
Morgan Lewis
CLASS ACTION ROUNDTABLE
KEY CLASS CERTIFICATION ISSUES FROM 2020 AND WHAT TO LOOK FOR IN 2021
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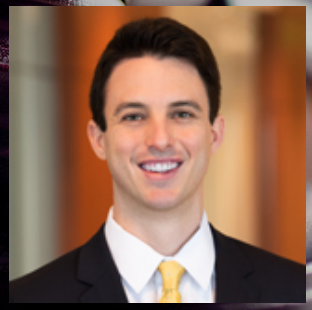
Presenters

Brian M. Ercole

Ezra D. Church

Lisa R. Weddle

Melissa M. Coates, Ph.D.



Matthew M. Papkin

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Class Actions – Still a Big Deal

- Continued Increase in Class Action Spend In 2020 By Companies
- Massive Potential Exposure
- Significant Discovery Expenses
- Bad Publicity
- *In Terrorem* Settlement Pressure
- Particularly Impactful on Businesses in the Covid-19 World

2020 – Three Key Class Certification Issues

- The Requirement of Ascertainability – The Divide Deepens
- Application of *BMS* to Class Actions – What About the Rules Enabling Act
- Discovery About Absent Class Members – Sword and Shield

Issue #1: The Requirement Of Ascertainability – The Divide Deepens

ASCERTAINABILITY – THE DIVIDE DEEPENS

<u>Eleventh Circuit</u>: Recently addressed whether putative class representatives must prove the existence of an administratively feasible method to identify absent class members as a precondition for certification and held that that failure to prove administrative feasibility was not grounds to deny certification.

- *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021)

<u>Reasoning</u>:

- Neither circuit precedent nor the text of Rule 23 provides a basis for it
- Rule 23 requires only that the proposed class is "adequately defined and clearly ascertainable."

<u>Held</u>:

- administrative feasibility is not a prerequisite to the requirements of Rule 23(a)
- ascertainability is limited to its traditional scope: a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination
- administrative feasibility is still relevant under Rule 23(b)(3)

CIRCUIT SPLIT

- Heightened ascertainability requirement still alive and well:
  - Heightened Standard: "proof of ascertainability encompasses both the definition of a class and its administrative feasibility."
  - Third Circuit still requires that both the "objective criteria" and "administratively feasible method" elements
  - First and Fourth Circuits follow as well

- Administrative feasibility not required:
  - Second, Sixth, Seventh, Eighth, and Ninth Circuits—and now the Eleventh—reject the heightened standard
  - Tenth Circuit has not expressly weighed in, but district courts within that circuit have recognized the test adopted by the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits to "be the better approach." *Rodriguez v. Cascade Collections LLC*, No. 220CV00120JNPDBP, 2021 WL 1222147, at *15 (D. Utah Mar. 31, 2021)

IMPLICATIONS

Implications: Administrative feasibility is not completely gone, but instead becomes part of the superiority analysis of Rule 23(b)(3)

Impact: The role of ascertainability is going to remain a big issue in litigation cases, depending on the jurisdiction

- Evaluate the state of the law in your jurisdiction
- Evaluate discovery (both affirmative and defensive discovery) with respect to the jurisdiction's ascertainability requirement
- Set up class opposition argument as appropriate

Issue #2: Application of *BMS* to Class Actions – What about The Rules Enabling Act?

The Application of *Bristol-Myers* to Class Actions

- *Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S. Ct. 1773 (2017) – Mass Action
  - **FACTS**: plaintiffs, including both California residents and non-residents, brought products liability suit in California state court alleging that the drug Plavix injured their health
  - **HOLDING**: due process did not permit the exercise of specific personal jurisdiction in California over nonresident plaintiffs' claims.
    - No general jurisdiction because BMS not "at home" in California
    - No specific jurisdiction over BMS with respect to the non-residents' claims because they lacked the necessary "affiliation between the forum and the underlying controversy, principally [an] activity or occurrence that takes place in the forum state."
    - Expressly left open "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."

Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020) – *BMS* Does Not Apply To Class Actions

- **Procedural Posture**: Appeal of grant of motion to strike class definition in TCPA junk fax class action with respect to non-Illinois members based upon *BMS*
- **Decision**: 3-0 (Wood, CJ, Kanne, J, and Barrett, J)
- **Holding**: 7th Circuit reverses and remands. *BMS* does not apply to class actions filed in federal court under a federal statute.
- **Reasoning**:
  - Plaintiffs in *BMS* brought their case under California's mass action law, which involves consolidation of individuals cases with named plaintiffs as parties, as opposed to represented plaintiffs with absentee litigants.
  - Absent-class members are treated differently depending on the context of the analysis. They are not considered for purposes of determining whether diversity citizenship under 28 U.S.C. § 1332 has been met, nor for purposes of venue.
  - No reason to treat them differently for personal jurisdiction—"named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so."
- **Note**: US Supreme Court denied certiorari (Jan. 11, 2021).

Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020) — Punt The Issue

- **Procedural Posture**: Appeal of class certification decision, including ruling that the defendant waived its personal jurisdiction defense as to the non-resident class members by not raising it prior to class certification stage
- **Decision**: 3-0
- **Holding**: Court reversed and remanded for several reasons. Ruled that the plaintiff could not have waived it personal jurisdiction defense towards non-resident class members prior to class certification because those class members were not yet parties to the case for purposes of personal jurisdiction.
- Notably, the Court acknowledged that courts are split on the issue of whether *BMS* applies to class actions, and also stated that "*Bristol-Myers* provided new legal support for [the defendant]'s objection."

Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (DC Cir. 2020) – Punt The Issue

- **Procedural Posture**: Appeal of denial of motion to dismiss absent class members' claims due to lack of personal jurisdiction based upon *BMS*
- **Decision**: 2-1
- **Holding**: DC Circuit affirms—and punts. Absent class certification, putative class members are not parties before a court. Thus, the motion to dismiss was premature.
  - Notably, plaintiffs never raised premature argument below.
- Majority refuses to consider dismissal or striking of class allegations under Rule 23(d)(1)(D).
- **Dissent**: recognizes the practical need to resolve these issues at the motion to dismiss stage, including voluminous class discovery.

The Sixth Circuit Follows The Seventh Circuit – *Lyngaas v. Curaden Ag*, --F.3d--, 2021 WL 1115870 (6th Cir. Mar. 24, 2021)

- **Procedural Posture**: Appeal of grant of class certification and judgment in favor of named plaintiff and the class following bench trial on TCPA claim.
- **Decision**: 2-1
- **Holding**: 6th Circuit affirms. Personal jurisdiction over named plaintiff is sufficient for class action.
- **Reasoning**: Following *Mussat*, the Sixth Circuit distinguishes litigants before the court (named plaintiffs and mass action plaintiffs) from those absent and not actively litigating their claims.
  - "a class action is formally one suit in which, as a practical matter, a defendant litigates against only the class representative"
  - "absent class members are not considered 'parties,' as a class representative is, for certain jurisdictional purposes"
- **Dissent**: Court must have personal jurisdiction over absent class members
  - Rejects argument that there are unwritten class-action exceptions to jurisdictional requirements – instead congress created statutory carve outs through supplemental jurisdiction statute
  - Congress has not similarly modified statutory requirements for personal jurisdiction, invoking class action device is not sufficient to allow a court to adjudicate claims for which it has no jurisdiction

PRACTICAL IMPLICATIONS

- Courts, like the Seventh and Sixth Circuit, that say *BMS* does not apply to class actions seem to ignore the Rules Enabling Act
- Need to evaluate the specific law in the specific jurisdiction
- Evaluate whether case law allows a motion to dismiss, strike, or transfer based upon a *BMS* argument
- Should continue to preserve *BMS* defenses in your answer as a precaution
- Evaluate benefits of making *BMS* argument to challenge certification or, if a class gets certified, to limit its scope

Issue #3: Discovery of Absent Class Members – Both Sword And Shield

Challenging The Scope Of Pre-Certification Discovery: *In re Williams-Sonoma, Inc.*, 947 F.3d 535 (9th Cir. 2020)

- **Background:**
  - A Kentucky plaintiff filed a class action in California alleging the thread count in bedding was misrepresented on the product's label.
  - Initially brought under California law.
  - District court determined that Kentucky law applied and that it prohibited consumer class actions.
  - Plaintiff then sought to obtain discovery from Williams-Sonoma on California purchases in the same action to help find a California purchaser who might be willing to sue as class representative.
  - The district court ordered Williams-Sonoma to produce a list of all California purchasers.
  - Williams-Sonoma filed a writ of mandamus.

Challenging The Scope Of Pre-Certification Discovery: In re *Williams-Sonoma, Inc.*, 947 F.3d 535 (9th Cir. 2020)

- **Holding**: The Ninth Circuit granted writ and vacated the pre-class-certification discovery order.
  - Seeking discovery of the name of a class member who could sue Williams-Sonoma under California law is not relevant to the plaintiff's claims
  - "[U]sing discovery to find a client to be the named plaintiff before a class action is certified is not within the scope of Rule 26(b)(1)."

- **Application**: Some trial courts to date have cabined this ruling solely to the situation where discovery is sought to find a new named plaintiff.
  - *Perez v. DirecTV Grp. Holdings, LLC*, No. SACV1601440JLSDFMX, 2020 WL 3124353, at *2 (C.D. Cal. May 14, 2020) (permitting broad discovery requests about TV subscribers and rejecting argument that true intent is "to find a new class representative" because discovery served before plaintiff's deposition)
  - *Heredia v. Sunrise Senior Living LLC*, No. 818CV01974JLSJDEX, 2020 WL 3108699, at *4 (C.D. Cal. Jan. 31, 2020) ("This is not a case where Plaintiffs are seeking information to find a new plaintiff, but rather, to discover information relevant to proffered class members").

Getting Pre-Certification Discovery of Absent Class Members – Sword To Challenge Class Certification

***Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67 (S.D.N.Y. 2020)**

- **Facts:**
  - Subscribers filed putative class action alleging that Peloton engaged in deceptive business practice and false advertising by removing the majority of its on-demand library of fitness classes.
  - Prior to certification, Peloton moved to depose 21 putative class members who were among over 2,700 consumers who originally filed arbitration.
  - Peloton argued that the depositions were relevant to class certification in two ways: (1) individual issues as to causation and injury would overwhelm common issues; and (2) Plaintiffs lack typicality under Rule 23(a).

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Getting Pre-Certification Discovery of Absent Class Members – Sword To Challenge Class Certification

***Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67 (S.D.N.Y. 2020)**

- **Holding:** Peloton could take up to ten depositions of absent class members under Rule 30.
- **Reasoning**:
  - Due process right of defendants to defend themselves at class certification
  - Evidence is relevant to class certification defenses, including whether individual issues will overrun the elements of causation and injury and whether named plaintiffs are typical
  - Evidence cannot be obtained through named plaintiffs alone or other means
  - Discovery was not sought to harass class members or deter class partiicpation, given that the discovery was sought of class members who had filed individual arbitration demands of Peleton
- ***Note***: "This is not a case in which discovery is sought of true strangers to the litigation—persons who had no knowledge of the lawsuit, no access to a lawyer, and even no idea that a potential claim existed. Each of the 21 individuals has already brought a claim against Peloton in arbitration based on the same allegations asserted here."

PRACTICAL IMPLICATIONS

- Evaluate whether to challenge burdensome class discovery
  - Pros and cons to fighting such discovery
  - Appellate options
- At the beginning of the case, outline what the class certification opposition will look like and what discovery you need
- Evaluate what, if any, discovery you need of absent class members to challenge class certification
  - Informal declarations
  - Formal deposition testimony
  - Interrogatory responses
- If formal discovery is helpful to build the class certification record, consider filing a motion with the court to seek targeted discovery of absent class members

2021 – Three Key Supreme Court Cases Impacting Class Actions

- Narrowing Our Favorite Statute – the TCPA
- Uninjured Class Members and Rule 23(b)(3) Class Certification – What Is To Be Done?
- The Merits Tightrope at Class Certification

Decision #1: Narrowing Our Favorite Statute – Telephone Consumer Protection Act

Facebook v. Duguid, 141 S.Ct. 1163 (April 1, 2021)

Supreme Court's Autodialer Decision

- *Facebook v. Duguid et al.* (April 1, 2021)—Long awaited clarification on the definition of an "automatic telephone dialing system," key term under the Telephone Consumer Protection Act ("TCPA").
- TCPA requires prior express consent for any call or text sent with an ATDS.
- Statutory definition says an "ATDS" is equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers.
- Plaintiff argued that the phrase "using a random or sequential number generator" modified only "to produce"; Facebook said that it modified both "to produce" and "to store."
- Significant question for Facebook and thousands of companies: Is a system that merely stores and calls/texts customer numbers automatically an ATDS?

Supreme Court's Autodialer Decision

- Court Held: Ruled 9-0 for Facebook.
  - Applying simple rules of grammar, an ATDS must have the capacity either to store a telephone number using a random or sequential number generator OR to produce a number using a random or sequential number generator.
  - Context confirms this reading since Congress's concern was that ATDS technology would dial emergency lines randomly or tie up all the sequentially numbered lines at a single entity.
  - The Supreme Court cannot reinterpret the statute to encompass new technology.
- Reduces risk for companies that text and call customers. Systems that are just calling from a list are not an ATDS.
- But not correct that you do not need consent:
  - Do Not Call Rules still apply
  - "Capacity" question
  - State law
  - Congressional action?
- Application beyond TCPA

Decision #2: Uninjured Class Members And Rule 23(b)(3) Certification – What is to be done?

Ramirez v. TransUnion, 141 S.Ct. 972 (2020)

Issue # 2: What About Uninjured Class Members?
Ramirez v. TransUnion LLC, 951 F.3d 1008 (9th Cir. 2020), *cert. granted in part*, 141 S.Ct. 972 (U.S. Dec. 16, 2020)

- Issue Presented:
  - "Whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."
- Factual Background:
  - TransUnion ("TU") placed OFAC alerts on thousands of consumers' credit reports based on the results of a vendor running individuals' names through a database that maintains a list of Specially Designated Nationals ("SDN") (i.e., prohibited from transacting business in the United States for national security reasons).
  - The practice was faulty, resulting in false positives.
  - The named plaintiff, Ramirez, was denied a car loan due to the false report. When Ramirez contacted TU to have the inaccurate alert removed, TU sent Ramirez his credit report without the OFAC alert, but sent a separate letter ("OFAC Letter") implying that Ramirez was an SDN.

Ramirez v. TransUnion LLC

- Claims: Ramirez brought three claims on behalf of the class under the Fair Credit Reporting Act ("FCRA").
- The Proposed Class:
  - "All natural persons in the United States and its Territories to whom TransUnion sent a letter similar in form to the [OFAC Letter] TransUnion sent to [Ramirez] ... from January 1, 2011-July 26, 2011."
  - The class consisted of ~8,000 class members. However, only ~1,500 class members had their credit report disseminated by TU to a third party.
- Lower Court Ruling:
  - The district court certified the class and a jury awarded statutory and punitive damages.
- Appellate Court Issues:
  - TU argued on appeal that the class should not have been certified for many reasons, including, because all class members other than Ramirez lacked Article III standing. TU based its argument on the fact that it only furnished credit reports to third parties for ~1,500 class members, and only those class members had concrete injuries under *Spokeo*. TU also argued that Ramirez's claims were not typical of the class members whose reports were not disseminated because his injuries were more severe.

Ramirez v. TransUnion LLC
951 F.3d 1008 (9th Cir. 2020)

9th Circuit Ruling:

- **Requirement** - All class members must have Article III standing and have suffered a cognizable injury at the final judgment stage of a class action, even though it is not necessary at earlier stages of the case.
- **Article III** - Both class members whose credit reports were disseminated to third parties and those that weren't, experienced concrete injury. The court relied on the "risk of harm" test for the group whose reports were not disseminated.
- **Rule 23** – Ramirez's injuries were not so unique, unusual, or severe as to make him an atypical representative of the class. His injuries still arose from the same event or practice that gave rise to the claims of the class members.

Status: US Supreme Court held oral argument on March 30, 2021.

POTENTIAL IMPLICATIONS OF SUPREME COURT DECISION

- Will help clarify what type of injury satisfies Article III standing
- May demand a more rigorous class certification analysis
  - May require an analysis of Article III standing and injury for absent class members at class certification, rather than allowing courts to punt on this issue until trial or any judgment
- May have an indirect impact on settlement classes with respect to uninjured class members
- May help explain what a class action really is – a joinder mechanism for all class members, a case where only named Plaintiffs and their claims really matter for purposes of trial, or something else
  - May help better define whether class members are actual parties and for what purposes

Decision #3: The Merits Tighrope At Class Certification

***Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 950 (2020)**

Reliance in Securities Class Actions: The Goldman Saga

- *Arkansas Teacher Retirement System v. Goldman Sachs Group., Inc.*, 955 F.3d 254 (2d Cir. 2020)
  - Action brought by shareholders, alleging that Goldman made material misstatements about internal procedures for handling conflicts of internest to maintain an inflated stock price. Once SEC brought enforcement action, stock price deflated and investors suffered losses.
- District Court: Certified shareholder class.
- Second Circuit: Vacated the order. Why? District court did not apply "preponderance of the evidence" standard in determining whether Goldman had rebutted legal presumption that the shareholders relied on Goldman's alleged general misstatements in purchasing its stock at market price (the "Basic" presumption).
- District Court (On Remand): Again certified shareholder class.
- Second Circuit: Affirmed certification order. First, shareholders did not have to submit evidence of fraud-induced inflation. Second, Goldman failed to rebut *Basic* presumption; argument that misstatements were too general to maintain price inflation of stock was a merits one inappropriate at Rule 23 phase.

Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys., 141 S. Ct. 950 (2020)

- Issues Presented:
  - "(1) Whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson* by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality; and (2) whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion."
- First securities class action that SCOTUS has taken up in many years
- Clarify the law in this area – out of more than 2,000 securities class actions, defendants have only rebutted presumption of price impact/reliance in 5 cases
- May further make clear how far into the merits of a case a court may or even must go at the class certification stage
- Status: Oral argument on March 29, 2021

IMMEDIATE IMPLICATIONS: Securities Class Actions

- At what stage should district courts address a defendant's evidence that alleged mistatements were too general to have affected stock price in order to rebut any presumption of reliance.
- If nature of misstatements are considered at class certification stage, what is the method of proof (*i.e.*, only through expert testimony).
- When a defendant seeks to rebut the *Basic* presumption, who has the ultimate burden of persuasion with respect to price impact?
- Additional potential issues that may be addressed:
  - Potential validity of price inflation maintenance theory
  - Validity of fraud-on-the-market presumption of reliance

BROADER IMPLICATIONS

- Consistent Battle: What, if any, merits-related determinations a district court can make in connection with Rule 23 certification.
- Plaintiffs: No merits-related determinations.
  - "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013).
- Defendants: Some merits-related determinations are necessary to resolve Rule 23 requirements.
  - *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim").
  - *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (Rule 23 class certification "will frequently entail overlap with the merits of the plaintiff's underlying claim.").
  - *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283 (2014) (proof of price impact relevant to both class certificationa nd merits issues).

Examples Of Merits-Related Class Certification Issues

- Securities Class Actions
  - Price impact
  - Reliance
- Defect Class Actions
  - Understanding nature of defect
  - How often alleged defect manifests
  - Duty to disclose
- Antitrust Class Actions
  - Impact and Injury
- Consumer Fraud Class Actions
  - Causation and Materiality

2021: OTHER KEY CLASS CERTIFICATION ISSUES TO WATCH FOR

- COVID-19 Class Certification Decisions
  - Refund Litigation
  - University Class Action
  - False Labeling Cases
- Standard for Certifying Rule 23(c) Issue Classes
- Evolving Rule 23 *Daubert* Standards
- Validity of Class-wide Conjoint Analyses
- Settlement Issues
  - Obstacles to Approval of Class Settlements
  - Validity of Incentive/Class Rep Awards

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

Morgan Lewis

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

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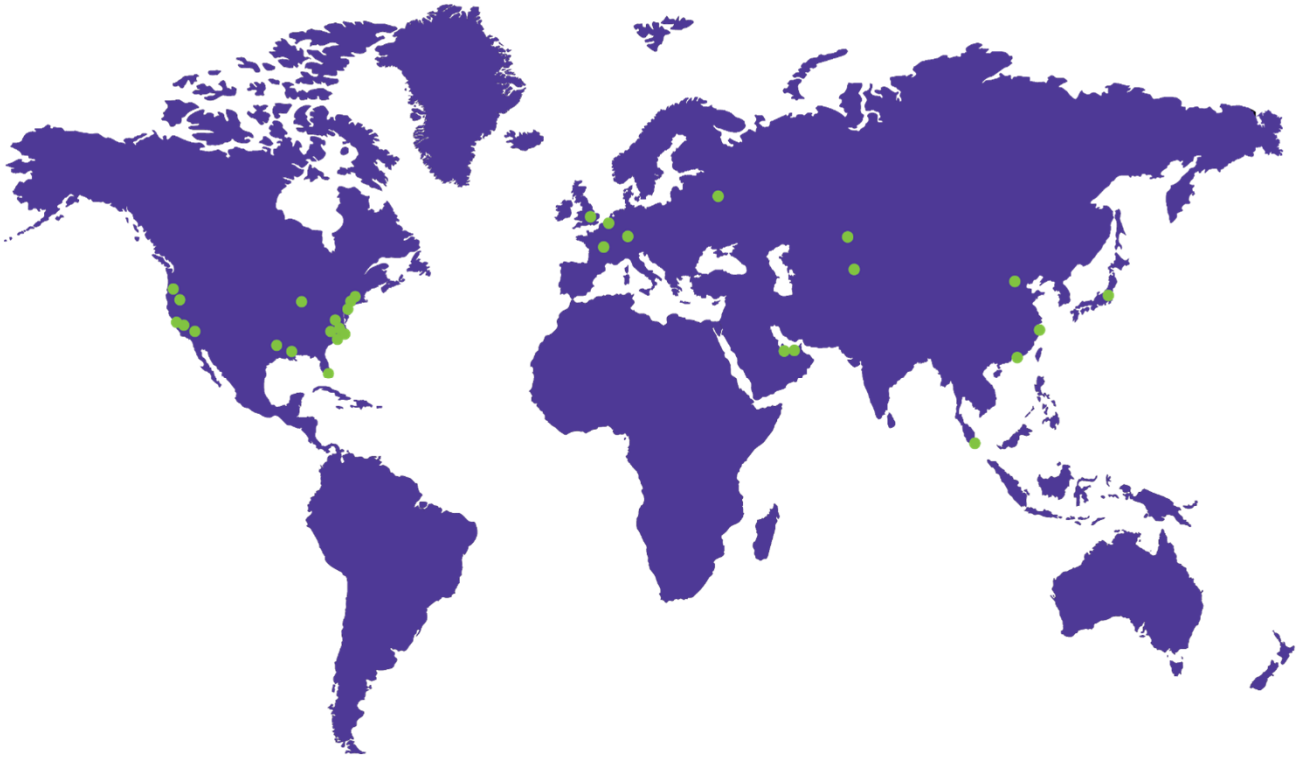


Morgan Lewis

Brian M. Ercole

Brian M. Ercole
Miami
+1.305.415.3416
brian.ercole@morganlewis.com

When clients face consumer-based class actions and complex litigation, Brian M. Ercole assists them through every phase. He regularly defends healthcare companies, pharmaceutical companies, food manufacturers, banks, retailers, and companies in the mortgage industry against putative class actions involving an array of claims. Brian guides clients through state and federal courts across the United States in matters involving civil RICO, TILA, breach of contract, fraud, and statutory unfair trade practices claims. Brian works with clients throughout the life of a dispute, including petitions before the Judicial Panel on Multidistrict Litigation, class settlement approval hearings, and appeals.

Ezra D. Church

Ezra D. Church
Philadelphia
+1.215.963.5710
ezra.church@morganlewis.com

Ezra D. Church counsels and defends companies in privacy, cybersecurity, and other consumer protection matters. He helps clients manage data security and other crisis incidents and represents them in high-profile privacy and other class actions. Focused particularly on retail, ecommerce, and other consumer-facing firms, his practice is at the forefront of issues such as biometrics, artificial intelligence, location tracking, ad tech, and blockchain. Ezra is a Certified Information Privacy Professional (CIPP) and co-chair of the firm's Class Action Working Group.

Lisa R. Weddle

Lisa R. Weddle
Los Angeles
+1.213.612.7334
lisa.weddle@morganlewis.com

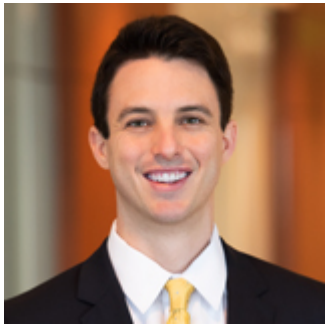
Lisa R. Weddle handles complex litigation and class actions in US federal and California state courts and arbitrations, with an emphasis on healthcare and ERISA welfare benefit plan litigation, commercial disputes, unfair competition, consumer protection, and false advertising claims. She represents large health insurance companies, a national dialysis provider, automotive manufacturers and dis tributors, national and global banks, and broker dealers. In the automotive arena, Lisa was part of a team that defeated certification of a nationwide class of over 7 million vehicle owners alleging a defective design in HVAC systems that purportedly caused odors and health hazards. Lisa and the team are also defending this automotive distributor and the manufacturer in two similar class actions throughout the country. Lisa also co-leads a team defending an automotive distributor against warranty claims under California's Song-Beverly Act.

Melissa M. Coates, PH.D.

Melissa M. Coates, PH.D.
Miami
+1.305.415.3419
melissa.coates@morganlewis.com

Melissa M. Coates represents clients in class actions, intellectual property, product liability, and financial services litigation before US federal and state court. In addition to complex commercial litigation, Melissa maintains an active pro bono practice. A former research scientist, Melissa holds a Ph.D. in biological sciences. In law school, Melissa interned for US District Court Judge Cecilia Altonaga and served as a research assistant to Professor Mary Doyle. She was also a member of the *University of Miami Law Review.* After law school, Melissa served as a law clerk to Judge Paul C. Huck of the US District Court for the Southern District of Florida.

Matthew M. Papkin



Matthew M. Papkin
Miami
+1.305.415.3392
matthew.papkin@morganlewis.com

Matthew M. Papkin represents clients in complex civil litigation and class actions before US federal and state courts. Prior to joining Morgan Lewis, Matt started his legal career at the Miami-Dade County Attorney's Office, where he defended the county in civil actions through trial. From 2018 to 2019, he served as a law clerk to Judge Beth Bloom of the US District Court for the Southern District of Florida.

THANK YOU