

# Don't Bet the Company:

Strategies to Reduce Class Action Risk

## Meet the Panel



**Lorrie Vick Leonard** is Vice President, Associate General Counsel & Chief Litigation Officer for Allianz Global Corporate & Specialty. In that capacity, she leads a staff of professionals whose responsibilities include management of internal investigations, employee relations matters and litigation, vendor contracts, corporate litigation, real estate and claims for extra contractual liability. One of her major responsibilities include creating and implementing strategy to manage outside counsel spend while achieving the best result for the Company. Before joining AGCS, she was a practicing attorney at Baker & McKenzie in Chicago, Illinois and Foster, Swift, Collins and Smith in Lansing, Michigan.

Formerly, Ms. Leonard was a member of the ABA Standing Committee on Lawyers' Professional Liability and spoke at numerous Conferences on litigation management, conflicts of interest, and avoiding malpractice claims. She has been practicing law for more than 35 years and is a member of the Association of Corporate Counsel Chicago Chapter and the Michigan and Illinois State Bar Associations.

## Meet the Panel (cont.)



**Kristin Ann Shepard** focuses on the defense of insurance companies and other financial institution clients in high-stakes litigation in state and federal trial and appellate courts. She has defended financial services companies in nationwide class actions, multidistrict litigation, and market conduct litigation, including underlying claims of consumer fraud, unfair insurance practices, RICO, and various common law torts. Kristin also has defended corporate-owned life insurance (COLI) carriers in litigation by policyholders and insureds, and advised clients on related tax matters.

## Meet the Panel (cont.)

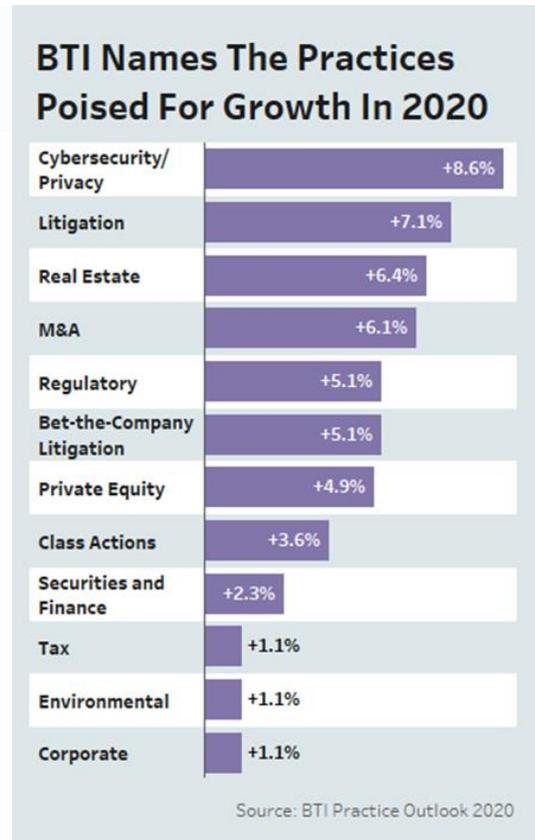


**Justin O. Kay** focuses on defending complex civil matters in federal court, state court, and before federal agencies. He is a regular contributor to the TCPA blog, a defense-oriented resource analyzing TCPA-related litigation and regulatory developments. Justin is a vice chair of the firm's Class Actions Team, a member of the TCPA Team, and chair of the firm-wide National Hiring Committee, which oversees the recruiting and hiring of associates.

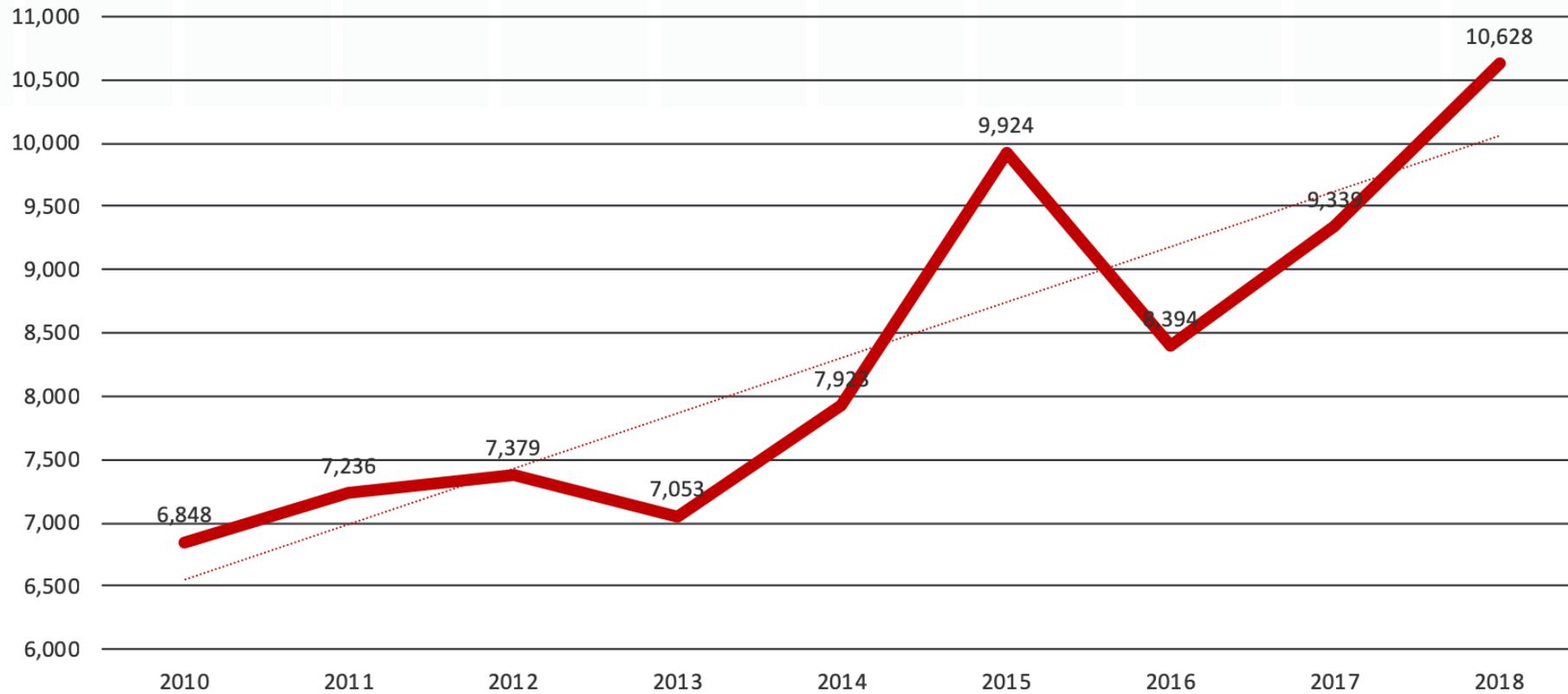
Prior to his legal career, Justin served as an Intelligence Officer for the Department of Defense's National Geospatial Intelligence Agency.

# In-House Counsel & Class Action Risk

- BTI Consulting Group's Practice Outlook 2020 Report (350+ in-house counsel in 15 industries) / Law360: GCs Expect Legal Spending to Rise for 5th Straight Year



# Class Actions Filed (Federal Court)



# Chicago 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
<b>N.D. Illinois</b>	<b>409</b>
M.D. Florida	319
S.D. California	204
E.D. Pennsylvania	201

# Data Privacy & Security The Next Frontier of Class Litigation

# Illinois Biometric Information Privacy Act (BIPA)

## BIPA

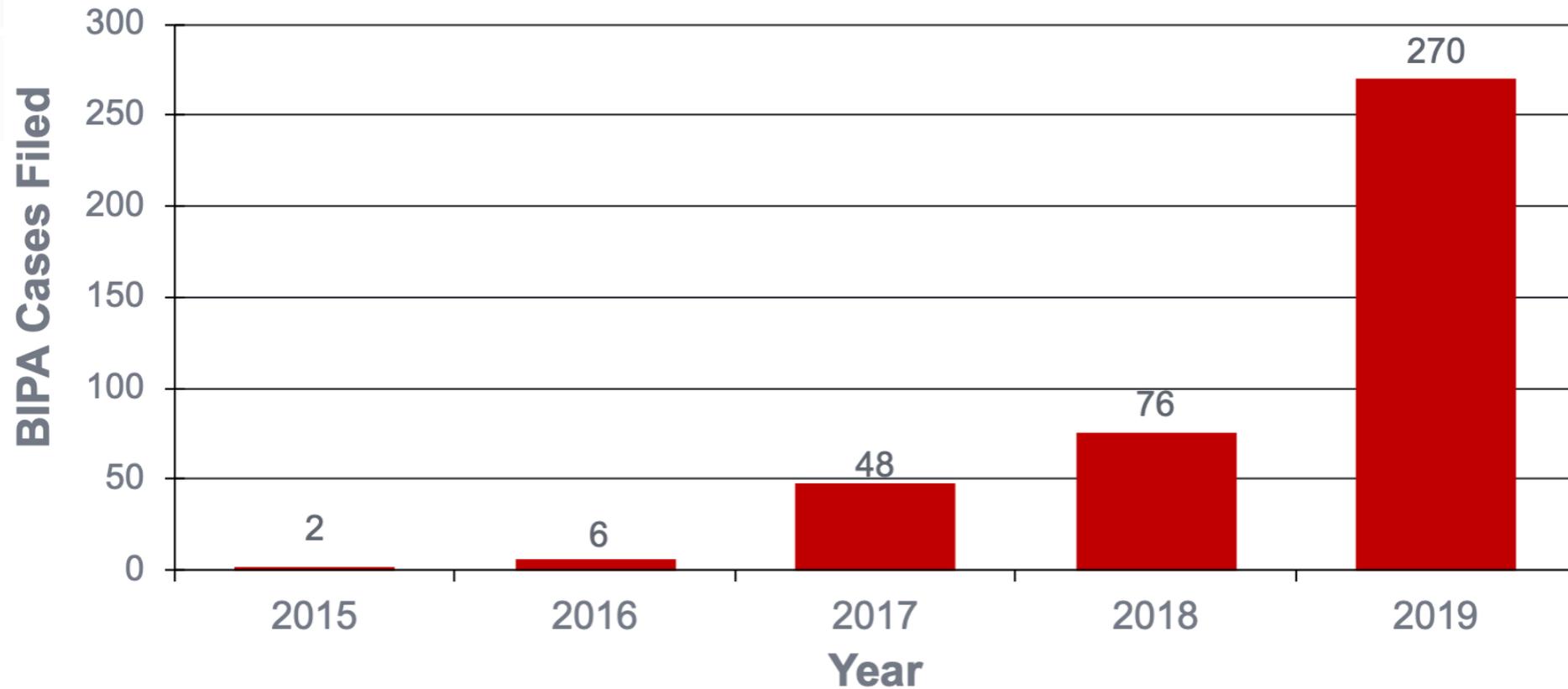
- BIPA's Requirements:

- 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

# BIPA Filings on the Rise...



## 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

**Next up:**  
**California Consumer  
Privacy Act (CCPA)**

# CCPA

- CCPA gives CA residents six data privacy rights:
  - To be provided with information on what PI is collected about them and the purposes for which it is used;
  - To be provided with information regarding sale or disclosure of PI;
  - To opt out of sale of PI to third parties (or, opt-in for minors)
  - To request deletion of PI
  - Not to be subject to discrimination for exercising these rights
  - 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

## 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

# General Class Action Defense Strategies

## Defenses at the Outset:

- Arbitration
- Lack of Standing
- Lack of Personal Jurisdiction

# Arbitration

- Individual Arbitration Presumed
  - Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (“Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.”)
  - Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) (court cannot compel class arbitration when arbitration agreement is silent on the issue)
- Class Action Waivers Permitted
  - Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (employment contracts)
  - AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (consumer contracts)
- Caution: Legislation
  - Federal Legislation (H.R. 1423) (employment and consumer)
  - State Law (California Assembly Bills 51 & 707) (employment)

## Standing

- Federal:

- Clapper v. Amnesty International USA, 568 U.S. 398, 409 (2013) (standing under Article III [of the United States Constitution] requires that any alleged “future harm” be “certainly impending” and that “allegations of possible future injury are not sufficient”)
- Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) (plaintiff “cannot satisfy the demands of Article III by alleging a bare procedural violation” of statute)
- Caution: Federal Circuit Split on application of law in data privacy/security context

- States:

- May provide broader standing than available under federal law

## Personal Jurisdiction

- Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1778-79 (2017)(state court could not assert specific personal jurisdiction over the nonresident defendant with respect to claims of nonresident mass tort plaintiffs who were allegedly injured by defendant’s conduct outside of the forum state)
- Does the ruling apply to class actions?
  - YES: *Mussat v. IQVIA Inc.*, No. 17 C 8841, 2018 WL 5311903, at \*1 (N.D. Ill. Oct. 26, 2018) (granting motion to strike class definition to the extent that it encompassed nonresident class members injured outside of Illinois), appeal filed, No. 19-1204 (7th Cir.)
  - NO: *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 127 (D.D.C. 2018) (Bristol–Myers does not require a court to assess personal jurisdiction with regard to non-resident putative class members), motion to certify appeal granted sub nom. *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1 (D.D.C. 2018)
  - Issue currently on appeal to the Seventh, Fifth, and District of Columbia Circuits
- What does this mean for defendants?

## 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.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).
- Standing
- Essential Elements
- Affirmative Defenses
- Actual Damages

# Settlement

- How to evaluate settlements
  - FTC Staff Report – Consumers and Class Actions: a Retrospective Analysis of Settlement Campaigns (Sept. 2019)
- Types of relief
  - Caution: Frank v. Gaos, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) (“cy pres payments are not a form of relief to the absent class members....”)

## In-House Counsel Insights

- Strategies for Partnering with Outside Counsel
- Joint Defense or Go it Alone?: When to Align with Co-defendants
- Class Action Settlements: Narrow or Broad?

# Questions?

# Thank you for attending!

Please be sure you have signed the attendance sheet.

The ACC will email you your certificates.

We would appreciate you taking the time to complete your evaluation prior to departing.

Your feedback is important to us when creating future programs.