amendments regarding free gifts or trial; cancellation online
- Some other states require renewal reminders

Available remedies:

- No private right of action, but can sue under consumer protection statutes
- Unconditional gifts

Case Study: Free Trials

- ***Sicliano v. Apple, Inc.*, No. 2013-1-cv-257676 (Cal. Super. Ct., Santa Clara)**
  - Claims related to, among other things, one-week free In-App Subscription to Hulu Plus ordered using Apple TV
  - $16.5 million settlement, including $4 million in attorney fees and expenses
- **MasterCard policy, effective as of April 12, requires merchants to secure consumer permission before charging**
  - Businesses will be required to send email or text with the cost of the subscription, payment date, merchant name, and explicit instructions on how to cancel trial
  - Only applies to physical product subscriptions, not online services like streaming video

Best Practices →

- Present autorenewal terms (including cancellation procedures) clearly and conspicuously before subscription is fulfilled
- Provide notices of material changes
- Consider whether to tailor practices to individual states, or use the strictest requirements to develop protocol for nationwide compliance
  - Capture affirmative consent?
  - Send acknowledgement?
  - Send renewal notices?
- Track developments in states where you have customers

Suspect #8: The TCCWNA

The TCCWNA

Section 15:
Prohibits a "provision" that "violates" a "legal right of a consumer" or "legal … responsibility of a seller" that was "clearly established" at that time.

Section 16:
Prohibits "stat[ing] that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within . . . New Jersey. . . ."

Section 17:
"Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages . . . , together with reasonable attorney's fees and court costs."

The TCCWNA: Who is "Aggrieved"?

- In October 2017, the New Jersey Supreme Court reversed class certification because individual issues predominated.

- In doing so, it observed that "[n]othing in the legislative history of the TCCWNA . . . suggests that . . . the Legislature . . . intended to impose billion-dollar penalties on restaurants that serve unpriced food and beverages to customers." *Dugan v. TGI Fridays*, 231 N.J. 24 (2017).

- In April 2018, it unanimously found that a consumer is not "aggrieved" unless she has suffered some actual "adverse consequences as a result of the . . . regulatory violation." *Spade v. Select Comfort,* 232 N.J. 504 (2018).

Best Practices →

To mitigate **Section 15** risk:

- If a document would **not** be enforced as a contract, remove contract-like clauses such as limitations of liabilities/remedies, indemnification clauses, etc.
- If a document **would** be enforced as a contract, draft such clauses so that they are consistent with New Jersey law. Or use separate clauses just for New Jersey.

To mitigate **Section 16** risk:

- Review savings clauses, severability provisions, etc., for triggering language.
- E.g., “void where prohibited by law,” “to the extent allowed by law,” or “if a court finds that any provision in this agreement is void or unenforceable, …”
- Avoid such language if possible. Or specify whether it applies in New Jersey.

Suspect #9: California Consumer Privacy Act

- CCPA gives CA residents six data privacy rights:
  1. To be provided with information on what PI is collected about them and the purposes for which it is used;
  2. To be provided with information regarding sale or disclosure of PI;
  3. To opt out of sale of PI to third parties (or, opt-in for minors)
  4. To request deletion of PI
  5. Not to be subject to discrimination for exercising these rights
  6. To seek actual or statutory damages of $100 to $750 for breaches of unencrypted PI that arise as a result of a business's violation of its duty to implement and maintain reasonable security procedures
- CCPA requirements regarding online privacy policy / website disclosures

California Consumer Privacy Act (cont.)

- California Attorney General is required to issue implementing regulations before July 1, 2020 on the following topics:
  - Are additional categories of personal information needed?
  - Does the definition of “unique identifiers” need to be updated?
  - What additional exceptions are needed to comply with state or federal law?
  - What rules and procedures should be established for submitting and complying with consumer requests?
  - What uniform opt-out logo/button would best promote consumer awareness?
  - What types of information or language are sufficient to provide consumers with easily understandable and accessible notice of their rights?
  - How should businesses verify and authenticate consumer requests?

Best Practices →

- Stay apprised of AG rulemaking and efforts to further amend statute (including expansion of private right of action, see S.B. 561)
- Assess organization's data collection and processing
- Test privacy and security controls
- Compliance training for employees, executive management, and boards
- Revisit policies and procedures regarding privacy, security, and information governance

Suspect #10: Labeling and Pricing

- False Labeling
  - “All Natural”
  - Health / “diet” claims
  - Multifunction ingredients
  - Trace pesticides
  - Country of origin
  - Slack Fill
- Comparative Pricing

Case Study: The “Food Court”

Best Practices →

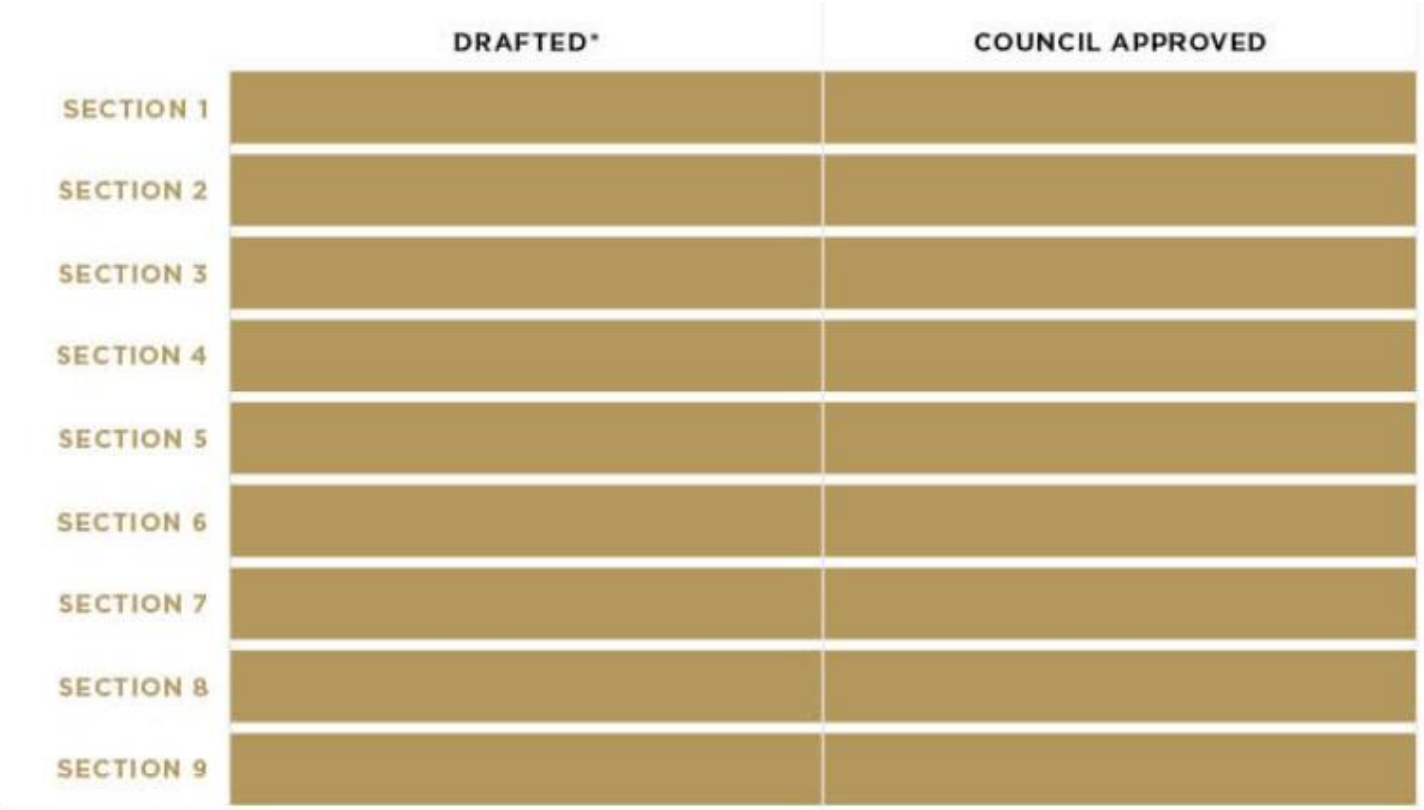
- Federal preemption and primary jurisdiction defenses
- Stay apprised of regulatory and legislative updates
- Obtain certifications from vendors and suppliers
- Insurance - ?

DEFENDING GOTCHA CASES

Compel Arbitration

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post*, at 9. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole, 584 F. 3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster*, 2008 WL 5216255, at *12.

Compel Arbitration (cont.)



The ALI's next annual meeting is scheduled for <u>May 20-22</u>

Compel Arbitration (cont.)

Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly

The company is facing a flood of arbitration cases over alleged wage theft. A judge called the company's efforts to block them "unseemly."

By Dave Jamieson

Chipotle may have outsmarted itself by blocking thousands of employee lawsuits over wage theft

By MICHAEL HILTZIK JAN 04, 2019 | 7:00 AM

Challenge Standing – Three Kinds

- **Constitutional Standing:**
  - An “injury-in-fact” that is
  - “traceable” to the violation
  - and “redressable” by a court

Jurisdictional

- **Prudential Standing:**
  - Various judge-made doctrines

Jurisdictional?

- **Statutory Standing:**
  - The alleged harm must fall within the “zone of interests” protected by a statute

Not Jurisdictional

Challenge Standing – Constitutional

SPOKEO, INC. *v.* ROBINS

Opinion of the Court

In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.[8]

Challenge Standing – Constitutional (cont.)

SPOKEO, INC. *v.* ROBINS

Opinion of the Court

Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujan*, 504 U. S., at 560. The plaintiff must have (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. *Id.*, at 560–561; *Friends of the Earth, Inc.*, 528 U. S., at 180–181. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 231 (1990). Where, as here, a case is at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element. *Warth*, *supra*, at 518.[6]

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[6] "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976) (quoting *Warth*, 422 U. S., at 502).

Challenge Standing – Constitutional (cont.)

"[T]he Court assumes that Plaintiff … incurred a specific charge for Defendants' call to his cellular telephone. Even with this assumption, the FAC does not adequately allege standing because it does not, and cannot, connect this claimed charge with the alleged TCPA violation—Defendants' use of an ATDS.... Put differently, Plaintiff does not, and cannot, allege that Defendants' use of an ATDS ... caused him to incur a charge that he would not have incurred had Defendants manually dialed his number, which would not have violated the TCPA."

Ewing v. SQM US, Inc., No., 16-1609 (S.D. Cal. Sept. 29, 2016)

Moot Claims

In contrast to the cases Campbell highlights, when the settlement offer Campbell extended to Gomez expired, Gomez remained emptyhanded; his TCPA complaint, which Campbell opposed on the merits, stood wholly unsatisfied. Because Gomez's individual claim was not made moot by the expired settlement offer, that claim would retain vitality during the time involved in determining whether the case could proceed on behalf of a class. While a class lacks independent status until certified, see *Sosna* v. *Iowa*, 419 U. S. 393, 399 (1975), a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.

Moot Claims (cont.)

In sum, an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate Gomez's complaint. That ruling suffices to decide this case. We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.

Moot Claims (cont.)

CAMPBELL-EWALD CO. *v.* GOMEZ

ROBERTS, C. J., dissenting

The good news is that this case is limited to its facts. The majority holds that an *offer* of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court. See *ante*, at 11–12. This Court leaves that question for another day—assuming there are other plaintiffs out there who, like Gomez, won't take "yes" for an answer.

Oppose Certification – Motions to Strike

- The gist is that it is clear from the complaint that a class can't be certified.
- I.e., there is no need to wait until after discovery. E.g.:
  - "Fail-safe"
  - Overbroad (arbitration, uninjured consumers, *Bristol-Myers Squibb*)
  - Unascertainable
- The most common procedural vehicles for striking class allegations:
  - **Fed. R. Civ. P. 23(d)(1)(D)** ("the court may … require that the pleadings be amended to eliminate allegations about representation of absent persons")
  - **Fed. R. Civ. P. 12(f)** ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Oppose Certification – Motions to Strike (cont.)

TYSON FOODS, INC. *v.* BOUAPHAKEO

ROBERTS, C. J., concurring

Given this difficulty, it remains to be seen whether the jury verdict can stand. The Court observes in dicta that the problem of distributing the damages award "appears to be one of petitioner's own making." *Ante*, at 17. Perhaps. But Tyson's insistence on a lump-sum jury award cannot overcome the limitations placed on the federal courts by the Constitution. Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited "to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis* v. *Casey*, 518 U. S. 343, 349 (1996). Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand. This issue should be considered by the District Court in the first instance. As the Court properly concludes, the problem is not presently ripe for our review.

Oppose Certification – Motions to Strike (cont.)

PROS:

- May educate the Court
- Court may start to think of the case as unmanageable
- Allegations could be stricken
- Could increase leverage if there is an early settlement
- As the movant, defendant frames the issues and has the last word

CONS:

- May educate the Plaintiff
- Court may start to think of the case as a class action
- Bad law of the case could be made
- Could decrease leverage if there isn’t an early settlement
- As the movant, defendant may bear an unstated burden of persuasion

Oppose Certification – Individualized Issues

"What matters . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."

- **Standing**
- **Essential Elements**
- **Affirmative Defenses**
- **Actual Damages**

Oppose Certification – Superiority

"(b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, . . . without sacrificing procedural fairness or bringing about other undesirable results…."
Fed. R. Civ. P. 23(b)(3), 1966 advisory committee notes

Certification "would be a horrendous, possibly annihilating punishment, unrelated to any damages to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation. . . ."
Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (Frankel, J.)

Oppose Certification – Superiority (cont.)

"Maybe suits such as this will lead Congress to amend the [FCRA]; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted. An award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified."
Murray v. GMAC Mortg., 434 F.3d 948, 954 (7th Cir. 2006) (Easterbrook, J.)

"[W]hether the potential for enormous liability can justify a denial of class certification depends on congressional intent…. To limit class availability merely on the basis of 'enormous' potential liability … would subvert congressional intent."
Bateman v. AMC Cinema, 623 F.3d 708, 722 (9th Cir. 2010)

QUESTIONS?

Thank you!

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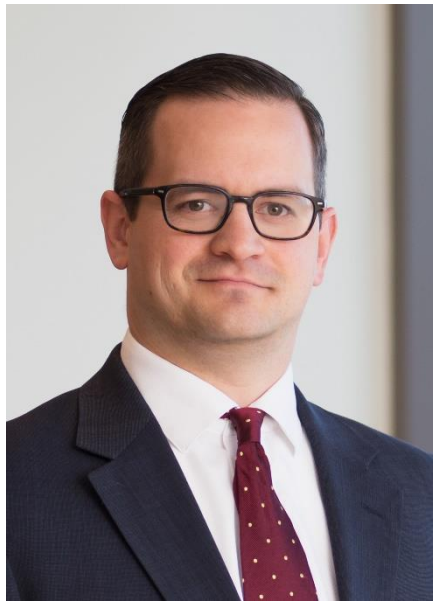

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