

Recent Developments in Class Action Litigation

Innovative Strategies for Litigating Class Action Suits

November 12-13, 2007
Millennium Biltmore Hotel
Los Angeles, California

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CAFA

BURDEN OF PROOF: SATISFACTION OF AMOUNT IN CONTROVERSY REQUIREMENT

- Ninth Circuit approach: *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006)
 - Where complaint is silent on damages: “preponderance of evidence” standard.
 - Where complaint specifies an amount less than \$5,000,000, party seeking removal must prove “with legal certainty that CAFA’s jurisdictional amount is met.”

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BURDEN OF PROOF: SATISFACTION OF AMOUNT IN CONTROVERSY REQUIREMENT (Cont.)

- *The Home Depot, Inc. v. Rickher*, No. 06-8006, 2006 WL 1727749, at *1-2 (7th Cir. 2006)
 - Holding that amount in controversy includes monetary damages, attorney's fees and the cost of complying with injunctive relief and that, where complaint was silent on issue, defendant satisfied the requirement to a "reasonable probability" through director's affidavit claiming that amount company would lose if enjoined would exceed \$1.2 million annually.

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NOTICE OF REMOVAL

- *Babasa v. LensCrafters, Inc.*, No. 07-55880, 2007 WL 2331949, at *2 (9th Cir. 2007)
 - Holding that pre-mediation letter put defendant on notice that amount in controversy satisfied CAFA's jurisdictional requirements and that notice of removal filed more than 30 days after receipt of letter was untimely.

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BURDEN OF PROOF: EXCEPTIONS TO CAFA JURISDICTION

- Once CAFA jurisdiction has been established by the removing party, the party opposing removal bears the burden of proving that an exception to CAFA jurisdiction applies
- “Home state” exception: *McMorris v. The TJX Companies, Inc.*, 493 F. Supp. 2d 158 (D. Mass. 2007)
- “Local controversy” exception: *Caruso v. Allstate Ins. Co.*, 469 F. Supp. 2d 364 (E.D. La. 2007)

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COUPON SETTLEMENTS

- *Figueroa v. Sharper Image Corp.*, No. 05-21251-CIV-ALTONAGA/Bandstra, 2007 U.S. Dist. LEXIS 78316 (S.D. Fla. 2007)
 - Ionic Breeze “air purifier”
 - Retail price \$350
 - Alleged false advertising re effectiveness
 - Multiple class actions
 - Attempted settlement with Florida counsel
 - Sharper Image’s “threat” of bankruptcy

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COUPON SETTLEMENTS (Cont.)

- *Figueroa v. Sharper Image Corp.*, No. 05-21251-CIV-ALTONAGA/Bandstra, 2007 U.S. Dist. LEXIS 78316 (S.D. Fla. 2007) (Cont.)
 - Proposed coupon deal
 - \$19 coupon
 - Redeemable only for purchase of another product sold by Sharper Image
 - Little or no actual cost to Sharper Image
 - \$2 million in attorneys' fees to plaintiffs' counsel

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BURDEN OF PROOF: ATTORNEY'S FEES

- *Lott v. Pfizer, Inc.*, 492 F.3d 789, 790, 793-94 (7th Cir. 2007)
 - Reversed award of attorney's fees and costs pertaining to unsuccessful removal under CAFA because defendant had an "objectively reasonable basis for seeking removal."

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CERTIFICATION UNDER RULE 23

- **Limited guidance from U.S. Supreme Court on Rule 23 standards**
 - *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974): Court cannot "conduct a preliminary inquiry into the merits of a suit";
 - *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982): Court must conduct a "rigorous analysis," which may require probing behind the pleadings.

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MORE RIGOROUS CERTIFICATION APPROACH

- *In re IPO Securities Litig.*, 471 F.3d 24, 27 (2d Cir. 2006)
 - District judge may not certify a class without making a ruling that each Rule 23 requirement is met;
 - "Some showing" standard insufficient;
 - All evidence must be assessed;
 - Overlap of Rule 23 requirement and merits issue does not relieve court of obligation to rule on whether Rule 23 requirement is met.

Disavowed *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) and *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 292 (2d Cir. 1999)

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MORE RIGOROUS CERTIFICATION APPROACH (Cont.)

- *In re IPO Securities Litig.*, 471 F.3d 24 (2d Cir. 2006) (Cont.)
 - Noted that quote from *Eisen* about merits inquiries taken out of context
 - Analyzed 2003 amendments to Rule 23
 - Held that plaintiffs cannot meet Rule 23 burden by introducing expert that is “not fatally flawed”
 - Endorsed resolution of factual and expert disputes

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MORE RIGOROUS CERTIFICATION APPROACH (Cont.)

- *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)
 - **“A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.”**

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LESS RIGOROUS CERTIFICATION APPROACH

- *Dukes v. Wal-Mart Inc.*, 474 F.3d 1214, 1227 (9th Cir. 2007) (upholding certification of Rule 23(b)(2) employment discrimination class and noting that “it has long been recognized that arguments evaluating the weight of the evidence or the merits of a case are improper at the class certification stage”)
 - Relies on *Visa Check* and *Caridad*
 - Applies “limited *Daubert*” standard
 - Restricts backpay remedy to plaintiffs with objective proof of interest in promotions, noting that a contrary result would require individual hearings
 - Limited to employment discrimination/23(b)(2) context?

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LESS RIGOROUS CERTIFICATION APPROACH (Cont.)

- *In re Live Concert Antitrust Litigation*, No. 06-ML-1745-SVW (RCx), slip op. at 133 (C.D. Cal. October 22, 2007)
 - Granted plaintiffs’ motion for class certification after analyzing “the allegations, expert testimony, and evidence through the very narrow prism permitted by *Dukes*.”
 - Noted that the result may have been vastly different if the MDL panel had selected a district court in a different circuit to serve as the MDL Court.
 - “[I]f the MDL panel had assigned the cases to the Southern District of New York, the district court could have engaged in a more probing analysis of the Rule 23 factors pursuant to *In re IPO Securities Litig.*”

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DAUBERT ISSUES

- **“Limited *Daubert*”:**
 - *See Dukes*
- **Full *Daubert*:**
 - *Bell v. Ascendant Solutions, Inc.*, No. 3:01-CV-0166-N, 2004 U.S. Dist. LEXIS 12321, at *6-16 (N.D. Tex. July 1, 2004), aff'd, 422 F.3d 307 (5th Cir. 2005)
 - *McNamara v. Bre-X Minerals, Ltd.*, 5:97-CV-159, 2002 U.S. Dist. LEXIS 27473, at *20-23 (E.D. Tex. Sept. 30, 2002)

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RULE 23(b)(2) HYBRID DAMAGES/INJUNCTIVE RELIEF CLASSES

- Several standards have emerged:
 - “Incidental damages” approach
 - “Ad hoc” approach
 - “Intent of plaintiffs” approach

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FIFTH CIRCUIT “INCIDENTAL DAMAGES” TEST (STRICT APPROACH)

- Damages flow to the class as a whole
- Damages can be computed by objective standards without individual damages hearings
- Proposed class is cohesive and homogeneous
- Opt-outs unnecessary
- See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998)

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MODIFIED “INCIDENTAL DAMAGES” TEST

- *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004)
 - Applied incidental test
 - Added antecedent showing that more than “negligible portion” of proposed class properly sought injunctive relief

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SECOND CIRCUIT “AD HOC” APPROACH

- *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001)
 - “[E]ven in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought”; and
 - “[T]he injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.”

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NINTH CIRCUIT “INTENT OF PLAINTIFFS” APPROACH

- *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003)
 - “Rather than adopting a particular bright-line rule, we have examined the specific facts and circumstances of each case. . . . In order to determine predominance, we have focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit.”
- *See also Lozano v. AT&T Wireless Services, Inc.*, Nos. 05-56466, 05-56511, 2007 U.S. App. LEXIS 22430 (9th Cir. 2007); *Dukes v. Wal-Mart Inc.*, 474 F.3d 1214 (9th Cir. 2007).

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RULE 23(b)(3) ISSUES

- RELIANCE
 - Continues to be hotly-contested issue in many cases
 - Fraud, products liability, RICO, securities, etc.
 - Can create problems regarding predominance, manageability, etc. for plaintiffs
 - To overcome the reliance hurdle, plaintiffs have advanced various theories, including:
 - “presumed” reliance
 - “inferred” reliance
 - fraud on the market

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CASES FINDING RELIANCE COULD NOT BE PROVEN ON CLASSWIDE BASIS

- *Poulos v. Caesar World*, 379 F.3d 654, 664-67 (9th Cir. 2004)
 - Predominance requirement not satisfied
 - Claims implicated subjective and individualized factors relating to each consumer’s knowledge, motivations and expectations
 - No presumption warranted because the fraud allegations could not be characterized primarily as claims of omission

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CASES FINDING RELIANCE COULD NOT BE PROVEN ON CLASSWIDE BASIS (Cont.)

- *Gunnells v. Healthplan Services*, 348 F.3d 417 (4th Cir. 2003)
- *Sandwich Chef of Texas, Inc. v. Reliance National Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003)
- *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002)
- *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002)

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CASES FINDING RELIANCE COULD NOT BE PROVEN ON CLASSWIDE BASIS (Cont.)

- *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001)
- *Yokoyama v. Midland National Life Insurance Co.*, 243 F.R.D. 400 (D. Haw. 2007)
- Fraud on the market cases: See e.g. *In re IPO Securities Litig.*, 471 F.3d 24 (2d Cir. 2006)

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CASES FINDING RELIANCE CAPABLE OF BEING ESTABLISHED ON CLASSWIDE BASIS

- *In re First Alliance Mortgage Co.*, 471 F.3d 977, 991-92 (9th Cir. 2006)
 - Affirmed certification of class of allegedly defrauded mortgage borrowers
 - Defendant's employees were required to:
 - Attend mandatory, standardized training program
 - Memorize a sales script
 - Strictly adhere to specific methods for hiding information and misleading borrowers

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CASES FINDING RELIANCE CAPABLE OF BEING ESTABLISHED ON CLASSWIDE BASIS (Cont.)

- *Klay v. Humana*, 382 F.3d 1241, 1255-59, 1268, 1276 (11th Cir. 2004)
 - Affirmed certification of RICO class
 - Found that defendants conveyed "essentially the same message" to class members
 - Refused to certify state law fraud, breach of contract, unjust enrichment and statutory claims on predominance grounds
 - Recommended the creation of sub-classes based on differences in modes of proof

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CASES FINDING RELIANCE CAPABLE OF BEING ESTABLISHED ON CLASSWIDE BASIS (Cont.)

- *Thorogood v. Sears, Roebuck and Co.*, No. 06 C 1999, 2007 U.S. Dist. LEXIS 81035 (N.D. Ill. Nov. 1, 2007)
 - Certified class of clothes dryer purchasers
 - Plaintiff alleged Sears misrepresented dryer's drums as being comprised entirely of stainless steel
 - Evidence that each class member was subject to uniform misrepresentations:
 - Each dryer imprinted with "stainless steel"
 - In-store advertising, website, manual and warranty represented dryer drums as made of stainless steel
 - Sears failed to counter evidence of uniform misrepresentations
 - Court presumed reliance on classwide basis

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RULE 23(b)(3) DAMAGES ISSUES

- *Pastor v. State Farm Mutual Auto Insurance Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007)
 - Affirming denial of class certification because "a federal district judge [would have to preside] over thousands of evidentiary hearings each involving a trivial amount of money" to value each class member's damages.

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RULE 23(b)(3) DAMAGES ISSUES (Cont.)

- *Yokoyama v. Midland National Life Insurance Co.*, 243 F.R.D. 400 (D. Haw. 2007)
 - Declined to certify statewide class challenging sale of fixed index annuities
 - Damage calculation would require individual analysis of factors such as:
 - Financial circumstances and characteristics of each class member
 - Product and product features selected
 - Product performance
 - Benefits obtained from product

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RULE 23(b)(3) DAMAGES ISSUES (Cont.)

- *Blackwell v. Skywest Airlines*, No. 06cv307, 2007 U.S. Dist. LEXIS 67949, at *26, 45-46 (S.D. Cal. 2007)
 - Denied class certification based in part on finding that determination of liability and damages would require individualized inquiries.

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RULE 23(b)(3) DAMAGES ISSUES (Cont.)

- *De Leon-Granados v. Eller & Sons Trees, Inc.*, No 06-15876, 2007 U.S. App. LEXIS 20961, at *15-16 (11th Cir. 2007)
 - Affirmed district court's certification of a class of migrant workers against their employer for allegedly violating their rights under the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") and holding, in part, that an award of statutory damages under the AWPA would eliminate the need to determine individualized damages

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RULE 23(b)(3) SUPERIORITY ISSUES

- *Guevarra v. Progressive Financial Services, Inc.*, No. C-05-3466-VRW, 2006 U.S. Dist. LEXIS 89193, at *6-9 (N.D. Cal. 2006)
 - Denied certification holding that plaintiff's proposed class definition failed to satisfy 23(b)(3)'s superiority requirement because it:
 - failed to include all customers who received allegedly illegal letters therefore contravening the class action device's central purpose of avoiding multiple lawsuits;
 - exposed the defendants to the risk of "one-way intervention"; and
 - imposed costs without advancing fairness or efficiency.
 - Also found that plaintiff's counsel divided the class to maximize attorney's fees without significant benefits to their clients and ordered plaintiff's counsel to show cause as to why the matter should not be referred to the State Bar and the Standing Committee on Professional Conduct.

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Guevarra (Cont.)

- *Guevarra v. Progressive Financial Services, Inc.*, 497 F. Supp. 2d 1090, 1092-93 (N.D. Cal. 2007)
 - Declined to refer matter pertaining to counsel's division of class because although counsel had "engaged in ethically questionable behavior," the language of the Fair Debt Collection Practices Act encouraged multiplicity of proceedings, therefore any remedy to the situation belonged to Congress.

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RULE 23: IMPACT OF STATE LAW VARIATIONS

- **Cases declining to certify class based on variations in state law:**
 - *Lozano v. AT&T Wireless Services, Inc.*, Nos. 05-56466, 05-56511, 2007 U.S. App. LEXIS 22430 (9th Cir. 2007)
 - *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007)
 - *In re Bridgestone/Firestone, Inc. Tires Prod Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) and 333 F.3d 763 (7th Cir. 2003)
 - *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002)
 - *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180 (9th Cir. 2001)
 - *In re Paxil Litigation*, 218 F.R.D. 242 (C.D. Cal. 2003)

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RULE 23: IMPACT OF STATE LAW VARIATIONS

- **Cases certifying class despite state law variations:**
 - *In re Wafarin Sodium Antitrust Litig.*, 391 F.3d 516, 530-31 (3d Cir. 2004)
 - Manageability issues created by state law variations irrelevant in settlement context
 - *Mooney v. Allianz Life Ins. Co.*, No. 06-545 ADM/FLN, 2007 U.S. Dist. LEXIS 34530, at *19-20 (D. Minn. 2007)
 - Minnesota's contacts with non-resident class members justified application of Minnesota law to all class claims

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OTHER ISSUES: CERTIFICATION BASED ON THEORY NOT ALLEGED IN COMPLAINT

- *Lozano v. AT&T Wireless Services, Inc.*, Nos. 05-56466, 05-56511, 2007 U.S. App. LEXIS 22430, at *27-31 (9th Cir. 2007)
 - Reversed district court's order certifying a California class where certification was based on theory not alleged in plaintiff's complaint and district court had failed to analyze the theory against the prerequisites for class certification.

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OTHER ISSUES: DISCOVERY TO IDENTIFY NEW CLASS REPRESENTATIVE

- *Falcon v. Phillips Electronics North America Corp.*, 489 F. Supp. 2d 367, 369 (S.D.N.Y. 2007)
 - Denied plaintiff's request for discovery to locate an adequate class representative after passage of class certification and merits discovery deadlines and noted that further discovery would be grossly unfair to the defendant.

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RULE 23(e) SETTLEMENT ISSUES

- *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)
- *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)
 - Court Must Ensure That Settlement:
 - Comports with Rule 23's certification requirements;
 - Benefits absent class members.

Manageability issues need not be addressed

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SETTLEMENT ISSUES (Cont.)

- *Adams v. Southern Farm Bureau Life Insurance Co.*, 493 F.3d 1276, 1286-89 (11th Cir. 2007)
 - Notice of a 1999 settlement sent to class members' last known addresses, published in the USA Today and posted on the company website was "adequate and thorough" thus giving the settlement res judicata effect on subsequent claims.

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SETTLEMENT ISSUES (Cont.)

- *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004)
 - "[T]he defendants benefited from the temporary approval of the settlement, which they used to enjoin other . . . litigation against them; and having reaped a benefit from their pertinacious defense of the class treatment of the case for purposes of settlement they cannot now be permitted to seek a further benefit from reversing their position."

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CLASS ACTION WAIVERS

- *Green Tree v. Bazzle*, 539 U.S. 444, 452-53 (2003)
 - Whether class-wide arbitration is permissible decided by arbitrator if contract is silent

- *Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440, 448-49 (2006)
 - Challenge to contract as a whole, and not specifically to arbitration provision, assumes arbitration agreement's validity and must be heard by the arbitrator

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CLASS ACTION WAIVERS (Cont.)

- **Despite Federal Arbitration Act, state law can render class action waiver unconscionable.**
- ***Federal cases finding waivers invalid under state law:***
 - *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1075, 1077-78 (9th Cir. 2007)
 - Class action waiver in arbitration clause found both substantively and procedurally unconscionable
 - Presented to employees on a "take it or leave it" basis
 - Required claims to be brought within one year

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CLASS ACTION WAIVERS (Cont.)

- ***Federal cases finding waivers invalid under state law (Cont.):***
- *Hollins v. Debt Relief of Am.*, 479 F.Supp.2d 1099, 1107-08 (D. Neb. 2007) (applying Nebraska and Texas law)
 - Arbitration clause required nearly bankrupt plaintiff to travel to another state

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CLASS ACTION WAIVERS (Cont.)

- ***Federal cases finding waivers invalid under state law (Cont.):***
- *Ting v. AT&T*, 319 F.3d 1126, 1150-52 (9th Cir. 2003) (applying California law), cert. denied, 540 U.S. 811 (2003)
 - Waiver was deemed not truly bilateral
 - Required customers to split arbitration fees
 - Required arbitration to remain confidential

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CLASS ACTION WAIVERS (Cont.)

- ***Federal cases finding waivers invalid under state law (Cont.):***
- *Shroyer v. New Cingular Wireless Services, Inc.*, No. 06-55964, 2007 U.S. App. LEXIS 19560, at *23-26, 45 (9th Cir. 2007) (applying California law)
 - Holding that class action waiver clause in a wireless phone contract was procedurally and substantively unconscionable because:
 - the clause was included in a “take-it-or-leave-it” contract;
 - the individual disputes involves relatively small amounts of damages;
 - the carrier had substantially greater bargaining power; and
 - the carrier engaged in a “scheme” to cheat customers by forcing them to sign new contracts after a merger with the customers’ previous carrier.
 - The Federal Arbitration Act (“FAA”) does not preempt a finding that a waiver is unconscionable because the FAA does not bar courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable waiver in an arbitration clause.

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CLASS ACTION WAIVERS (Cont.)

- ***Federal cases finding waivers invalid under state law (Cont.):***
- *Dale v. Comcast Corp.*, No. 06-15516, 2007 U.S. App. LEXIS 21082, at *23-24 (11th Cir. 2007) (applying Georgia law)
 - Holding that class waiver provision in Comcast’s subscriber contract was unconscionable.

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CLASS ACTION WAIVER UPHELD

- *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004) (applying Louisiana law)
 - Clause permitted customers to bring small claims actions
- *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 557-58 (7th Cir. 2003)
 - Clause upheld where defendant agreed to pay arbitration costs

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CALIFORNIA STATE CASES ADDRESSING CLASS ACTION WAIVERS

- *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148, 162-63 (2005)
 - Waiver invalid
 - Adhesion contract
 - Small amounts of damages involved
 - Waiver would operate as exculpatory clause

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CALIFORNIA STATE CASES ADDRESSING CLASS ACTION WAIVERS (Cont.)

- *Gentry v. Superior Court*, 42 Cal. 4th 443, 463-64 (2007)
 - Reversed the court of appeal's decision to uphold a class arbitration waiver and held that "when it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider . . . the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration" in determining whether a class arbitration waiver is enforceable.

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OTHER LIMITATIONS ON CLASS WAIVERS (CA LAW)

- *Aviation Data, Inc. v. American Express Travel Related Services Company, Inc.*, 152 Cal. App. 4th 1522, 1542 (Cal. App. July 6, 2007)
 - Contractual right to arbitration lost by misrepresenting benefits of proposed class action settlement

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OTHER LIMITATIONS ON CLASS WAIVERS (CA LAW) (Cont.)

- *Lee v. Southern Cal. Univ. for Prof. Studies*, 148 Cal. App. 4th 782, 786-88 (Cal.App. 2007)
 - Class representative not bound by arbitration agreements signed by other class members

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CA CASES UPHOLDING CLASS WAIVERS UP FOR REVIEW

- *Konig v. U-Haul Co. of California*, 145 Cal. App. 4th 1243, 1253-55 (2006), *rev. granted, depublished by*, S149883, 2007 Cal. LEXIS 1900 (Cal. Feb. 28, 2007)
- *Jones v. Citigroup*, 135 Cal. App. 4th 1491 (2006), *rev. granted, depublished by* 43 Cal. Rptr. 3d 749 (2006)

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STATUTES GOVERNING THE ENFORCEABILITY OF CLASS WAIVERS

- Utah Code § 70C-3-104, 70C-4-105: Class action waivers in consumer credit transactions valid if disclosed in all capital letters or bold-face type.
- Okla. Stat. tit. 12 § 1880: Class action waivers "shall be closely reviewed for unconscionability."
- New Mex. Stat. § 44-7A-1(b)(4)(f), 44-7A-5: Class action waiver in an adhesion consumer arbitration agreement is unenforceable.

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INTERLOCUTORY APPEALS

- Rule 23(f): *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005)
 - "Review of class certification decisions will be most appropriate when: (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous."

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INTERLOCUTORY APPEALS

- 28 U.S.C. § 1292(B): *John v. National Security Fire and Casualty Co.*, No. 07-30237, 2007 U.S. App. LEXIS 22532, at *3-5 (5th Cir. 2007)
 - Holding that appellate jurisdiction regarding plaintiffs' interlocutory appeal extended only to order dismissing plaintiffs' allegations of a unitary class on the pleadings and refusing to consider whether the district court should have certified two separate classes that were never proposed.

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CALIFORNIA DEVELOPMENTS: B.P.C. § 17200. *et seq* and § 17500. *et seq*

- Proposition 64 applies to pending cases
 - *California For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 232 (2006);
 - Does not affect the ordinary rules governing the amendment of complaints and relation back
 - *Branick v. Downey Sav. & Loan Ass'n*, 39 Cal. 4th 235, 242 (2006).

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CALIFORNIA DEVELOPMENTS: B.P.C. § 17200. *et seq* and § 17500. *et seq* (Cont.)

- “Injury in fact” issues up for review:
 - *In re Tobacco Cases*, 51 Cal. Rptr. 3d 707 (2007)
 - *Pfizer, Inc. v. Superior Court*, 51 Cal. Rptr. 3d 707 (2007)

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RECENT CASE ADDRESSING STANDING ISSUES

- *Lozano v. AT&T Wireless Services, Inc.*, Nos. 05-56466, 05-56511, 2007 U.S. App. LEXIS 22430, at *37 (9th Cir. 2007)
 - Holding that wireless services company’s customer had standing to bring a claim under the UCL because the customer alleged a realistic threat that the company would continue to wrongfully charge him.

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CALIFORNIA DEVELOPMENTS: PRE-CERTIFICATION DISCOVERY TO IDENTIFY CLASS REPRESENTATIVES

- **Discovery permitted:**
 - *Best Buy Stores, L.P. v. Superior Court*, 137 Cal. App. 4th 772 (2006).
- **Discovery denied:**
 - *First American Title Ins. Co. v. Superior Court*, 146 Cal. App. 4th 1564 (2007);
 - *Cryoport Systems v. CNA Insurance Cos.*, 149 Cal. App. 4th 627 (2007).

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CALIFORNIA DEVELOPMENTS: PRIVACY ISSUES AND DISCOVERY

- *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007)
- *Belaire-West Landscape v. Superior Court*, 149 Cal. App. 4th 554 (2007)
- *Tien v. Superior Court (Tenet Healthcare Corp.)*, 139 Cal. App. 4th 528 (2006)

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ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 07-445 (April 11, 2007)

“The key to evaluating the propriety of contacting putative class members is whether they are deemed to be represented by the lawyer or lawyers seeking to certify a class. If potential class members are represented by counsel for the named plaintiff, Rule 4.2 prohibits defense counsel from contacting them absent consent of plaintiffs' counsel. If potential class members are not represented by counsel for the named plaintiff, both plaintiffs' and defense counsel are governed by Rule 4.3, which addresses communicating with persons not represented by counsel. In the latter situation, plaintiffs' counsel's right to contact putative class members also is subject to the limits on contacting prospective clients under Rule 7.3.” (footnote omitted).

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CALIFORNIA DEVELOPMENTS: CONTACT WITH FORMER POTENTIAL CLASS MEMBERS AFTER DENIAL OF CERTIFICATION

- *Experian Information Solutions, Inc. v. Superior Court*, 138 Cal. App. 4th 122, 131-32 (2006)
 - “[A]fter class certification has been denied by a trial court, court-ordered notifications to former, potential class members that they might have legal claims against a defendant are impermissible”
 - “Nothing in this opinion prohibits a plaintiff's counsel from communicating with potential clients and witnesses whose identities are not covered by a protective order as long as such communications are permitted under the California Rules of Professional Conduct”

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CALIFORNIA DEVELOPMENTS: ADEQUACY OF COUNSEL REQUIREMENT

- *Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1273-74, 1279 (2005)
 - Law firms disqualified where associate for one firm served as named plaintiff
 - Firm employing associate and associate “placed themselves in a position of divided loyalties”
 - Second law firm disqualified due to business relationship with first firm

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CALIFORNIA DEVELOPMENTS: SUMMARY JUDGMENT

- *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1084 (2007)
 - Trial court abused its discretion by ruling on the merits concurrently with class certification order

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CONSUMER PROTECTION CLAIMS

- *Buell v. Direct General Insurance Agency, Inc.*, 488 F. Supp. 2d 1215, 1218 (M.D. Fla. 2007) (concerning Fla. Stat. § 626.9541(1)(z))
 - Holding that a Florida statute involving unfair insurance trade practices did not create a private cause of action permitting plaintiffs to file a class action.
- *Kitzes v. Home Depot, U.S.A., Inc.*, 872 N.E.2d 53, 61 (Ill. App. 2007)
 - Affirming trial court's refusal to certify a class of treated wood purchasers claiming reduced property values, and finding that individual issues predominated, where plaintiffs were subject to individual defenses and 40% of sales were to intermediate customers such as home builders and not to end users.

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INTERLOCUTORY APPEALS

- *CE Design, Ltd. v. The Mortgage Exchange, Inc.*, 872 N.E.2d 1056, 1061 (Ill. App. 2007)
 - Holding that plaintiffs' motion to reconsider did not toll Illinois' 30-day time limit on appealing a denial of class certification.

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QUESTIONS?

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