CLASS ACTION TRENDS AND LEGAL DEVELOPMENTS

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Class Action Trends and Legal Developments
Emily Harris

For the first time, in a long time, the U.S. Supreme Court is unlikely to hear a case in its upcoming term that deals with class actions. This is a break from the steady roll-out of opinions since 2010 that have changed the class action landscape. What follows is a look at the recent past and issues percolating up from the lower courts, as well as the new amendments to Rule 23 that went into effect December 31, 2018.

CAFA Removal

The Class Action Fairness Act ("CAFA") provides a path for removal of state class actions to federal court, which would not otherwise be removable under the federal question and diversity jurisdiction doctrines. Under CAFA, Congress provides federal jurisdiction over class actions where the matter in controversy exceeds $5,000,000 and at least one class member is a citizen of a state different from the defendant. 28 U.S.C. §1332(d)(2)(A). Removal under CAFA may be had by "any defendant" and "without regard to whether any defendant is a citizen of the state in which the action is brought." 28 U.S.C. § 1453(b).

In Home Depot v. Jackson, 139 S.Ct. 1743 (May 28, 2019), the U.S. Supreme Court took up the question of whether a third party named in a class action counterclaim brought by the original defendant otherwise satisfies the jurisdictional requirements of CAFA. In a 5-4 opinion written by Justice Thomas, the Court concluded the answer was no. In Home Depot, Citibank filed a debt-collection action against the defendant, George Jackson. Jackson then counterclaimed against Citibank on his individual claims and also filed third-party class action claims against Home Depot, alleging unfair trade practices. Citibank dismissed its claims against Jackson and Home Depot removed the action under CAFA. The case was remanded back to state court on the ground that Home Depot, as a counterclaim party, could not remove the action because it was not a defendant under the relevant statutes.

Reaching the Supreme Court, the Court first reasoned under rules of statutory interpretation that 28 U.S.C. § 1441(a) limited removal to a defendant of a "civil action," not a "claim." Because a counterclaim is irrelevant to whether the district court had original jurisdiction over a civil action, "[s]ection 1441(a) does not permit removal based on counterclaims at all." 139 S.Ct. at 1748. The Court further concluded that CAFA did not provide a path for removal, despite the language in § 1453(b) that permits removal by "any defendant" to a "class action." Id. at 1750-51. In this respect the Court reasoned that the use of the term "any defendant" in CAFA "simply clarif[ies] that certain limitations on removal that otherwise might apply" – citizenship of the defendant and consent by all defendants – "do not limit removal under § 1453(b)." Recognizing, as the dissent argued that the Court's interpretation would allow a defendant to use the statute as a tactic to prevent removal of a class action under CAFA, the Court concludes its opinion by inviting Congress to amend CAFA to avoid the result. Stay tuned.

Personal Jurisdiction

The reverberations of Bristol Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017) continue throughout the lower courts, particularly in the class

context. In Bristol Myers Squibb, the Court held that unless there was general jurisdiction for a corporation, claims by nonresidents could not proceed due to a lack of specific personal jurisdiction. Id. at 1783-84. Left unanswered by the Supreme Court's opinion was whether the holding applied in federal court and whether the jurisdictional limits applies to class actions. As of the date of this article, no federal appellate court has addressed whether Bristol Myers Squibb prohibits national class actions. The district courts are divided on the issue. Some courts limit Bristol Myers Squibb to mass actions and hold that it does not impact the claims of absent class members. Other courts hold that absent class members are non-parties and Rule 23 allows nationwide classes. And, other courts have found that Bristol Myers Squibb does actually prohibit nationwide class actions if the defendant corporation is not sued in one of its home forums. See § 6:26.Personal jurisdiction over defendants in plaintiff class actions, 2 Newberg on Class Actions § 6:26 (5th ed.). One of the most recent of these cases is Bakov v. Consolidated World Travel, 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019). In Bakov, plaintiffs sought a nationwide class against a defendant for alleged Telephone Consumer Protection Act (TCPA) claims. Plaintiffs brought a motion to certify a nationwide class. While the court certified an Illinois-only class, it refused to certify a nationwide class holding that it lacked general jurisdiction over the defendant and that under Bristol Myers Squibb, it lacked specific personal jurisdiction over the defendant as to non-Illinois claims. Id. at *13-14. This is one issue that will surely make its way to the U.S. Supreme Court.

Arbitration

Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407 (2019), is a follow-up to the Supreme Court's 2010 opinion in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010), where it was held that a court may not compel arbitration on a classwide basis when an arbitration agreement is silent. Nine years later in Lamps Plus the Court revisited its opinion, not only reaffirming it but taking it a step further holding that the FAA also "bars an order requiring class arbitration when the agreement is ambiguous." Id. at 1412 & 1416. "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration," its informality, "which makes the process slower, more costly and more likely to generate a procedural morass than final judgment." Id. at 1416. After Lamps Plus, a defendant cannot be forced to arbitrate on a classwide basis unless, the agreement clearly allows for class arbitration; otherwise, the only claim that will be compelled to arbitration is an individual claim.

Arbitration Agreement's Impact on Class Notice and Membership

In re JPMorgan Chase & Co., 916 F.3d 494 (5th Cir. 2019), the Fifth Circuit Court of Appeals considered the issue of whether class notice should be provided in a conditionally certified FLSA class action to potential opt-in class members who had executed arbitration agreements. The court concluded the trial court erred in ordering notice to employees who had executed arbitration agreements because the arbitration agreement was uncontested and, as a result, those employees cannot participate in the litigation.

In the several months since the 5th Circuit's opinion, several decisions in FLSA matters have distinguished the In re JP Morgan Chase holding, concluding that when there is a challenge to the validity and enforceability of an arbitration agreement by the collective action proponents, it is appropriate for notice to be sent to all potential opt-in class members. Camp v. Bimbo Bakeries USA, Inc., 2019 WL 1472586 (D. NH. Apr. 3, 2019); Beattie v. TTEC Healthcare Solutions, Inc., 2019 WL 4242664 (D. Colo. Sept. 6, 2019). Again, this is an issue to watch as it percolates up through the courts.

Rule 23(f) Appeals

Under Rule 23(f), a Court of Appeals may permit an appeal from an order granting or denying class certification. The petition for permission to appeal must be filed "within 14 days after the order is entered." In Nutraceutical Corp. v. Lambert, the Supreme Court addressed the question of whether the 14-day deadline for filing a Rule 23(f) petition could be equitably tolled. In the underlying case, a class was initially certified. Two years later, the court decertified the class. Within the 14-day period, the plaintiff advised the court orally that it intended to file a motion for reconsideration. The court told the plaintiff to file its motion within 20 days of the class decertification order, and plaintiff met that deadline. The plaintiff filed a Rule 23(f) petition within 14 days of the court's denial of its motion for reconsideration.

The Rule 23(f) petition was denied as untimely. On review, the U.S. Supreme Court noted that while Rule 23(f) is not jurisdictional, the "text of the rule [did not] leave room for such flexibility" as to allow equitable tolling. 139 S. Ct. at 714. Rather, according to the Court, Rule 26(b)(1), which generally authorizes extensions of time, specifically and expressly carves out the ability of the Court of Appeals to extend the time for a petition for permission to appeal. Id. at 715. As such, the rules "compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." Id. This is not to

say that a Rule 23(f) appeal must always be filed within 14 days of the order granting or denying a class. As the Court recognized, "[a] timely motion for reconsideration filed within the window to appeal does not toll anything; it 'renders an otherwise final decision of a district court not final' for purposes of appeal."

Rule 23 Amendments and Court Approval of Class Action Settlements

On December 1, 2018, new amendments to Rule 23 took effect. The new amendments are focused on class action settlement procedures.

Preliminary approval factors: Prior to December 1, 2018, Rule 23 provided only that a court was to determine that a settlement was "fair, reasonable and adequate." District courts and appellate courts looked to caselaw to define the factors to be considered, which varied to some extent across the country. Amended Rule 23(e)(2) now sets forth a unified set of factors, requiring courts to consider whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

These unified factors are to add to, rather than replace, factors previously considered by the courts when reviewing class action settlements.

Class notice: Notice under Rule 23(b)(3) has entered the modern age. The rule now expressly contemplates that notice to class members may be provided by "electronic means or other appropriate means." The rules now also require parties to provide "frontloaded" information to the court so that it can determine whether to give notice to a proposed settlement class. Under Rule 23(e)(1)(B), the court is direct notice to the class members if "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Last, Rule 23(f) has been amended to state that Rule 23(f) appeals may not be taken from an order on class notice under Rule 23(e)(1).

Settlement objectors: Amendments to Rule 23(e)(5)(A) now requires objectors to a settlement to "state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." In addition, under Rule 23(e)(5)(B), "no payment or consideration may be provided in connection with (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing or abandoning an appeal from a judgment approving the proposal" unless such action has been approved by the court after a hearing.

Class Action Settlement Standing

In Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016), the Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." In other words, a statutory right to sue is insufficient, in and of itself, to meet the concrete injury requirement.

In Frank v. Gaos, the Supreme Court extended the reasoning of Spokeo and held that the obligation of a court to assure itself of Article III standing "extends to court approval of proposed class action settlements." 139 S. Ct. 1041, 1046 (2019). Before the district court, the defendant had moved to dismiss the plaintiff's claim based on lack of Article III standing. The district court denied the motion based on a Ninth Circuit case (Edwards v. First American Corp.) holding that standing existed whenever there was a statutory cause of action. Because the holding in Edwards was abrogated by Spokeo, no court had reexamined the plaintiffs' standing in the interim period after the parties entered into a cy pres class action settlement. The Supreme Court granted a petition to review whether the cy pres settlement was fair and reasonable. The Solicitor General filed an amicus brief, arguing that standing should be addressed first in light of Spokeo. The Supreme Court examined the issue and concluded that "a court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute and federal courts lack jurisdiction if no named plaintiff has standing." Id. Thus, the Court agreed that the settling plaintiff's standing must be examined to ensure the court has jurisdiction to consider the class

action settlement, and remanded the case for further proceedings. Frank has returned to the district court, where briefing is yet to commence to examine the standing issue.

Cy Pres Settlements

After much anticipation, the Supreme Court issued its decision in Frank v. Gaos, in which Rule 23 watchers to learn the fate of cy pres only class action settlements. As noted above, the Court did not reach that issue but instead tackled another thorny issue – that of plaintiff standing to support a class action settlements.

While Frank v. Gaos was proceeding to the U.S. Supreme Court, a similar class action settlement also involving Google was pending before the Court of Appeals for the Third Circuit, In re Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316 (3rd Cir. 2019). In that case, Google also entered into a class action settlement to resolve claims on a nationwide basis. Like the one in Frank v. Gaos, the settlement only provided for monetary payments to class counsel for attorneys' fees, to class representatives for service awards, and to cy pres recipients from a $5.5 million settlement fund. 934 F.3d at 321. No monetary compensation was to be paid to class members who would be asked to give a broad release of claims, including statutory damages. Id. The district court approved the cy pres only settlement finding that "payments to absent class members would be logistically burdensome, impractical, and economically infeasible, resulting (at best) with direct compensation of a de minimis amount." Id. at 324. The court rejected intervenor's (Ted Frank) objections that there were pre-existing relationships between Google, class counsel and the cy pres recipients, holding that there was no conflict of interest. Id.

After concluding that the plaintiffs had Article III standing under Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) and Frank v. Gaos, 139 S.Ct. 1041 (2019), the Third Circuit addressed whether the cy pres only settlement was fair, reasonable and adequate. The Third Circuit first examined the issue in the abstract and concluded that in a Rule 23(b)(2) class, a settlement was never intended to involve individualized determinations in liability or damages. As such, the court determined that a cy pres only (b)(2) settlement could satisfy Rule 23's certification and fairness requirements because it belongs to the class as a whole. Id. at 328.

But, the court was not persuaded that the cy pres settlement in the case before it could be approved for two reasons. First, despite settlement as a (b)(2) class, the class members would be required to grant a broad release of claims that included statutory damages (which had made class certification under (b)(3) more difficult). Id. at 329. On that basis, the court remanded to the district court to determine if a "defendant can ever obtain a class-wide release of claims for money damages in a Rule 23(b)(2) settlement." Id. at 329-30. With respect to cy pres, the court also found that it was troubled by the selection of the cy pres recipients and whether the district court had sufficiently analyzed the intevenor's objections with respect to conflicts of interest. Id. at 330-31. As it stands now, both Frank v. Gaos and In re Google have been remanded to their respective district courts for further proceedings, which will undoubtedly address the appropriateness of the cy pres only settlements and will likely make their way back up to the higher courts.

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" Would we like to join The Class Action Lawsuit-of-the-Month Club ? "

CLASS ACTION TRENDS

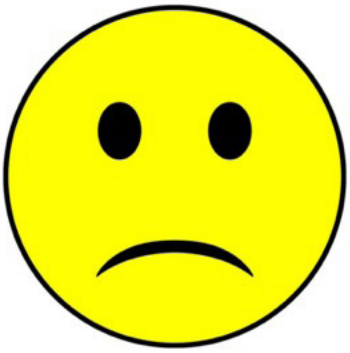
- Over 50% of U.S. companies face class action lawsuits
- The number of class action lawsuits companies are facing in a year are on the rise
- The leading types of class actions continue to be labor & employment and consumer fraud cases

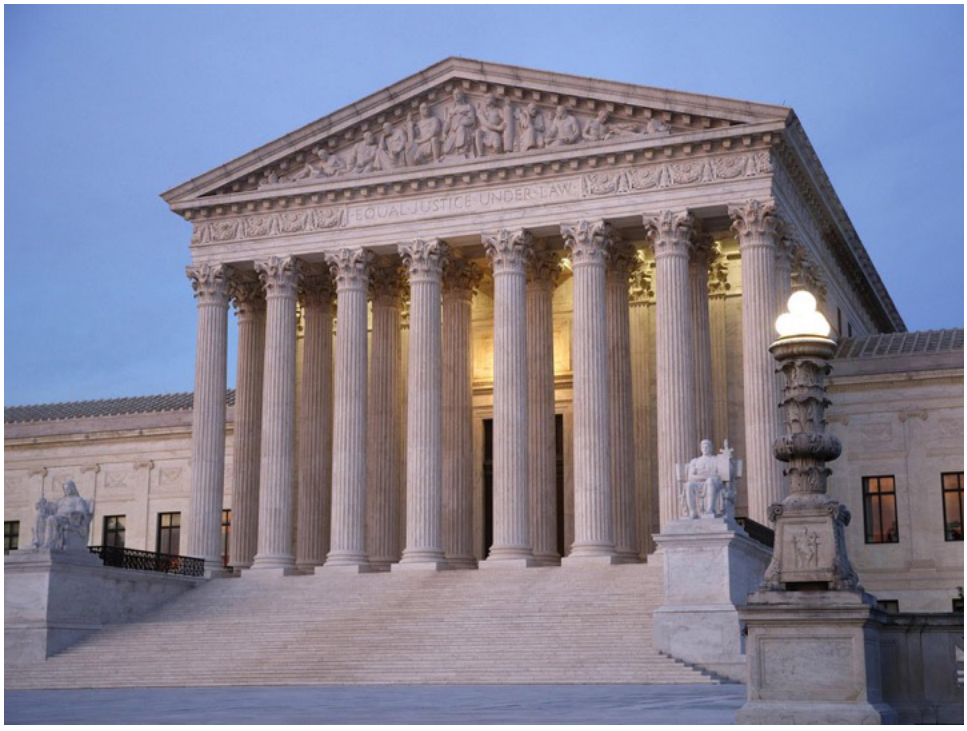
CLASS ACTION TRENDS

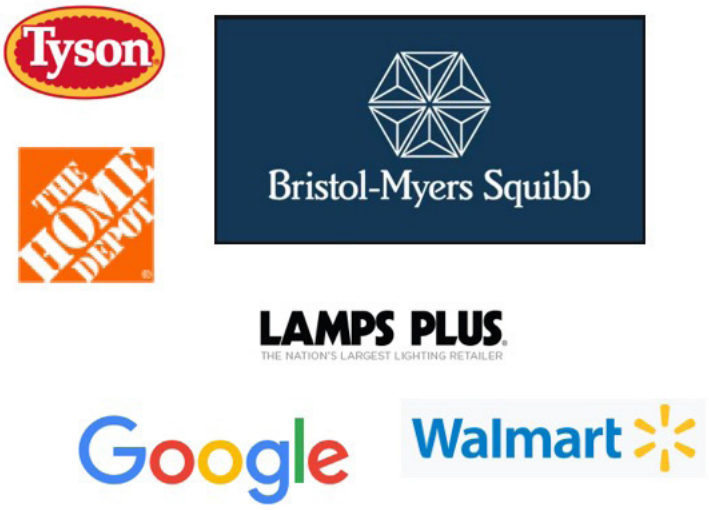
- Corporate spending on class action defense continues to rise
- The number of in-house attorneys dedicated to class actions is on the rise
- Settlement rates for class actions continue to rise

CLASS ACTION TRENDS

- Only 2% of class action cases go to trial







CAFA REMOVAL

Home Depot v. Jackson, 139 S. Ct. 1743 (2019)

"Section 1441(a) does not permit removal based on counterclaims at all."

CAFA's use of "any defendant" does not allow for removal of counterclaims.

PERSONAL JURISDICTION

Bristol Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017)

"For specific jurisdiction, a defendant's general connection with the forum are not enough."

"In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'"

A state does not have specific personal jurisdiction over defendant to entertain nonresident claims.

PERSONAL JURISDICTION

Does *Bristol Myers Squibb* Prohibit Nationwide Class Actions?

Courts are divided:

- Only applies to mass actions
- Absent class members are not parties
- National class prohibited if corporation is not sued in its home forums

CLASS ARBITRATION

Lamps Plus v. Varela, 139 S. Ct. 1407 (2019)

The FAA "bars an order requiring class arbitration when the agreement is ambiguous."

"Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage of arbitration" – "its informality."

ARBITRATION AND CLASS NOTICE

In Re JPMorgan Chase & Co., 916 F.3d 494 (5th Cir. 2019)

In FLSA collective action, it was error to provide notice to employees who had executed arbitration agreements because they could not participate in the litigation.

RULE 23(f) PETITIONS

Nutraceutical Corp. v. Lambert, 139 S. Ct. 710 (2019)

> Federal Rules of Appellate Procedure "compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist."

AMENDMENTS TO RULE 23

- New amendments are the first amendments to Rule 23 since 2003.
- Amendments are effective December 1, 2018.
- Amendments were four years in the making.
- Amendments focus on the class action settlement process.

AMENDMENTS TO RULE 23

Rule 23(c)(2)(B) – Class Notice for (b)(3) Classes:

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

AMENDMENTS TO RULE 23

RULE 23(e) – Class Settlements:

(e) The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(3)(2); and

(ii) certify the class for purposes of judgment on the proposal.

AMENDMENTS TO RULE 23

Rule 23(e)(2) – Uniform Factors for Preliminary Approval:

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~:~~

- **(A)** the class representatives and class counsel have adequately represented the class;
- **(B)** the proposal was negotiated at arm's length;
- **(C)** the relief provided for the class is adequate, taking into account:
  - **(i)** the costs, risks, and delay of trial and appeal;
  - **(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - **(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and
  - **(iv)** any agreement required to be identified under Rule 23(e)(3); and
- **(D)** the proposal treats class members equitably relative to each other.

AMENDMENTS TO RULE 23

Rule 23(e)(5) – Class Objectors:

(5) ***Class-Member Objections.***

- **(A)** *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
- **(B)** *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
  - **(i)** forgoing or withdrawing an objection, or
  - **(ii)** forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

AMENDMENTS TO RULE 23

Rule 23(f) – Appeals from Class Certification Orders:

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule (23)(e)(1). ~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

CLASS SETTLEMENT STANDING

Frank v. Gaos, 139 S. Ct. 1041 (2019)

"Article III standing extends to court approval of proposed class action settlements."

"A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute and federal courts lack jurisdiction if no named plaintiff has standing."

CY PRES SETTLEMENTS

In re Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316 (3rd Cir. 2019)

Cy pres only settlement "belongs to class as a whole" and therefore not per se improper in Rule 23(b)(2) settlement classes, which are not intended to involve individualized determinations of liability or damages.

Concerns:

- Broad release including Rule 23(b)(3) damages
- Conflicts of interest in selection of *cy pres* recipients

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Emily is the firm's managing partner. Her practice focuses on complex civil litigation, class action defense, products liability, real estate litigation, and employment litigation, at both the trial and appellate level. Emily is also one of the lead attorneys pursuing wrongful death claims against landowners and government entities arising from the 2014 Oso Landslide. Emily excels in handling large and complex matters that require creative problem-solving, diligence, and fine attention to detail.

Prior to joining Corr Cronin in 2004, Emily was a litigation associate at O'Melveny & Myers LLP in Los Angeles, and she clerked for the Honorable Thomas G. Nelson on the United States Court of Appeals Ninth Circuit. Emily has been selected to the "Rising Star" list in Seattle's legal community. She is licensed to practice in Washington and California.

Featured Cases

- Rails to Trails Class Actions – Defending King County in numerous cases challenging ownership of former railroad corridors valued at over $100 million. Defeated motion for preliminary injunction, secured dismissal of claims for quiet title and a declaratory judgment regarding ownership of the corridor and obtained judgments quieting title in King County.
- Oso Landslide – Pursuing wrongful death claims arising from the March 22, 2014 Oso, Washington Landslide. Obtained significant spoliation sanction order against State of $1.2 million. With co-counsel, obtained $60 million settlement from the State and Grandy Lake Forest Associates.
- Fiber Optic Right of Way Litigation – Defense of telecommunications company in multiple class actions in state and federal courts alleging claims of trespass arising from installation of fiber-optic cable on railroad rights-of-way.
- Class Action Jury Trial – Defense verdict in four-week jury trial defending a national transportation company against multi-million dollar claims that its independent contractor drivers were employees.
- Products Liability Trial – Successfully defended bottle manufacturer and winery against products liability claims seeking more than $900,000 in damages. After a four week bench trial, obtained a complete defense verdict.

Presentations and Publications

- Ethical Duties for Lawyers Working with Expert Witnesses, Landslides in Washington, Law Seminars Int'l, Seattle, Washington, March 2017
- Occam's Razor: Simplicity as an Effective Trial Tool, Network of Trial Law Firms, Napa, California, April 2015 Class Action Jury Trials: Going the Distance, Network of Trial Law Firms, Naples Florida, May 2013

Education

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