Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

Plaintiff

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A disciple of visual
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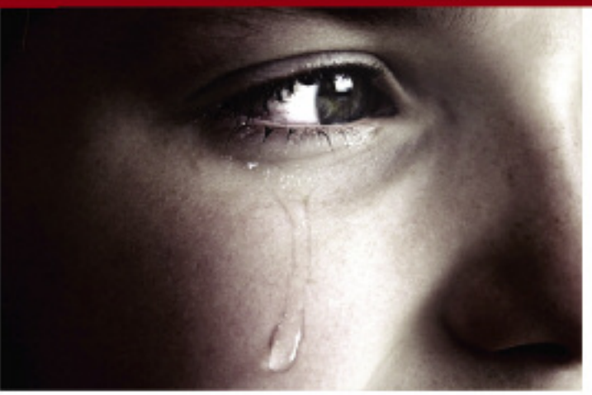
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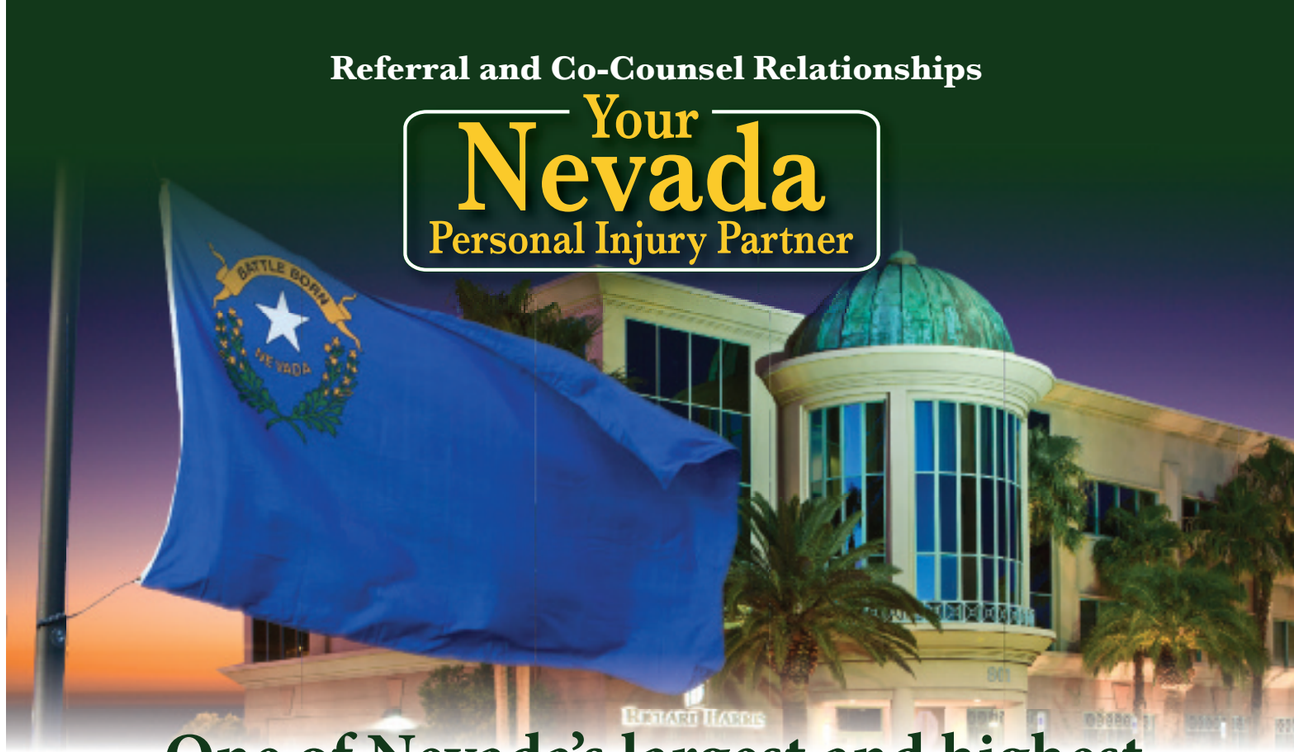
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Principles of litigating consumer class actions

While class actions are complex, the cases most suited to class treatment are statutory driven cases with a simple damages analysis

By Abbas Kazerounian

Class actions are extremely complex in nature and generally have far more considerations and variables than individually litigated cases. However, the cases that are most suited to class treatment tend to be statutory driven cases with a simple damages analysis. Though statutory cases are often complex (e.g., statutory interpretations, regulatory considerations, lack of stare decisis and legislative intent to mention a few), the damages offered by statutes are often appealing for class treatment. If a statute offers common damages for certain wrongful conduct, plaintiff attorneys know that they have a class of people that have common and similar damages.

Taking the Telephone Consumer Protection Act ("TCPA") as an example, it is clear and unambiguous that negligent violations trigger a $500 penalty per call and willful violations bring about $1500 in damages. There are no variables or alternatives to the damages brought about by the TCPA. Therefore, all the trier of fact has to establish is whether the alleged violation is negligent or willful in nature.

Taking a cellular-telephone marketing TCPA case as a model, a plaintiff attorney has to see if he/she can create common questions of fact and law for a set of people that are similarly situated. "All" that the plaintiff has to do is establish that the call/s made to his/her cellular telephone was with the use of an automated telephone dialing system ("ATDS") and/or a pre-recorded voice in the last four years (see 47 U.S.C. § 227 (b) *et seq.*). With few caveats and/or exceptions, there are only two affirmative defenses to this statute: prior express consent OR whether the call was made for an emergency purpose. Therefore, as a starting premise, the plaintiff has common questions of fact and law:

Were the calls made to a cellular telephone?

Were the calls made with an ATDS and/or prerecorded voice?

Were the calls made with prior express consent?

Were the calls made for purposes of an emergency?

If the calls are violations, were they negligent or willful?

Interestingly, only questions 1, 2 and 5 are plaintiff's burden. Questions 3 and 4 are affirmative defenses and the defendant's burden (see *Grant v. Capital Mgmt. Servs., L.P.* (9th Cir. 2011) 449 Fed. Appx. 598, fn. 1). At this juncture, at least on

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the surface, there is potential for a class action with the common questions and uniformity of potentially eviscerating damages.

Is it that simple?

Obviously certifying a case is not that simple. Though at first there seems to be a set of common questions, a smart defense attorney can still create issues and barriers to a potential class action. Since the landmark case of *Wal-Mart Stores, Inc. v. Dukes* (U.S. 2011) 131 S.Ct. 2541, attorneys have successfully defended class actions by creating an individualized inquiry. Taking the hypothetical of a TCPA case, if the defense can create an individualized question on one or more of the merits issues (as how they will apply to absent class members), they will defeat certification under the analysis of the Supreme Court in *Dukes*. As an example – whether or not the mechanism that made the calls to the putative class is an ATDS is dispositive but it will not necessarily create an individualized issue (because the same mechanism that made all the calls is or is not an ATDS and common to all absent class members). The most successful defenses in the TCPA realm have been individualized issues surrounding ascertainability. Though in the 9th Circuit the burden of providing prior express consent is massive (on the defense), that also creates an opportunity in defending the case.

Where the battle is won and lost

In the 9th Circuit, the defense has a large burden in showing *all* prior express consent documents at the time of TCPA discovery (see *Stemple v. QC Holdings, Inc.*, 2013 U.S. Dist. LEXIS 99582). However, if the defense can demonstrate that even though some class members may have been called without consent, it would be impossible to certify this case without manually going through every "account" (to see if in fact consent was given or not), the class action would be destroyed. If the defendant is a large national bank, that could be millions of accounts. What that amounts to (at least in the 9th Circuit) is that the most important battle in (most) class-action litigation is the discovery battle.

If the court decides that the plaintiff should be entitled to all documents, software and data, that usually amounts to bad news for the defense. In TCPA litigation, if the Court orders all prior express

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documents to be produced pre certification, that usually spells trouble for the defense. The same is true for the outbound dial list (which is the list of numbers called from the "alleged" ATDS mechanism to all cellular numbers). In conjunction with a site inspection and the right experts, this gives every opportunity to the plaintiff to create a certifiable class. Why? With the data and technology being available, the plaintiff has an opportunity to try and demonstrate to the court that he/she can ascertain the "class" through the technology available to him/her and without manually going through every account. Should the discovery be denied by the court, the defense will have the upper hand because without the data, it will be hard to know what class of people may be segregated via an efficient and systematic avenue (rather than an individualized manner).

In the TCPA context, even if the data is made available to the plaintiff by the court, and the defendant actually provides it, that data could be and usually is extremely voluminous. In a case against a national bank, the data could consist of billions of telephone numbers and millions of prior express consent documents. Even with the aid of electronic discovery rules, the institutionalized defendant has the upper hand in the depth of its pocket. Even with the data, the plaintiff still has to have the resources to be able to mine, scrub, de-duplicate and extrapolate. Only with the best experts and technology may a plaintiff have the potential to demonstrate that he/she can ascertain a class. This is, of course, incredibly expensive and creates a much larger risk to the plaintiff than to the defendant. The risk to the defendant is that once the discovery order goes against it, a capable plaintiff is permitted to go on a fishing expedition within the parameters of the discovery order – not something that any astute institutionalized defendant would want. That is why a large portion of defendants choose to go to mediation at this juncture of litigation.

The big mistake

Once the discovery battle is over, the largest mistake that a plaintiff can make

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is to bite off more than they can chew. If the potential class presented to the plaintiff is enormous, it can be a mistake to try to certify the "whole enchilada." Taking the TCPA example, the damages are catastrophic. Should the discovery be available (and it has been established via experts that smaller subclasses can be ascertained), it is always better to carve out a smaller manageable subclass to certify rather than the millions that may be available as the *potential* universe.

In *Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 579 (S.D. Cal. Oct. 29, 2013), the plaintiff attempted to certify the whole potential class valued at over $2 billion. The defendant showed numerous ways that it had obtained consent. Though it is easy to Monday morning quarterback, and easy to comment without the discovery being made available to the commentator, the chances of ascertaining and managing a smaller subset of similarly situated people were exponentially higher in *Connelly* than the route that the plaintiff took [*Author's note*: It should be noted that *Connelly* is on appeal, but if I were to predict an outcome it would be that the 9th Circuit will affirm the lower court's decision.].

The smarter play would have been to concentrate on a subset of similarly situated people because it is more manageable. Furthermore, it is of note that with only 10,000 people in a certified class, if plaintiff wins on merits, the defendant is facing liability of at least $5 million.

In the case of *Connelly*, a small subclass of people could have been 100,000 people or more. If plaintiff had managed to certify that smaller subclass, what would that have done? The liability would have been potentially $50 million. The most likely scenario is that the defense would have wanted to mediate this case before merits were decided with a dispositive motion. But the interesting point here is that it is unlikely that the defense would have gone to the mediation table trying to mediate only the class of 100,000. They would have most likely gone to the mediation table attempting to mediate the entire potential universe.

Why would the defense leave millions out there for another plaintiff to

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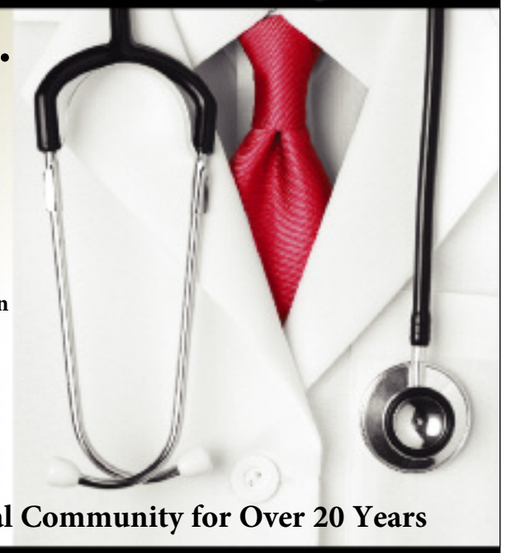
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pick off (at least another subclass)? Most likely, the defense would not want to do that. Therefore, it is arguable that to try and certify the largest class available is not always the smartest litigation strategy. Plaintiff has to be sure of his class, especially if eviscerating damages are a possibility. It is always going to be making a judge's job easier if it is deemed that the plaintiff is overreaching (with catastrophic economic consequences).

Mediation

Should the parties decide to mediate a class action, and should the parties even come to a meeting of the minds, class counsel will still have a lot of work ahead of them. Unlike a personal injury case, where a case is usually paid within 30 days of an executed settlement agreement, in the context of a class action, every aspect of the agreement has to be put before a court and scrutinized. That includes but is not limited to the structure of the settlement, the terms of the release (specifically the scope of the release), the notice given to class members, the attorneys' fees being requested and the relief negotiated on behalf of the class. Therefore, the parties may believe that they have a good deal, but until the court approves that agreement, the settlement agreement is almost meaningless.

This is where the sophistication of the mediator is imperative. Long gone are the days of reversionary settlements in the 9th Circuit. If you have a certificate/voucher settlement, there are issues that have to be considered:

- Are the certificates transferable?
- Will they go out of date?
- Will the class be given cash in conjunction with the tokens/vouchers?
- Do class members have to spend money in order to use your certificates?

If the plaintiff decides to accept vouchers, will that pass muster before the court? The plaintiff has to show why he/she is accepting such a settlement. Some voucher/token settlements can be justified – perhaps the defendant is struggling financially, or the risks of litigation are great. The issue is that it has to be justified and explained with in-depth knowledge of the prevailing law in the particular circuit.

Sometimes, in certain consumer cases, the best method of notice is merely national publication and not direct mail notice. This is another issue that has to be justified to the court. Did the plaintiff try hard enough to ascertain addresses for the class members? In a potential misrepresentation case against a food manufacturer (for products sold in almost any supermarket) direct mail notice may be impossible and the best method of notice would be publication. The issue here is that for purposes of preliminary approval, a judge still has to go through an FRCP 23 analysis. The problem for the judge would be whether this class is even ascertainable for settlement purposes. At this juncture there is a balancing act between showing the court the best notice practicable and at the same time showing that the class is ascertainable. The plaintiff faces risk in availing this settlement notice plan to a court because there is a chance that the court could respond to it negatively (as it pertains to ascertainability).

When mediating a class case, it is therefore not just a matter of agreeing to a number. Class counsel has to consider the structure of the settlement (is it reversionary, is it a common fund, is it a claims made or an opt-out only settlement?), the compensation, the scope of the release, the notice, attorneys' fees and so much more. The case law is continually changing and class counsel and mediators have to be very cognizant of what will and will not pass muster before the courts. To demonstrate the contrast, when mediating a personal injury matter, the case law is almost never a factor as the stare decisis has changed very little on common law negligence in the last 50 years. There are exponentially more moving parts and issues with class mediations than individualized cases. As a result, a far more sophisticated mediator would be needed for a class case.

In the world of TCPA, class cases are sometimes settled for pennies on the dollar. But does that make the settlements bad? Not necessarily – because what the lay person or even the judge may not know are the risks involved, the financial viability of the defendant, commensurate results, etc. Class counsel has the task of educating the presiding judge as to why the settlement at bar is fair, reasonable and adequate. Class counsel has to be persuasive and make sure that the judge understands the nuances of the settlement and its reasonableness because the judge is the person that ultimately decides upon the fairness of the settlement.

Conclusion

There is no simple roadmap to litigating a class case; different attorneys have demonstrated through different techniques and strategies that they can prevail. However, there are takeaways that should perhaps be rules of general applicability (and always with exceptions) when entering into unchartered territories, e.g., when trying to litigate a type of case that has not been litigated before, it is advisable not to overreach. Be sure that a class can be ascertained and is manageable; be sure of the case law before agreeing to a settlement that is unconventional – it must still pass muster before the court. Being creative is a huge part of being a good class action attorney but the license to be creative is more elastic and forgiving when one has mastered their craft and their specific practice area.


Kazerounian

Abbas Kazerounian is a founding partner at Kazerouni Law Group, APC. *Kazerounian's areas of specialty surround consumer class. In 2013 and 2014 Mr. Kazerounian was selected as a Super Lawyers Rising Star. He also recently argued and won the landmark case of* Knutson v. Sirius XM Radio *before the Ninth Circuit. Mr. Kazerounian is an adjunct professor of law at CWSL and the author of* On Two Feet and Wings *(named one of the best books of 2014 by Kirkus Review).*

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Mediating the class-action case

A look at the process and substance of class-action mediation, and plaintiffs' intra-team disputes

By Dave Rudy

Author's note:
In a previous *Plaintiff* article (January, 2013) I discussed general considerations in selecting mediators in complex and class-action cases. This article examines the subject further, including scrutiny of mediator qualifications in class-action cases. In addition, I examine strategies for addressing intra-team squabbles on the Plaintiffs' side in class-actions cases.

None of the suggestions made in this article is intended to be dogmatic or preclusive. The purpose is to encourage practitioners to analyze these issues more deeply as part of their mediation preparation.

Process* and *Substance

Normally in civil litigation, the mediator will not concern himself with the *substance* of the deal.[1] That is to say, the mediator's role does not typically extend to approving the substantive terms on which the parties decide to resolve their dispute. The mediator's primary responsibility is to guard and tend the *process* of mediation. The only factor (relevant to the present analysis) which typically crosses the line between *substance* and *process* is the *durability*[2] of a settlement. Although *durability* is mostly a *process* concern, the line is not bright, and often it is an issue of *substance* as well.

Durability is a critical concern in every class-action settlement. These settlements bind the rights and obligations of absent participants (class members), raise serious due process concerns (far broader than the mechanics of notice), present detailed issues with respect to the defendant(s)' obtaining of complete peace, and are subject to scrutiny and analysis by the trial judge and potentially appellate justices.

As every class-action lawyer knows, it is unproductive to spend hours or days arriving at a hard-fought settlement which is later rejected by the trial court. In addition, Defendants are especially concerned with the breadth and finality of the resulting peace. The more durable the settlement, the more desirable it is to the class-action defendant. Therefore, considerations of *durability* are extremely important to both sides in class-action settlement negotiation.

All of this points to the need for a well-qualified class-action mediator. A durable settlement is much better facilitated by a mediator who understands what durability means in a class-action settlement, and tends the process with an eye firmly fixed on settlement issues and how they relate to process.[3] A matter as basic as *when* to raise particular settlement issues can be critical to the conclusion of the case.[4] Here are some other considerations that an experienced class action mediator will bring into focus:

- Should non-monetary or monetary terms be discussed first?
- How detailed does the MOU or "deal sheet" need to be to prevent a deal from blowing up during the proposed class settlement agreement drafting phase?
- How and when should attorneys' fees be discussed?
- What issues might foreseeable objectors/intervenors raise?
- Will the current proposal(s) regarding notice and class-wide release likely pass muster with the Judge?[5]

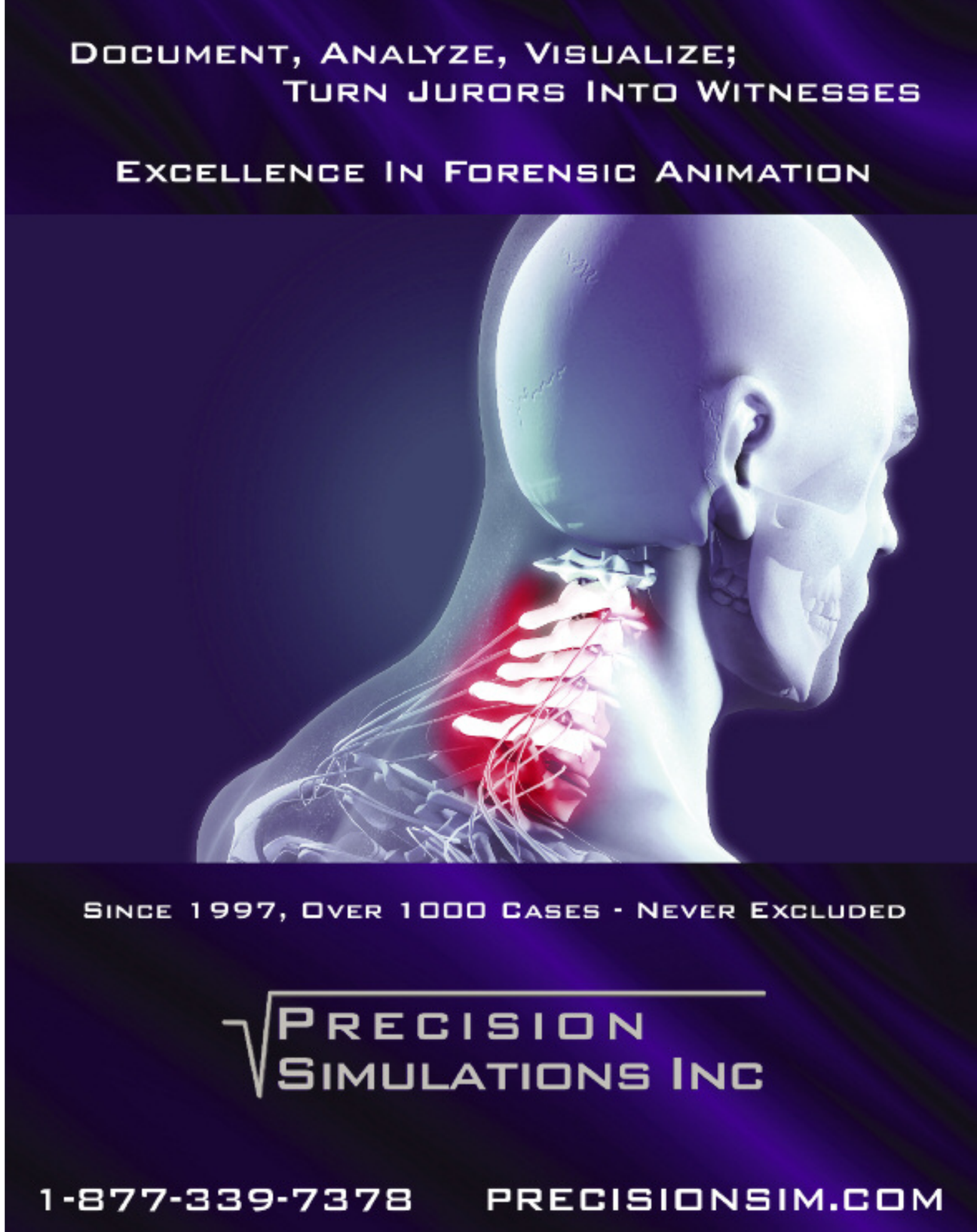
Experience in class actions vs. "subject matter"

This author contends that subject matter experience, while desirable, is not nearly as important as *process* experience. There is a difference between a mediator experienced in class-action lawsuits and one with expertise in the "subject matter." For example, imagine a section 17200 case in which your opponent proposes as the neutral an experienced wage and hour litigator who is a novice mediator. The wage and hour lawyer's class-action experience is relevant to knowledge of class-action settlement issues, what the court might be interested in knowing when considering whether to approve the settlement and related matters. So the lawyer's class-action experience constitutes some qualification as against another who has no experience with class actions of any kind. The fact that her experience is in a different class-action field should not disqualify her from consideration for this assignment.[6]

The problem, rather, is the proposed neutral's lack of experience in managing the *very* complex logistics of the class-action mediation. One might think that having attended many class-action mediations, it is relatively easy to transfer that

See ***Class-Action Mediation****, Page 18*

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experience to the mediator's role. In fact, whereas the mediator may be engaged in virtually linear conversation in any given room, the totality of all rooms is far more complex and typically far from linear. In addition to managing each of those conversations, the mediator is focused on the time of day, overall progress, timing with respect to injection of issues, what the terms and conditions of settlement will look like, and a dozen other matters, all the while dealing with one curve ball after another disrupting the flow. The point is not that it takes a certain kind of genius to be a mediator, but rather that experience in the role of mediator is important: there is no substitute for time on the firing line and experience in successfully keeping all the balls in the air simultaneously.

Precisely because the mediation will present manifold unexpected challenges, the wiser course is to have an experienced class-action mediator in place.

All of this suggests that the best class-action mediator choice is one with substantial experience in mediating class actions, who is expert in complex case logistics, and who has sufficient subject-matter expertise to be able to work effectively and credibly with the parties and counsel in getting the matter resolved.

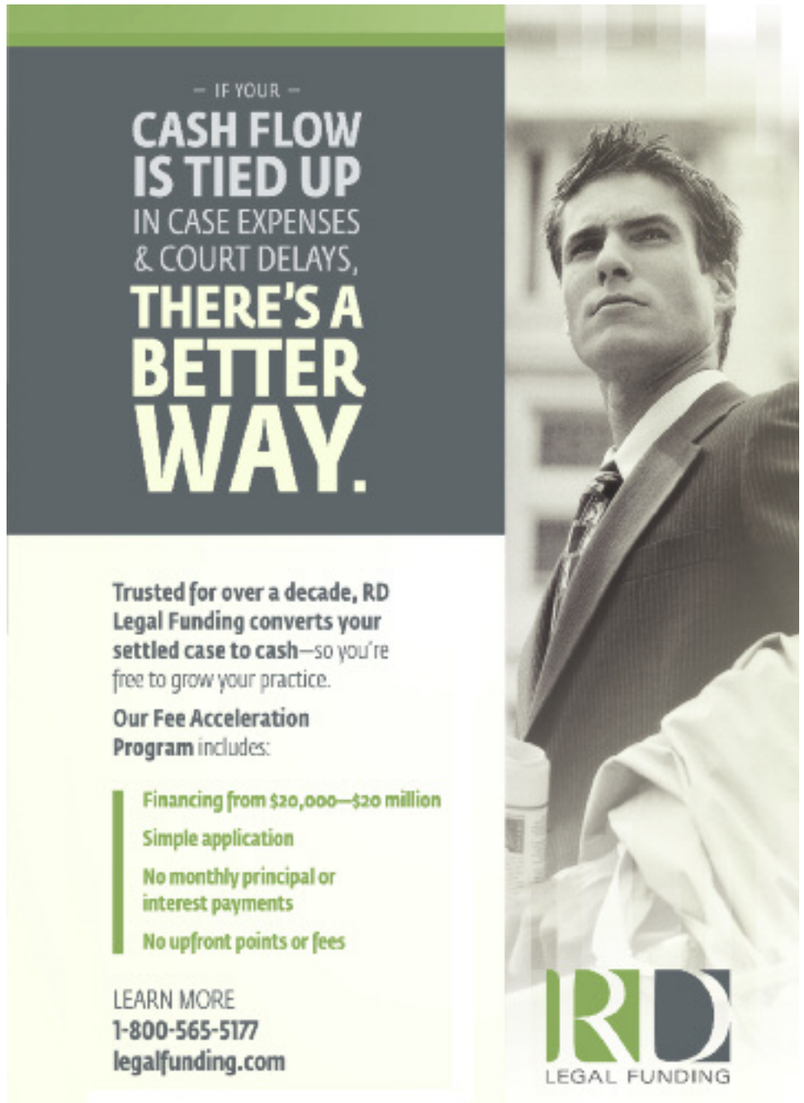
Intra-team[7] disputes: Plaintiff

Even the slightest familiarity with class actions will include some familiarity with intra-team disputes on the Plaintiffs' side.[8] Issues in contention may range from professional disagreements about how to plead or proceed with the lawsuit(s) to disputes over lead counsel assignments, "copycatting" and division of attorneys' fees.

The potential disputes cover such a wide range of topics or particular instances that it is unproductive to try to catalog them. Instead, let us consider some suggestions with respect to their best resolution.

First, it is axiomatic in order to be most effective and successful, any negotiator must not be burdened with collateral issues that impede her ability to focus on the negotiation. In other words, the Plaintiffs' lawyer should be able to bring to bear all her attention and skill on only one front: negotiation of the best resolution of the dispute with the opponent. Dividing resources between

*See **Class-Action Mediation**, Page 20*



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Class-Action Mediation, continued from Page 18

intra-Plaintiffs disputes and the main dispute with defendant(s) should be avoided wherever possible.[9]

A threshold issue may compound the challenges to pre-mediation resolution of differences among Plaintiffs' law firms. Counsel do not want to waste time and money trying to resolve issues which may become mooted in the event that settlement between Plaintiffs and Defendant(s) fails.

There are at least two reasons why this threshold issue should not stand in the way. First, it is worth the extra time and effort to eliminate this obstacle because of the damage that intra-Plaintiff disputes can do to the strength of the Plaintiffs' negotiating position. Second, even if the action(s) is not settled at this mediation session, it will be very productive as the litigation or settlement process proceeds. It is important to establish good communication among multiple Plaintiffs' counsel, get them working together, and generally agreed on overall strategy. Chances are it will be well worth the effort to build bridges and solve problems on the Plaintiffs' legal team even absent a settlement at that juncture.

If counsel are unable to resolve differences prior to contacting the mediator, some early mediator intervention is highly advisable. Counsel should be strongly urged by the mediator to meet and address plaintiff-side issues *only* for one-half day or more in advance of the full mediation session. It does not strengthen the Plaintiffs' hand in the coming negotiation to have time and energy flowing into intra-team disputes. It also does not bode well for the success of the mediation day if much of the early mediation session is consumed by plaintiff-only matters that do not involve (but may fortify) the defense. It is a momentum-killer whenever one party must sit for a lengthy period while the opponent resolves intra-team conflicts.

Even if Plaintiffs' counsel are unable or unwilling to meet prior to the main

*See **Class-Action Mediation**, Page 22*



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mediation session, the mediator should initiate the conversation and raise the issue(s) with each of the counsel prior to the mediation session. This pre-mediation or "advance" work is required in virtually every logistically complex case; in class actions, it is indispensable. The more work done on these kinds of issues prior to the mediation session, the more likely resolution is to occur on the appointed day(s). Mediators should do whatever they can to raise issues about any incipient plaintiff-side (or defense-side for that matter) conflicts and do what they can to resolve them outside (and preferably before) the main mediation session(s). Advocates should hold the mediator's feet to the fire to make sure that this pre-mediation activity actually occurs and that the mediator follows up as needed.

In many types of cases, the defense may be pleased to see conflict on the Plaintiffs' side (among counsel or between counsel and party). In the class action, however, the opposite is as likely. Class-action defendants are motivated by the peace that a settlement will achieve. Internecine warfare on the opponent team may tend to make the defense more nervous than happy.[10] The defense is also aware that settling one case and forcing the other Plaintiffs and counsel into an objector role may not present the best posture for court approval of the settlement. That, in turn, calls *durability* of settlement into question, and such a posture is therefore undesirable for both sides as previously discussed.

There are many ways to resolve such disputes on the Plaintiffs' side. Counsel may do so without assistance prior to mediation. The mediator may assist them to resolution of these issues, working by telephone and/or separate session. If no conclusive agreement can be reached, then an interim agreement on matters affecting the negotiation should be attempted, covering subjects such as:

- Who is authorized by the group to negotiate with the other side;
- What are the key terms on which all can agree (including ranges of acceptable positions on amount of settlement and other key issues);
- What information (if any) about the intra-team disputes should be communicated to the opponent (there probably needs to be some such communication, because these issues inevitably will have implications for settlement documentation as well as for the terms and conditions of settlement);
- Alternate means of resolving any remaining issues (use of arbitrator or Special Master, further mediation after a deal has been reached with the defense, submission of some issues on a disputed basis to the judge as part of the settlement approval process, etc.); and
- Any other subjects necessary to provide a framework that allows the negotiation to proceed while preserving the disputed positions.

Each of these approaches provides the benefit of removing the intra-Plaintiff team disputes at least temporarily, so that the main negotiation can proceed without interruption. Thus, Plaintiffs' counsel maximize chances of a settlement on terms more favorable to the side otherwise weakened by the conflict, keep momentum going in the main negotiation, and put to the side issues that compromise the strength of Plaintiffs' negotiating position.


Rudy

Dave Rudy is a full-time statewide neutral with Judicate West. *He has been a full-time neutral since 1991. The vast majority of his mediations have been in complex multi-party cases, including many different kinds of class actions. For more than 15 years before becoming a mediator, he tried cases on behalf of plaintiffs, including* Garvey v. State Farm and Evans et al. v. Rolling Hills et al. *(13 month jury trial arising out of Rolling Hills Flying Triangle landslide).*

Endnotes

[1] A notable exception (not relevant here) would be the special case where one or more parties are unrepresented and misrepresentations of law lead an unrepresented party to an unrealistic view of the strength or weakness of their legal position. In such a case, the essential fairness of the process itself – which is the mediator's responsibility – may quickly be called into question.

[2] Let us adopt a working definition, for purposes of this analysis. *Durability* means the likelihood that a settlement will actually be able to be implemented and survive such that the dispute (at least as much as is settled) is truly put to rest by the settlement agreement. Obviously, to the extent that a settlement is unlikely to be approved by the Court, it is not durable.

[3] The undersigned, and undoubtedly many of the readers of this article, has been involved in a number of class action settlement processes where the non-monetary negotiation was far more critical, difficult and time-consuming than negotiating the principal settlement sum.

[4] This is *not* to say that class-action attorneys need a mediator to tell them what to place on their settlement list of issues. Rather, the point is that an experienced class-action mediator understands these issues, sees them coming and can be very helpful to experienced counsel in two ways: developing the *recipe* for the settlement process itself (typically unique to each case); and in *mediating* the timing and expression of various issues to make the process work at its best.

[5] This is not an exhaustive list, but these are some considerations in which the running of the process may affect the likelihood of settlement, and surely affect the efficiency and ease of the settlement process.

[6] Of course, wage and hour experience is not entirely the same as section 17200 experience, but the differences are not so pronounced as to make the wage and hour lawyer's experience lack value in a section 17200 case.

[7] The term "team" can be a misnomer, when there are intervenors, issues of "piling on," etc. One consideration for mediation logistics is having ample space into which to separate pieces of the Plaintiff side.

[8] There is a host of issues that can arise on the defendants' side of the case as well, many involving similar professional disputes concerning how the action should be litigated, conflicts among defendants, etc. This analysis focuses on Plaintiff-side issues only.

[9] It is not uncommon in this writer's experience for such disputes to have been resolved prior to mediation. Watching the course of settlement negotiations where this is not the case quickly convinces any observer that the former course is far more effective than the latter. On the other hand, disputes on Plaintiffs' side can also operate to add leverage and/or value to a class settlement, to the extent that the defense is made aware of them to Plaintiffs' tactical advantage.

[10] Of course, this is a generalization, and like all generalizations, needs to be taken critically in any particular case.

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Employment class action: The year in review

Take heart! New cases have reached the California Supreme Court to answer questions on class certification and enforcement of arbitration agreements

By Christina Molteni

In the wake of *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 and *Dukes v. Wal-Mart* (2011) 131 S.Ct. 2541, employment class-action practitioners faced a hot and contested year in 2014. New cases have reached the California Supreme Court testing the waters to answer class certification issues and enforcement of arbitration agreements in the employment context in California. This article will show a few thoughts on developments this past year and what may be coming ahead.

Duran and manageability of the class action

The case, *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, was brought by business banking officers – loan officers – against U.S. Bank (USB), who claimed that they were misclassified as outside salespersons exempt from California's overtime laws and were denied overtime pay. The trial court certified a class of 260 plaintiffs and a year after certification, the parties presented competing trial management plans. The trial court decided to proceed with its own trial plan, taking testimony from 20 randomly selected class members in addition to the two named plaintiffs and bifurcated the trial in a liability phase and a damages phase. The trial court found that the entire class had been misclassified and then, in the damages phase, rendered a verdict of about $15 million.[1]

The Supreme Court ultimately decertified the class and reversed the judgment because the trial court's implementation of the trial plan – mainly sampling, prevented USB from proving relevant affirmative defenses and showing that some class members were exempt and not entitled to recovery.[2] Nonetheless, the Court confirmed core principles vital to preserving the class-action procedure as a mechanism for courts to efficiently adjudicate the claims of large groups of people.

After some discussions of the statutory frame of the outside salesman exemption, the Supreme Court thoroughly explained class certification principles, highlighting the relevance of manageability, to the point of equating it to a showing of commonality. ("In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class." *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 29.) The Supreme Court addressed the trial's court obligation to consider individual issues and manageability while certifying a class.

Whereas the Court has encouraged innovation on trial courts while managing class actions – by using representative testimony, sampling, or other procedures employing statistical methodology; the innovative approach must allow defendants to litigate their affirmative defenses. In this specific case, the sui generis trial plan should have permitted the defendant to introduce its own evidence, both to challenge the plaintiffs' showing of liability and to reduce the amount of restitution. ("Procedural innovation must conform to the substantive rights of the parties." *Duran*, *supra*, 59 Cal.4th at p. 40.) Statistical sampling is one of the means of proving liability and damages in class-action litigation. However, reliance on statistical proof cannot be used to bar the presentation of valid defenses to liability or damages, even though those defenses are to be adjudicated on an individual level. The Court held that here, the trial court relied on statistical sampling; however, it failed to develop the trial plan with expert input and refused to allow the defendant to impeach the plan. (*Id.*, at p. 16.)

The Court clarified that notwithstanding the presence of individualized issues in addition to common ones, class certification may be granted. However, the main issue is whether those individualized issues can be properly managed. (*Duran*, 59 Cal.4th at p. 29.) A class-action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when those defenses turn on individual questions; however, class-action defendants do not have an unfettered right to present individualized evidence in support of a defense. (*Id.*, at p. 64.)

This case answered difficult questions about how individual issues can be successfully managed in a complex class action. Yet, it was Justice Liu's concurrence that provided much needed guidance in certification of misclassification cases. First, his concurrence advised to inquire whether the substantive law governing the plaintiffs' claims renders those claims amenable to class treatment. The main consideration is to inquire into the realistic requirements of the job, not only by observing how the employee actually spends his time, but by also observing the employer's realistic expectations. If realistic expectations of the employer and realistic requirements of the job are likely to prove susceptible of common proof, the case is amenable to class treatment.[3] However, that is not the only

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consideration. In certifying a class action, the trial court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. In fact, any sampling or similar statistical approach should take into consideration individual issues, if present.



In spite of *Duran* being reversed, it did not become the end of class actions as extolled by the defense bar. Instead, it alerted class-action practitioners about the significance of the manageability of a class action as one of the requirements to certify a class and the careful crafting of a trial plan to prove that manageability. Moreover, a plaintiff's proactive approach while moving to certify a class should consider defendant's affirmative defenses at the class certification stage.

Iskanian and class actions waivers in PAGA cases

This case, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, has been closely followed by class-action practitioners because it addressed the enforceability of class and representative actions waivers – mostly on Private Attorneys General Act (PAGA)[4] cases. Arshavir Iskanian was employed as a driver by CLS Transportation Los Angeles (CLS) and during his employment he signed a "Proprietary Information and Arbitration Policy/ Agreement."[5] He filed a class and representative action complaint against CLS, alleging that the company failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner.[6] Shortly after, the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 174, overruling California law regarding class-action waivers in commercial contracts. CLS renewed its motion to compel arbitration. The trial court granted the motion and the Court of Appeal affirmed.

The California Supreme Court had to decide whether *Concepcion* overruled *Gentry v. Superior Court* (*Circuit City Stores, Inc.*) (2007) 42 Cal.4th 443 with respect to contractual class-action waivers in the context of non-waivable labor law rights and whether an arbitration agreement requiring an employee as a condition of employment to give up the right to bring a representative PAGA action in any

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forum was contrary to public policy. As an ancillary issue, the class-action waiver was discussed under the National Labor Relations Act (NLRA).

First, the California Supreme Court concluded that the U.S. Supreme Court's decisions in *Concepcion* and *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304 abrogated the rule in *Gentry*, rejecting some class-action waivers in employment contracts. In fact, *Concepcion* had invalidated *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 – a California precedent holding unconscionable and unenforceable a class arbitration waiver in a consumer contract of adhesion – based upon the Federal Arbitration Act (FAA), remarking that a class waiver was not invalid even if an individual proceeding would be an ineffective means to prosecute certain claims, because class proceedings interfered with fundamental attributes of arbitration (*AT&T Mobility LLC v. Concepcion*, *supra*, 131 S.Ct. at p. 1753).

The California Court also rejected the argument that the class arbitration waiver was unlawful under the NLRA of 1935. While recognizing FAA's liberal federal policy favors arbitration, the Court found that the NLRA does not represent a contrary congressional command overriding the FAA's mandate. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 371.) Although the California Supreme Court partially agreed with the United States Court of Appeals for the Fifth Circuit in *D.R. Horton, Inc., v. NLRB* (2013) 737 F.3d 344, it rather distinguished it because CLS's arbitration agreement was less restrictive than the one considered in Horton: the arbitration agreement did not preclude employees from filing joint claims in arbitration, did not restrict the capacity of employees to discuss their claims among themselves, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims. *D.R. Horton, Inc.* (2012) 357 NLRB 184.

Finally, on deciding the PAGA issue, the Court held that a waiver of a representative action under the arbitration agreement was not allowed under California law for public purpose reasons.[7] Moreover, the FAA did not preempt California law prohibiting such waiver because a PAGA claim is not a dispute between an employer and an employee arising out of their contractual relationship. Conversely, it is a dispute between an employer and the state which deputizes aggrieved employees to seek civil penalties on behalf of the state. ("[A]n action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties" *Iskanian v. CLS Transportation, LLC*, *supra*, 59 Cal.4th 348, 371.) Therefore, it is "a type of qui tam action" where 75 percent of the penalties will go to the state's coffers. (*Id.*, at p. 387.)

Although the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement, there is no indication that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals. (*Iskanian*, 59 Cal.4th at 385.)[8] California's public policy prohibiting waiver of PAGA claims – whose sole purpose is to assert the state's and its agency's interest in enforcing the Labor Code, does not interfere with the FAA's goals of promoting arbitration as a forum for private disputes. (*Id.*, at p. 89.) In sum, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.

Even though *Iskanian* allowed class-action waivers in some employment contracts while abrogating *Gentry*, California law still requires arbitration agreements to not be unconscionable. Whereas the defense bar have been drafting careful arbitration agreements for employers, plaintiff attorneys will likely assert only PAGA representative claims where employee arbitration agreements and class action waivers are present.[9]

Ayala looks at misclassification test and right of control

Four newspaper carriers, among them Maria Ayala, sued on behalf of a putative class of individual carriers, against Antelope Valley Newspapers, Inc. (Antelope) contending that they had been misclassified as independent contractors, rather than employees, and thereby were deprived of overtime, meal and rest periods, reimbursement of business expenses, and other protections to which they were legally entitled (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522). Plaintiffs moved to certify a class based, among other common evidence, on the contents of the standard contract entered between Antelope and all its carriers.

The trial court denied class certification because plaintiffs did not show that common questions predominate. The trial court anticipated that to resolve the carriers' employee status, the court should heavily inquire into the defendant's control over the individualized carriers' work. The Court of Appeal disagreed with the trial court and held that while overtime and meal and rest period claims were too individualized, the trial court should have certified the remaining claims due to the newspaper's right of control.

While analyzing the substantive law applicable to the case, the California Supreme Court ruled that the misclassification test looks at the right of control, not how it is exercised. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533.) For purposes of certification, it did not matter how much variation exists in how the company actually exerted control from individual to individual. The relevant question was whether the scope of the right of control, whatever it might have been, is susceptible to classwide assessment. (*Id.*, at p. 534.) Although the written contract between the carriers and Antelope might not have been conclusive if other evidence was present, it was a necessary starting point. If the newspaper had the same right to control the work of all the carriers, then class certification might have been appropriate, regardless of whether the actual exercise of that control varied from carrier to carrier. (*Id.*, at p. 535.) The Supreme Court finally remanded the case to the trial court with instructions to re-analyze the suitability of class certification based on whether the company's right of control varied from individual to individual, and whether those variations were manageable and not whether their exercise of control varied for each carrier. (*Id.*, at p. 540.)

For class-action practitioners, the *Ayala* holding continued the path set by *Duran* and stressed the relevance of effective manageability of the proof of individual issues and how the manageability of a class affects its certification. The Court exhaustively emphasized that individual issues do not render class certification inappropriate so long as such issues may effectively be managed, and it should not be overlooked while moving to certify a class.

What is next?

Manageability of the class and class-action arbitration are issues that will also be present this coming year. Employers will keep raising a myriad of individualized facts and courts will continue to diligently answer the crux question to certify a class: whether the theory of recovery advanced by the proponents of certification is likely to prove amenable to class treatment. See *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, as modified on denial of reh'g (Dec. 3, 2014.) *Duran* and *Ayala* will help advocates to navigate manageability issues to address in the class-certification motion and trial plans.

The issue of whether the court or the arbitrator decides whether an arbitration agreement contemplates class arbitration will be reviewed by the California Supreme Court. (*Sandquist v. Lebo Automotive,* No. S220812, Nov. 12, 2014)[10] There is a clear split on who should decide the issue of class arbitration. On one side, courts have held that the issue was for the arbitrator to decide (See *Sandquist*, *supra; Bergiadis v. Fred Loya Insurance Agency, Inc.* (No. B249276, 2014 WL 5469743).

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On the other side, courts have held that the courts should decide the issue of class arbitration. (See *Network Capital Funding Corp. v. Papke* (2014) 230 Cal.App.4th 503 and *Garden Fresh Restaurant Corp. v. Superior Court* (2014) 180 Cal.Rptr.3d 89.) The issue will be contested and litigated until the California Supreme Court resolves it.

Lastly, plaintiffs and their attorneys are gearing up to file PAGA claims on behalf of the California Labor and Workforce Development Agency; however, whether *Iskanian* will be taken by the U.S. Supreme Court and will survive FAA preemption remains to be seen.[11]



Molteni

Cristina Molteni is a member of Albert G. Stoll, Jr. Law Corporation, *focusing her practice on representing mostly monolingual Spanish-speaking clients in wage and hour class actions in the construction industry. Before joining AGS, Cristina worked in other labor and employment firms in the San Francisco Bay Area, handling numerous wage and hour class action cases. Cristina is a graduate from Facultad de Derecho, Universidad de Buenos Aires (Argentina) and Faculddade de Direito, Universidade de São Paulo (Brazil) and she was a clerk in the National Labor Court in Buenos Aires, Argentina, and a tenured professor of Employment and Labor Law in Universidade Cândido Mendes, Rio de Janeiro, Brazil.*

Endnotes

[1] Plaintiffs had dismissed their claims under the Labor Code and proceeded solely on a claim for equitable relief under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.)

[2] The majority decided that on remand, the trial court may entertain a new class certification motion and a new trial will be required for both liability and restitution. (*Duran v. US Bank National Assn.*, *supra*, 59 Cal.4th at p. 50.) Justice Liu's concurrence specifically indicated that if the case were to proceed as a class action on remand, the trial court "must start anew by assessing whether there is a trial plan that can properly address both common and individual issues." (*Duran*, *supra*, at p. 58.)

[3] The two types of evidence must be considered and weighed alongside each other, and more broadly, they must be considered and weighed together with the full range of evidence bearing on the ultimate issue, including the employer's job description, company policies, industry customs, and testimony of supervisors or managers who monitored, evaluated, or otherwise set expectations for employees in the class. (*Duran*, *supra*, at p. 57.)

[4] California Labor Code section 2698, et seq. This statute authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.

[5] The arbitration agreement provided that "any and all" employment-related disputes would be submitted to binding arbitration and contained a waiver of the right to bring claims on behalf of a class or as a representative of others.

[6] CLS moved to compel arbitration and the trial court granted CLS's motion. Shortly after the trial court's order, the California Supreme Court decided *Gentry* (*Gentry v. Superior Court* (2007) 42 Cal.4th 443), and CLS voluntarily withdrew its first motion to compel arbitration. The class of drivers was eventually certified in 2009.

[7] The unwaivability of certain statutory rights derives from two statutes that are themselves derived from public policy, Civil Code sections 1668 and 3513. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-383.)

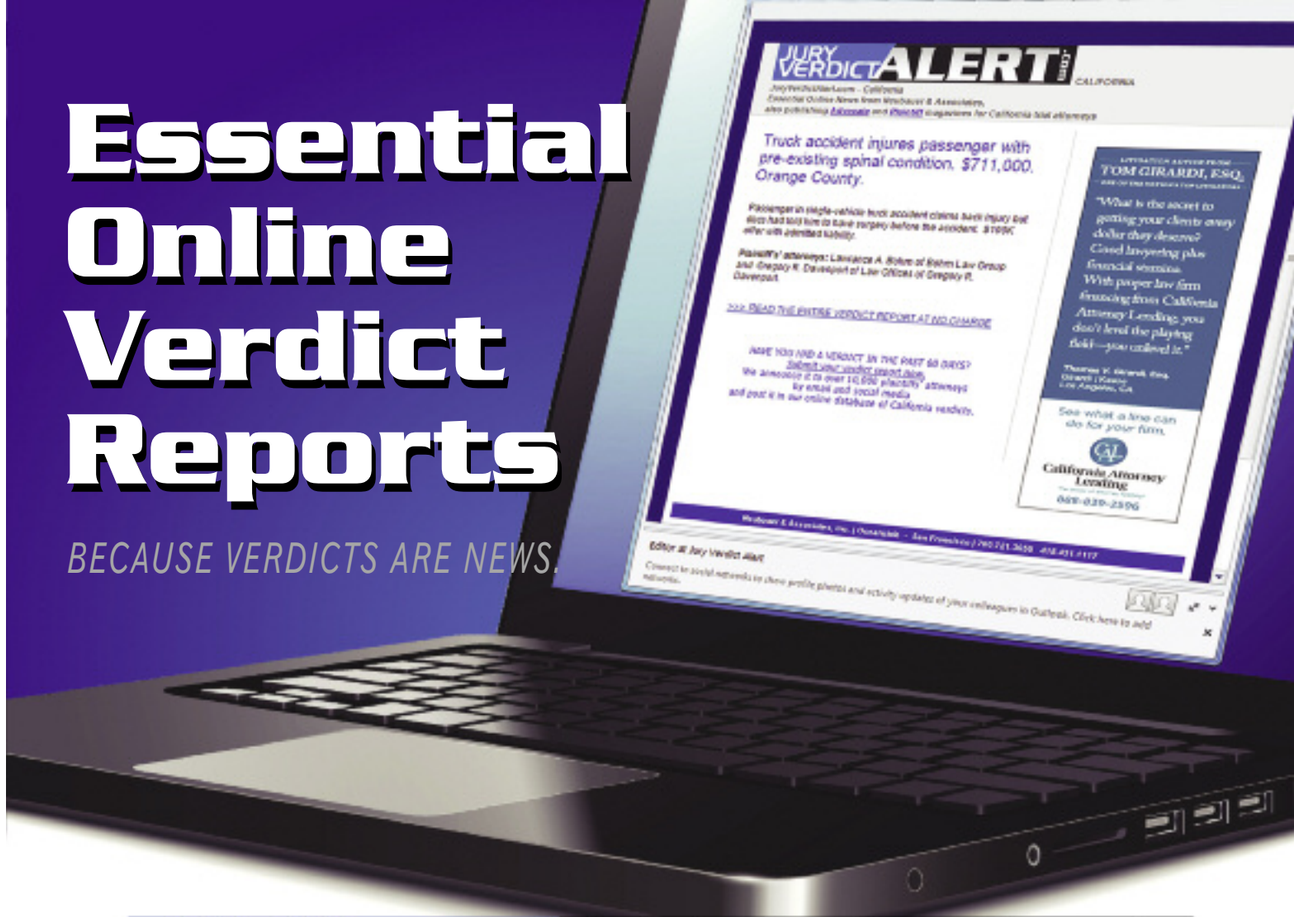
[8] In *EEOC v. Wafflehouse, Inc.* (2002) 534 U.S. 279, the U.S. Supreme Court held that an arbitration agreement did not prevent the Equal Employment Opportunity Commission (EEOC) from suing the employer on behalf of the employee. (*Id.*, at p. 296.)

[9] As of this writing, a petition for a writ of certiorari is pending in *Iskanian* before the Supreme Court.

[10] In *Sandquist*, the Court of Appeal reversed the trial court order dismissing the class claims and the matter was remanded with directions to enter a new order submitting the issue of whether the parties agreed to arbitrate class claims to the arbitrator. (*Sandquist v. Lebo Automotive*, 2014 WL 3590152.)

[11] A number of federal courts in California have lately rejected the *Iskanian* holding regarding PAGA. See *Fardig v. Hobby Lobby Stores* (C.D. Cal. Aug. 11, 2014, 2014 WL4783618); *Langston v. 20/20 Companies, Inc.*, (C.D. Cal. Oct. 17, 2014, 2014 WL5335734); *Chico v. Hilton Worldwide, Inc.* (C.D. Cal. Oct. 10, 2014, No. 2:14-cv-05750); and *Ortiz v. Hobby Lobby Stores, Inc.* (E.D. Cal. Sept. 30, 2014 No. 2:13-cv-01619). On those cases, the PAGA claims proceeded in arbitration.





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Profile: Steven Brady

Trial lawyer becomes a disciple of visual advocacy in the courtroom

By Stephen Ellison

About 30 years ago, when Steven Brady was entering the legal profession, there was no way he could have imagined the trial methods he would be using in 2015. But when time and technology called for change, he embraced new techniques willingly and has now become a veritable master of trial presentation.

"About 10 years ago, I was achieving some exciting results in cases, but there were still cases where I was getting more than I should have gotten or less than I anticipated getting," explained the principal of the Brady Law Group in San Rafael. "I still believed there was a sort of horse-race element – like the insurance companies would like us to believe – in taking a case to trial. So I looked around at what people I held in the highest esteem were doing here in the Bay Area, specifically Bill Veen and Bob Arns; they had gotten in front of the technology curve."

Indeed, certain trial lawyers had begun to realize the advantages of what Brady dubbed "the digital promise" – using PowerPoint technology and other forms of electronic visual aids to present cases more effectively to juries. Determined not to get left behind, Brady enlisted his office IT expert, and the two of them started attending seminars and reading extensively on multimedia presentations in trial. After a couple of years, they had mastered the new wave of trial presentation, Brady said.

"We really started working on elevating our game, and I started speaking to other groups of lawyers on the subject," he said. "It set the trajectory for my whole trial practice. … We approach every case now from a place of visual advocacy, where we're constantly trying to think of ways to show our jurors rather than tell them what our theories of liability and causation are and what our client's damages are. We know that most people are visual learners, and we know most people don't like to be told what to do."


Brady

So instead of getting up and simply telling jurors about the case, Brady immediately turns on his projector, says very little and shows the jury what the evidence is – and, in turn, shows them why they need to care about the case and why the plaintiff is entitled to their verdict. He keeps the projector running throughout the trial, he said, showing evidence early and often using his visual aids. "We have a separate PowerPoint for every witness – on direct and cross," Brady explained. "We have it all laid out. I can reduce any case to about 300 slides, and then regardless of what happens during the trial, we have the whole case already in slides; I can pick and choose and grab whatever slides I need to make or refute whatever points are an issue. And we can do that on the fly because we've prepared it all ahead of time.

"It's been a lot of fun, and it's really opened a whole lot of doorways and expanded our horizons," Brady said of his visual-advocacy approach. "It's been a very successful way of obtaining consistent trial verdicts for our clients."

Another key element in Brady's trial approach is immediacy. He is a firm believer that most jurors make up their mind about a case within the first hour of trial. So from the outset, his opening statement, he subscribes to a focused message and approach, taking the opportunity to lay out his entire case. He said he typically does about an hour-and-a-half opening, sometimes two hours, in the PowerPoint format, during which he employs the didactic method, calmly teaching the jurors the issues in the case. And he has found they respond very well.

Make it a tough act to follow

"Most people are used to getting their information from the TV and the computer. Why wouldn't we want to give them the information in the way they're used to and most comfortable getting it?" Brady said. "The first time I did one of these long openings, several esteemed lawyers told me I was out of my mind; the jurors wouldn't have the patience for it. But we've been successful in capturing their hearts and minds. … We try to remember to be respectful of the jurors' time and keep it as short and sweet as we can. But many of our clients, by the time we get to trial, have been receiving medical treatment for about five years; sometimes they've had multiple surgeries. It's a complicated fact sequence that you have to start teaching the jury about at the first opportunity you have."

After his lengthy opening, Brady said, the judge typically orders a break and everyone gets a little rest. When they reconvene, the jury will be waiting for the defense to start their show. "Then a funny thing happens," Brady said. "About 30 seconds into the defendant's opening, you look at the jurors' faces, and they look a little confused. Then about 45 seconds in you can see they've figured it out … they realize the defense lawyer is going to just stand there and talk to them – he doesn't have a show. Then at about the one-minute mark, you can see them just turn down the volume, and right there it's over. They go back to thinking about what they want to think about and what we've just shown them. I really believe that's the key to the case."

Fell in love with trial advocacy

Born in Chicago and raised in Southern California, Brady was exposed to the law at a fairly young age, watching his father work as a corporate attorney specializing in tax and mergers and acquisitions work. He remembered his dad finding the job interesting and fulfilling, and that was enough to pique the younger Brady's interest and steer him toward law school.

Brady went back to the Chicago area to study philosophy at Northwestern University then returned to Los Angeles to attend Loyola Law School. Though he was certain he wouldn't follow his father into business and corporate law, Brady wasn't quite sure what area he would enter – until his first year of law school, when he "fell in love" with a trial advocacy competition. From there, he targeted a clerkship in the L.A. area and eventually landed a job with a top plaintiffs' attorney, Ned Good.

With Good, Brady got the chance to work on an American Airlines DC-10 crash case that served as his baptism into plaintiffs' law. "I jumped into working on those cases, and really got hooked. It was just fascinating," he said. "I lost my virginity there when I found out how American Airlines and McDonnell-Douglas had prior knowledge that there were major cracks and structural flaws on the engine mounts and pylons of those planes. What we found out was truly tragic; 300-plus souls perished in that crash.

"We live in a society where corporations put profits before safety," Brady continued, "and the only ones who are in a position to change that, to put safety before profits or at least start to move in that direction, are the trial lawyers. I've been blessed for the last 30 years to work in an area where we get to do service not only for our clients and their families, but we get to bring about real change that will make the lives of a whole community of people – and sometimes even larger groups – safer."

On the defensive

After graduating from law school, Brady was all set to go to work at a plaintiffs' firm in Los Angeles when one of the senior partners of that firm told him he should start by getting some experience working as a defense lawyer. That senior partner pointed Brady to a growing defense firm and even set up an interview for him. So he spent the first three years of his career doing defense work and learning how claims are analyzed, how defense lawyers work up claims and the thought process they go through, he said. He also learned a little bit about defense firms' hierarchy. "It was without a doubt the best decision I ever made," Brady said. "Truly an invaluable experience."

Though he spoke highly of the work and the people for whom he worked, there was still something missing. Brady hadn't yet been given a chance to take the lead on a trial, and he was eager to get that aspect of his career moving. In the spring of 1987, he ran into a plaintiffs' lawyer to whom he was bemoaning the fact that he had yet to be lead counsel in a trial. The plaintiffs' lawyer invited Brady to join his firm and start trying some cases. "I was given some awful cases at first," Brady said. "I learned quickly that you couldn't make pigs fly. … But I got to try some really difficult cases and managed to achieve a modicum of success. And that led the way to getting better cases … and really learning the craft."

Bay Area-bound

Brady endured the L.A. riots in 1992 and the Northridge earthquake in '94 in what he called "a crazy time" in Southern California. It was about that time, he and a colleague from Stockton named Dick Katz began talking about the possibility of Brady joining Katz's busy practice. "Dick was talking to me about how it was a busy time for him and that he could use another lawyer," Brady recalled. "And I said, 'What about me?' He said, 'Send me the names of a dozen lawyers you've tried cases against, and not just ones you've won … and a dozen judges you've tried cases in front of.' I put together the lists and sent them to him and then didn't hear from him for months.

"Then I made the fortunate mistake of telling my wife one day about this, and she said, 'Why don't you call him?' So I did, and he said he had my list and he'd get back to me," Brady continued. "A couple of hours later, he called back and said, 'I want you up here next weekend.' We came up a week later, and we fell in love with it. We found out about that time that my wife was pregnant with twins. Four or five months later, we packed it up and moved to Marin County. That was 20 years ago. Since then, I've been blessed. I found a community of lawyers here in the Bay Area that enjoys a much greater sense of fraternity than anything I saw down in Southern California. I got the chance to raise all three of my kids up here in a great public school system, and I'm planning to grow old here."

When he's not in the office or working his projector in the courtroom, Brady enjoys traveling and spending time with his family. He is an avid mountain biker, often taking treks to the top of Mount Tamalpais and frequently riding into work. "Exercise of one kind or another is a necessary daily buffer between the giant-slaying we're often forced to do in this office," he said.

After 30-plus years in the profession, Brady feels he's just beginning to master that giant-slaying. And yet, he's having more fun than ever, he said.

"I'm blessed. I love what I do, I wake up excited every day to be in a job where we get to do a service for people who can't often speak for themselves or can't often obtain any kind of justice for themselves and their families. It's really just so rewarding to have the opportunity to do fulfilling work that gives you a great deal of self-esteem. You know what they say: If you want self-esteem, do esteemable acts. Well, we get a chance to do that on a daily basis as plaintiffs' trial lawyers here in California."

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Unrelated medical issues can hurt your case

Don't let defense counsel use unrelated medical issues to distract the jury and embarrass your client

By Eustace de St. Phalle with Andrew Clay
The Veen Firm, PC

A personal injury case is usually built on the medicine. The plaintiff must prove that he or she has bodily injuries that were caused by defendant's negligent conduct. Evidence of the plaintiff's injuries appears in the plaintiff's medical records. However, there are typically some marginally related or unrelated medical issues in these records. These can include injuries to other parts of the body, or injuries to the same body part that healed long ago.

Allowing unrelated or marginal medical issues to emerge in discovery or at trial can be damaging to plaintiff's case. First, defendants will try to find any other medical conditions, either pre-existing or occurring after the incident, that will act as alternative explanations for the plaintiff's current medical conditions, pain, mental state, diminished functional capacity, employability, etc. The defendant will try to deflect blame from itself wherever it can, and other potential causes are helpful to get the jury thinking that something other than defendant is to blame.

Second, some marginally related medical issues may arise that are embarrassing to the plaintiff. Some medical conditions may have been caused by your client's habits or behavior. Also, plaintiff's psychological issues, particularly any discussions with therapists, will reveal extremely personal materials. Such ancillary issues distract from the theme of your case, and at worst may shame the plaintiff, reducing sympathy from the jury.

It is important that we as plaintiffs' attorneys protect our clients from attacks based on unrelated or barely-related medical issues. The law provides significant protection of plaintiff's medical and mental privacy, barring discovery or admission of protected information unless it is directly relevant to the plaintiff's claims.

Privacy protections for medical information and records

The two main legal mainstays for the protection of plaintiff's medical information are the Constitutional right of privacy (Cal Const. Art. I §1) and the physician-patient privilege (Evid. Code, § 992). California recognizes a Constitutional right of privacy protecting discovery of a person's medical information. The courts have emphasized that a patient's medical conditions constitute "a quintessential zone of human privacy." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 441.) Privacy protection extends to protection of information about one's medical conditions and medical history, as well as to any medical records.

Additionally, a patient's communications with her physician are confidential and privileged. These communications include "information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship," for "the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship . . ." (Evid. Code § 992) "The patient-physician privilege 'creates a zone of privacy' . . ." (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 899.)

The two levels of protection – Constitutional right of privacy and statutory physician-patient privilege – are independent and overlapping. As stated by the Supreme Court, "The patient-physician privilege and the right of privacy are closely related protections against public disclosure of private information." (*Binder, supra,* 196 Cal.App.3d at 899.) Because they are independent, one form of protection may exist where the other is waived. Even where the right of privacy has been waived, "the codes provide a variety of protections that remain available to aid in safeguarding the privacy of the patient." (*In re Lifschutz, supra,* 2 Cal.3d at p. 437.) Conversely, "Notwithstanding waiver of a statutory privilege, a patient retains the more general right to privacy protected by the state and federal Constitutions." (*San Diego Trolley, Inc. v. Superior Court (Kinder)* (2001) 87 Cal.App.4th 1083, 1092 [admission of being under psychiatric care did not waive right to privacy of psychiatric records].)

The limited waiver of medical privacy in personal injury cases

When a patient makes a claim for personal injuries, the right of privacy regarding "an issue concerning the condition of the patient" is waived "if such issue has been tendered by the patient" by filing suit for related injuries. (Evid. Code, § 996 [the "patient-litigant exception"].) However, a "patient-litigant" does not waive automatically all medical privacy. "Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy." (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841-842.) Rather, only those issues that have been *directly put at issue* are waived. "[T]he scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." (*In re Lifschutz* (1970) 2 Cal.3d 415, 435.)

When a plaintiff's medical conditions are not put directly at issue by the case, courts interpret California's right of privacy to protect such information from disclosure. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 862-864.) In *Britt,* plaintiffs objected to the trial court's unlimited order which required them to supply information related to all past medical conditions, without regard to whether such conditions have any bearing on the present litigation. The California Supreme Court held that the trial court's order was improperly broad:

> [P]laintiffs are 'not obligated to sacrifice all privacy to seek redress for a specific (physical,) mental or emotional injury'; while they may not withhold information which relates to any physical or mental condition which they have put in issue by bringing this lawsuit, they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past.

(*Britt v. Superior Court, supra*, 20 Cal.3d 844, 864.)

Privacy protection for mental and emotional conditions

The law also provides protection for plaintiff's mental and emotional conditions. The California Supreme Court has affirmed that mental states are protected by the Constitutional right of privacy: "If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." (*Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 944.) There is parallel protection for a patient's communications with psychotherapists (Evid. Code, §, 1014);



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again, this is independent of the Constitutional right of privacy and provides overlapping protection.

Where a plaintiff makes no separate claim for mental or emotional distress, a personal injury action seeking damages for (*inter alia*) noneconomic damages does *not* place plaintiff's psychiatric conditions at issue. Plaintiff's right to privacy in his or her psychotherapeutic records outweighs any need for discovery thereof. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1016; see Weil & Brown, Cal. Prac. Guide, Civ. Proc. Bef. Trial §§ 8:305-8:305.3.) A plaintiff who seeks damages for personal injuries, including pain and suffering, does not thereby surrender the right to privacy in post-injury psychotherapeutic records. (*Davis, supra,* 7 Cal.App.4th at 1017.) If the defendant seeks a mental examination in a personal injury case, the plaintiff can make a statutory stipulation that "no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed" (Code Civ. Proc., § 2032.320), which will block the mental exam.

Even where an emotional distress claim is made, the constitutional right of privacy protects any issue that is not directly relevant to the litigation. (*Vinson, supra,* 43 Cal.3d 833, 841-842 [in sexual harassment case with emotional distress claim, plaintiff was not required to submit to extensive questioning about her sexual history].)

Blocking discovery of unrelated medical conditions

Because of the right to privacy, discovery of even *related* medical conditions is limited. The ordinary broad ambit of discovery, permitting fishing trips, is not applicable; the protected information must be "directly relevant": "It is not enough the [private medical] information may lead to relevant evidence." (*Binder, supra,* 196 Cal.App.3d 893 at 901.) Direct relevance means that the protected information is *essential* to determining the truth of the matters in dispute. (*Harris v. Sup. Ct.* (*Smets*) (1992) 3 Cal.App.4th 661, 665.) Importantly, "[m]ere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice." (*Davis v. Superior Ct*. (1992) 7 Cal.App.4th 1008, 1018.) The party seeking access to constitutionally protected information has the burden of proving the *direct relevance* of the information sought. (*Id.* at 1017.)

Further, the court must not simply "open the doors" even when it agrees a medical issue is relevant. "[E]ven when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.'" (*Board of Trustees v. Superior Court of Santa Clara County* (1981) 119 Cal.App.3d 516, 525.)

> Even where the balance, because of a 'compelling state purpose,' weighs in favor of disclosure of private information, the scope of such disclosure will be narrowly circumscribed; such an invasion of the right of privacy 'must be drawn with narrow specificity.' [Citation.] . . . In balancing the respective interests, it is also the rule that 'if state scrutiny is to be allowed, it must be by the least intrusive manner.'

(*Binder v. Superior Court*, 196 Cal.App.3d 893, 900-901, *citing, Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 680.)

In general, a medical condition is "put at issue" in a personal injury case when it relates to the same part of the body claimed to be injured by defendant's negligence. Judicial Council Form Interrogatory nos. 10.1 and 10.3 inquire into "complaints or injuries that involved the same part of your body claimed to have been injured in the INCIDENT." This question may in fact be overbroad in some cases where, for example, a different area of the "body part" was affected, or the injury was remote in time from the incident.

It is important for plaintiff to resist improper or overbroad discovery into plaintiff's unrelated medical conditions. Where defendant propounds discovery requests, or asks questions at deposition that delve into unrelated conditions, the request or question should be objected to. A standard objection should cite the Constitutional right of medical privacy and Evidence Code section 992 as well as the lead case *Britt v. Superior Court.* Answers to questions and production of documents should be limited to information on relevant medical issues. Usually an objection suffices to assert these protections, since the propounding party must make a motion to compel discovery. However, if a certain issue comes up consistently in the medical records, it may be prudent to seek a protective order to limit discovery into such issues. (Code Civ. Proc., § 2025.420 (re depositions); § 2030.090 (interrogatories); § 2031.060 (requests for production).)

Where a defendant subpoenas medical records from plaintiff's current or past health care providers where no treatment of relevant body parts occurred, the plaintiff should move promptly to quash the records subpoena under Code of Civil Procedure section 1987.1. In quashing the subpoena, plaintiff should emphasize that it is the *burden of defendant to justify discovery* by showing both the *direct relevance* of the information (*Britt, supra,* 20 Cal.3d at 855-856) and the proper limitation of the requested scope of disclosure (*Board of Trustees, supra*, 119 Cal.App.3d 516, 526).

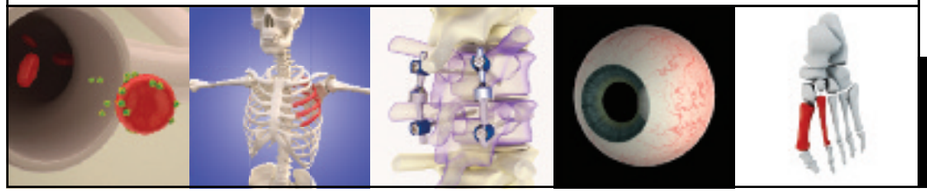
Blocking introduction of unrelated or marginal conditions at trial

Evidence of a prior accident is admissible to show that a present physical condition has a cause antecedent to the accident being litigated. (*Johnson v. Matson Navigation Co.* (1958) 163 Cal.App.2d 336). However, if the plaintiff is not claiming injury to the same body part, then evidence of a prior medical condition has no probative value and it is error to admit it. (*Downing v. Barrett Mobile Home Transp*., 38 Cal.App.3d 519, 525.) In *Downing,* an auto accident case, the defense counsel cross examined plaintiff regarding a kidney condition (kidney stone) that occurred as the result of a previous accident. The Court of Appeal found this to be an improper inquiry, as "there was no reason to admit such evidence; it had no probative value as plaintiff was not claiming kidney damage as a result of this accident." (*Ibid*.)

Plaintiffs should be prepared to make a motion in limine to preclude any unrelated medical information or medical records. The motion should assert the Constitutional right of privacy as well as relevant statutes protecting physician-patient communications (Evid. Code § 992) and/or therapist-patient communications (Evid. Code, §, 1014), and applicable case law. Additionally, plaintiff

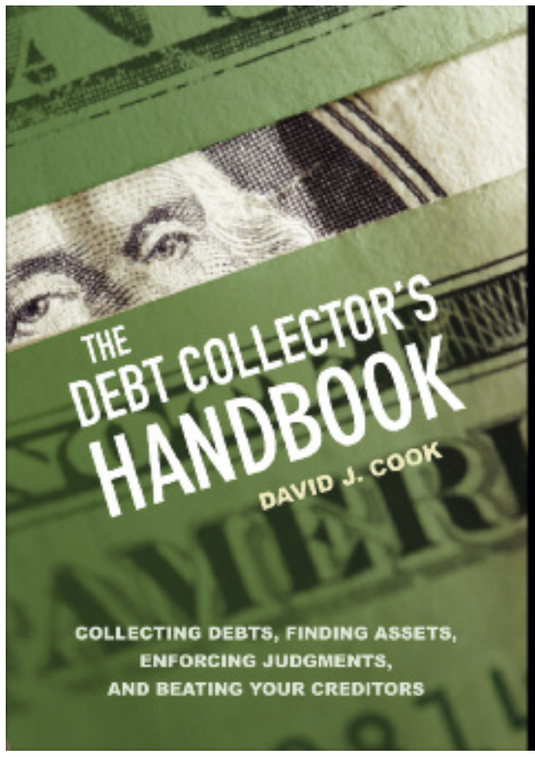
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should argue that the information should be precluded as prejudicial, remote, and/or unduly time-consuming. (Evid. Code, § 352; see *People v. Cargenas* (1982) 31 Cal.3d 897, 904 (if prejudicial effect of admitting evidence outweighs the probative value, trial court should exclude the evidence). If possible, argue that discussion of the marginal medical issue will be a big distraction that will waste time and resources in an already lengthy trial. Medical records may be redacted to protect privacy.

Conclusion

Your client's private medical conditions are at risk for exposure during discovery and trial. It is imperative to stand up for plaintiff's privacy rights and prevent distracting and embarrassing issues from clouding the case. The law provides significant protections which should be employed to keep out extraneous material and keep the jury focused on the substantive causation and damage issues in your case.


de Saint Phalle

Please contact the authors if you would like a sample motion in limine to exclude unrelated medical conditions.

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Delaware court upholds draconian loser-pays provision

Unilateral changes to corporate by-laws that undermine shareholder rights can't be justified by contract law

By Paul Bland

The world of corporate governance and securities law is in an uproar. On May 8, 2014, the Delaware Supreme Court issued a decision in *ATP Tour, Inc. v. Deutscher Tennis Bund* ("the *ATP Decision*")[1] that upheld the facial validity, in at least some circumstances, of a draconian loser pays provision. Under the provision, if a member of a non-stock corporation brings a civil action against the officers and directors of a corporation (and/or the corporation itself), and fails to obtain, in substance and amount, "the full remedy sought," the stockholder is liable for the defendants' attorneys' fees. There are many ways (a number of which will be discussed below) that the scope and impact of the *ATP Decision* might be limited. But if the corporate defense bar succeeds in pushing for a broad interpretation and if most Delaware corporations adopt such provisions, the impact on securities law could be catastrophic.

The prospect that a plaintiff in a non-frivolous securities, breach of fiduciary duty or antitrust case could be liable for enormous attorneys' fees (in the *ATP Decision*, the defendants were seeking just under $18 million as of last May) could certainly have a chilling effect on such litigation, and the chill will only grow colder if the logic of the *ATP Decision* is extended from non-stock corporations like ATP to cover claims brought by investors in publicly traded corporations. If the *ATP Decision* leads to the widespread use and acceptance of loser pays rules, it becomes very hard to see how some future plaintiff would be willing to take the risk to obtain any remedy for even the kinds of egregious fraud that we saw in the infamous Enron or Worldcom cases, for example.

How can this worst-case scenario be prevented? The answer in states other than Delaware may be found in fundamental contract law principles.

By-laws are a contract, shareholders have agreed to its provisions

The Delaware Supreme Court based its acceptance of ATP's loser pays term on principles of contract law. The corporation's by-laws are a contract, the Court reasoned, so the stockholders have agreed to all the provisions of the by-laws. And even though the loser pays provision at issue was adopted long after the plaintiffs had become members of the corporation, the *ATP Decision* held that they were bound by contract principles because they had "agreed" to be subject to changes in the by-laws. The law in Delaware may be established that by-laws (and changing by-laws) are contracts, according to the *ATP Decision*, but the principal question for this article is whether other state high courts are likely to agree with the conclusion that unilateral amendments to by-laws can be given effect under normal rules of contract law? This article will argue that for most states, a wealth of well-developed contract law (the major points of which were not even considered by the Delaware Supreme Court in the *ATP Decision*) dictates that the answer is "no."

Contractual agreements involve *binding* promises between two parties, and can't be rewritten after-the-fact by one side. If one party claims the power to unilaterally amend a contract to add new terms or amend a contract in any way, without providing the other party with clear notice and an opportunity to reject the proposed amendments, most courts would rule such an arrangement does not constitute a contract. The reason is that the arrangement is illusory – there is no binding promise. If an arrangement amounts to "I will do A, and you will do B, but I could change my mind on my own about A, B, or any other terms I might add, and you agree in advance that I can rewrite the contract entirely as I wish without your further consent or involvement," that is not a contract pretty much anywhere (with the apparent bizarre exception of Delaware).

Moreover, core rules of contract law provide that material terms may not be added to an agreement by one party, without the agreement of the other party. A contract constitutes a binding agreement that contains a collection of rights and responsibilities by each party. The law is well established throughout the U.S. (at least, it is outside of Delaware) that if one party to a contract declares that it also wants the deal to include a material new term, the new term does not become part of the contract unless there is a new document. The Delaware Supreme Court's invocations of the concept of contract in the *ATP Decision* were sloppy at best, and counter to core principles of established contract law in a great many other states.

ATP's By-law

The "American Rule" provides that parties to civil litigation are normally liable only for their own attorneys' fees, with certain exceptions. Perhaps the most prominent exception is that there are a number of statutes aimed at protecting individuals from corporate

misconduct – the securities laws, the antitrust laws, the civil rights laws, etc. – that provide that prevailing plaintiffs may recover their reasonable attorneys' fees. But the general rule is that these fee shifting statutes do not apply to prevailing defendants (with very few exceptions) unless the plaintiff brought a case in bad faith, or a case so lacking in merit as to be frivolous.

ATP, a corporation that operates international men's tennis tournaments, adopted a new by-law in 2006 that rejected the American Rule, and replaces it with a very strict loser pays rule for any litigation brought against the league or its members by other members. This by-law provides that if the plaintiff:

> does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought then each claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs and expenses of every kind and description (including but not limited to, all reasonable attorneys' fees and other litigation expenses) . . . that the parties may incur in connection with such a Claim.[2]

The language triggering the loser pays provision if the plaintiff does not achieve "in substance and amount, the full remedy sought" is arguably extremely severe. Suppose a plaintiff brings a claim under three theories and prevails on two of them; did the plaintiff achieve "in substance" "the full remedy sought," or would a plaintiff prevailing upon 66 percent of its theories be subject to a large attorneys' fees award? Suppose a plaintiff sues for $10 million and wins "only" $7 million. Did that plaintiff receive "the full remedy sought" in amount, or a lesser figure that will trigger a huge loser pays award? If plaintiffs who win most of their claims can still be hit with multi-million dollar attorneys' fees awards, it will obviously be an enormous deterrent to the filing of cases in the first place.

One other notable fact about ATP's provision is that it was adopted in 2006, but was applied to members who had joined the ATP back in the early 1990s. In other words, the provision was a retroactive loser pays provision, adopted by the board of directors as a protection against the members but without seeking the members' input or consent.

The *ATP Decision*

The tennis federations of two nations (Germany and Qatar), which are members of ATP, sued ATP, alleging a number of illegal actions in connection with certain decisions the ATP had made about how to restructure the tennis tour. The ATP had allegedly downgraded a tournament operated by Germany and Qatar (the Hamburg Tournament) in ways that those two federations found objectionable. In keeping with the old saw about bad facts making bad law, it's frustrating to many plaintiffs' lawyers that whether scam artists like the guys who ran Enron can avoid liability under the securities laws might be determined by a case about where a tennis tournament will be held.

In any case, the plaintiffs asserted both state law and federal antitrust claims against ATP. After a good deal of discovery and substantial motions practice, the case proceeded to a ten-day trial. At the end of the trial, the District Court granted ATP's motion for judgment as a matter of law with respect to the fiduciary duty claims, and the jury ruled for the defendants on the antitrust claims. In short, the plaintiffs did not prevail upon any claim.

ATP then sought to enforce its loser pays by-law, and asked the court to award it nearly $18 million in attorneys' fees. The District Court denied ATP's motion, on the grounds that it would contradict the purposes of the federal antitrust laws for the defendant to be awarded its attorneys' fees in a case that was not frivolous.[3] Put another way, the District Court held that even if one assumed that ATP had a valid claim under Delaware law for its attorneys' fees under its by-law, that any such Delaware law would be preempted by the federal antitrust laws.

The Third Circuit vacated the District Court's decision.[4] The argument that the federal antitrust laws override Delaware state law, which was the basis of the district court's decision, is rooted – like all federal preemption arguments – in the Supremacy Clause of Article III of the U.S. Constitution. But the Third Circuit held that the district court should not have reached the constitutional preemption issue, without first determining if Delaware would allow such a loser pays provision to be promulgated in a by-law.

On remand, the District Court chose not to attempt to resolve in the first instance the myriad questions of Delaware law that had been posed by the Third Circuit. Rather than predict Delaware law as to the validity of a loser pays by-law, the District Court instead certified four questions to the Delaware Supreme Court that it thought would resolve the issue.

The Delaware Supreme Court's opinion responding to the four certified questions in the *ATP Decision* is rather murky, and it has generated substantial debate about its holding and meaning. Two major points stick out, though:

- ATP's loser pays by-law is facially valid under Delaware law, and
- While there is a possibility that the by-law would not be enforceable depending upon certain circumstances not presented to the court in the posture of these certified questions, it was not a problem to apply the by-law against members who joined the corporation before the loser pays rule was enacted.

The Delaware Supreme Court justified the idea that the by-law is enforceable on the grounds that the by-law was a type of contract. The *ATP Decision* states:

> [I]t is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees. Because corporate by-laws are 'contracts among a corporation's shareholders,' a fee-shifting provision contained in a non-stock corporation's validly enacted by-law would fall within the contractual exception to the American Rule.

How could there be a contractual agreement to the by-law, one might ask, when it was adopted by the corporation a dozen years after the German and Qatar federations had joined the ATP, without their consent? The Court held, in the *ATP Decision*, that when the plaintiff tennis federations had first become members of the corporation, they had agreed to be bound by by-laws that may be adopted and/or amended from time to time by the corporation's board. The idea was that even though the corporation had adopted the loser pays by-law after the federations had become members, they had agreed in advance that the corporation could adopt such a new by-law (or essentially any other by-law the directors might decide to change or add).

Potential limitations on the *ATP Decision*

The full scope of the *ATP Decision* has yet to be fleshed out or made clear. There is an argument, for example, that its holding may not be applicable to

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shareholder corporations. It is possible that in a case involving a for-profit corporation with generally passive investor shareholders that the Delaware Supreme Court might apply a different rule than it did to the unusual membership corporation involved in the *ATP Decision*. If some future decision were to interpret the *ATP Decision* so narrowly, it would dramatically lessen the significance of the case for enforcement of the securities laws. Some commentators have predicted that the Delaware Supreme Court would not interpret the case as applying to the kinds of shareholder corporations where most "regular investors" put their retirement savings and so forth.

There is certainly a substantial risk that the *ATP Decision* would apply more broadly, however. The opinion's rationale is not obviously cabined to the particular type of corporation involved in the case, and some of the cases cited in the decision for support for various propositions do involve corporations with shareholders. Moreover, it is rather hard to picture the hardy plaintiff who would be willing to bring a test case seeking to narrow the *ATP Decision* to non-stock corporations. The plaintiff tennis federations in the *ATP Decision* are facing the potential of nearly $18 million in liability for the defendants' attorneys' fees. Very few (if any) plaintiffs are likely to risk a similarly ruinous result if they were to lose a challenge aimed at narrowing the precedent set forth in the *ATP Decision*.

Similarly, with respect to cases involving claims under federal statutes (such as the antitrust or securities laws), there is a substantial possibility that Delaware law permitting this by-law is preempted. After all, the Third Circuit did not overturn the District Court's original decision striking the by-law as preempted by the antitrust laws; it merely said that the District Court should not have reached that constitutional issue without first resolving more prosaic issues that might avoid it. There is a very strong argument that the District Court got it right on the merits of its holding about the antitrust laws, however: that imposing loser pays attorneys' fees in a non-frivolous case would strongly deter the enforcement of the federal antitrust laws, undermining their purpose. In the analogous context of employment discrimination, for example, the U.S. Supreme Court has forcefully enunciated the reason that loser pays rules are not included in remedial statutes designed to protect individuals. The Court explained that, if such laws were read to permit prevailing corporate defendants to recover attorneys' fees from individuals, plaintiffs would be discouraged from seeking protection of the law: "[A]ssessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII."[5]

Finally, the Delaware Supreme Court left open the possibility that the loser pays by-law might be unenforceable even in the *ATP Decision* itself, depending upon the full circumstances. The Court noted that even if a by-law is facially valid, it will not be enforced if it was adopted or used for an inequitable purpose.[6] The question then becomes what is an inequitable purpose. The plaintiffs suggested in the *ATP Decision* that it would always be inequitable for a corporation to seek to deter litigation by its members, and the District Court in the case posed that question as the third question certified to the Delaware Supreme Court: "Is such a by-law rendered unenforceable as a matter of law if one or more Board members subjectively intended the adoption of the by-law to deter legal challenges by members to other potential corporation action than under consideration?" While the Delaware Supreme Court reaffirmed the rule that by-laws will not be enforceable where they are inequitable, it did not adopt the broad protective rule suggested by the plaintiffs. It rejected the idea that the by-law was necessarily unenforceable if its purpose was to "deter litigation," because, the Court noted, that is a purpose of all loser pays terms.[7] The Court essentially gave no guidance in the *ATP Decision* itself as to when a by-law might be so inequitable that it could not be enforced. In fairness to the Court, it stated that it did not know enough about the purposes and circumstances animating the adoption of this by-law in this case. After all, the case arrived at the Delaware Supreme Court with a request that the Court decide four specific certified questions, but the Court was not given the chance to decide the entire case based upon a full factual record fleshing out the history of the adoption of the by-law.

It is worth noting that in many other states, a loser pays provision for non-frivolous lawsuits may well be vulnerable as unconscionable under normal provisions of state contract law. In a medical malpractice case, for example, the Utah Supreme Court held that a fee-shifting provision "is not only substantively unconscionable but against public policy."[8] Many other courts have struck loser pays provisions in a wide variety of similar settings.[9]

Reaction to the *ATP Decision*

While the vast majority of corporations have not taken any action yet to adopt similar provisions, "since the [*ATP*] ruling more than two dozen companies have added fee-shifting language to their governing documents."[10] Given the significance of the decision, one might ask why the number of corporations adopting loser pays provisions is not much higher? Part of the answer may lie in the uncertainty and controversy that is widespread in the current climate, and the fierce debate (whose conclusions are not yet clear) that has been stirred up in the legislative, judicial, and public realms. Many corporations may also be holding back, in light of the fierce opposition to loser pays provisions among nearly all large institutional investors.[11]

The *ATP Decision* has triggered an explosion of controversy and fierce debate. On one side, consumer advocates, plaintiffs' attorneys, institutional investors, and many others have vehemently denounced the decision as an enormous threat to the enforcement of the securities laws. One leading consumer advocate wrote, for example, that:

> [F]ee-shifting provisions could effectively bar shareholder securities suits. For example, a company could make a material misstatement or omission its registration statement, or defraud investors into buying its securities, and not face liability. Thus, the presence of a fee-shifting provision could nullify private enforcement of the federal securities laws, weakening investor protections and undermining the integrity of our nation's capital markets.[12]

This author feels that those remarks are exactly on the money. In a similar vein, Professor John Coffey, who is probably the nation's most prominent scholar working on the subject of class actions (and particularly class actions involving securities fraud), has argued that if the Securities and Exchange Commission doesn't take action to prohibit corporations from adopting loser pays provisions in by-laws and in Initial Public Offerings, that it may well risk irrelevance.[13]

On the other hand, some corporate advocates believe that nearly all securities fraud class actions are unjustified, and that it would be good for the country if these cases were largely extinguished. The Executive Director of U.S. Chamber of Commerce's Institute for Legal Reform, which opposes nearly any liability for nearly any corporation under nearly any statute or cause of action (the ILR lobbies and litigates against punitive damages in virtually all circumstances, opposes the use of class actions ins virtually all circumstances, opposes the existence of statutory damages, etc.), took to the pages of the Wall Street Journal to attack the notion that the Delaware legislature might overturn the *ATP Decision*.[14]

Shortly after the Court issued the *ATP* Decision, corrective legislation was introduced in the Delaware state legislature. The legislation quickly proved controversial, and the legislature adjourned for 2014 without having acted upon it. There was a call for further study, however, and during the legislature's recess, the Delaware Corporate Law Section has proposed that no by-law could impose financial liability upon a non-consenting shareholder. To this author, it is rather disturbing (if not surprising) that the Chamber of Commerce has signaled that it will fiercely oppose and lobby against a measure protecting "non-consenting shareholders" from financial liability, but the battle lines will be clearly drawn.

It is always difficult to predict what a legislature will do in the face of a newly emerging controversy, with powerful interests on both sides. Nonetheless, the Delaware legislature has some powerful reasons to take action overturning the *ATP Decision*. Delaware has taken enormous pride in, and benefited a great deal from, the fact that its state courts play an outsized role in corporate governance in the United States. With a large number of large corporations incorporated in Delaware, the state's generally pro-business courts have developed a great deal of sophistication about corporate governance, and it is clear that Delaware courts are interested in maintaining and expanding that role.

The *ATP Decision* threatens the role of Delaware's courts in corporate governance, though. First, if loser pays provisions deter the filing of nearly all securities fraud cases, Delaware's courts – no matter how sophisticated and clever – will have no cases to decide, because cheated shareholders will be sitting at home avoiding ruinous loser pays decisions rather than litigating. Delaware



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courts can hardly decide the cases that shape our economic policy if no one brings any cases before them. Second, if the *ATP Decision* is interpreted broadly and the Delaware legislature fails to act, it is likely that securities fraud and other corporate governance litigation will all move to other states, and that many other states will refuse to accept or follow Delaware law. In the area of litigation over abusive mandatory arbitration clauses, for example, quite a few courts have found that state laws that would permit arbitration clauses that are essentially exculpatory violate the "public policy" of forum states and have ignored corporation's choice-of-law provisions. If Delaware continues to adhere to an extreme position of embracing loser pays decisions, Delaware's proud courts could find themselves bypassed for most disputes. So even with the Chamber of Commerce opposing any legislation to fix the *ATP Decision*, it's premature to bet against reform.

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Bland

Endnotes

[1] 91 A.3d 554 (Del. 2014) (en banc).
[2] *Id.* at 557.
[3] *Deutscher Tennis Bund v. ATP Tour, Inc.*, No. 07-178, 2009 WL 3367041 (D. Del. Oct. 19, 2009).
[4] Deutscher *Tennis Bund v. ATP Tour Inc.*, 480 Fed. Appx. 124 (3d Cir. 2012).
[5] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1987).
[6] 91 A.3d at 558-559.
[7] *Id.* at 560.
[8] *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996).
[9] *See Ragone v. Atl. Video at the Manhattan Ctr.*, 595 F.3d 115, 125-126 (2d Cir. 2010) (enforcement of term awarding fees to prevailing defendant would "significantly diminish a litigant's rights under Title VII"); *In re Checking Account Overdraft Litig.*, MDL No. 2036, 685 F.3d 1269 (11th Cir. 2012) (loser pays provision unconscionable under South Carolina contract law, provision stricken from contract); *Zaborowski v. MHN Gov't Services*, No. C 12-05109, 2013 WL 1363568 (N.D. Cal. April 3, 2013) (arbitration clause substantively unconscionable where it contained a fee-shifting provision where plaintiffs would pay for the defendant's costs if they lost); *Dreher v. Eskco, Inc.*, 2009 WL 2176060 (S.D. Ohio July 21, 2009) (loser-pays provision unenforceable); *Boyd v. Allied Home Mortgage Capital Corp.*, 523 F. Supp. 2d 650, 659 (N.D. Ohio 2007) (refusing to enforce loser-pays clause that would have required plaintiff to pay for defendants' attorney fees in defending arbitration clause); *Wherry v. Award Inc.*, 192 Cal.App.4th 1242 (2011) (loser pays provision in employment contract substantively unconscionable); *Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006) (loser-pays provision would impose risk that is unconscionable); *Brown v. MHN Gov't Servs., Inc.*, 2013 WL 4130395 (Wash. Aug. 15, 2013) (clause substantively unconscionable which included a loser pays provision when ordinarily only prevailing employees may recover costs and fees under state wage act); *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197 (Wash. 2012) (arbitration clause substantively unconscionable where it contained a loser pays provision).
[10] Gretchen Morgenson, *Shareholders, Disarmed by a Delaware Court*, New York Times, October 25, 2014.
[11] Michael Green, *ABA Speakers: Fee-Shifting Bylaws, Proxy Access Continue Drawing Attention*, Corporate Counsel Weekly (December 5, 2014) (quoting Patrick McGurn, Executive Director of Institutional Shareholder Services as saying that "institutional investors have a 'virtually universal' and 'absolute visceral reaction' to these types of [loser pays] amendments….")
[12] Micah Hauptman, Financial Services Counsel of the Consumer Federation of America, *A Delaware Court Decision Threatens Enforcement of Our Nation's Securities Laws, While the SEC Stands Idly By*, The Huffington Post, November 12, 2014.
[13] John C. Coffee Jr., *'Loser Pays': Who Will Be the Biggest Loser?* New York Law Journal, November 20, 2014.
[14] Lisa A. Rickard, *Delaware Flirts With Encouraging Shareholder Lawsuits*, Wall Street Journal, November 15, 2014, at A-11.



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When the class-action case does not settle

Trying the class action is a new experience, but with a familiar feel – much like a regular trial

By Joshua H. Haffner

There was a time when it was virtually unheard of for a class-action case to go to trial. They were, and to a large degree still are, notorious for settling, either before or after certification, but certainly before a jury or judge makes ultimate findings on the claims and defenses. The reasons for this are manifold. Class actions tend to be big cases with high stakes for both sides.

From the plaintiff's perspective, it is extremely challenging to even get a class certified, and they can be defeated pre-trial on the merits at the pleading or summary judgment stage. From the defense perspective, providing class notice alone can be very undesirable, let alone the potential liability that could result if the class claims are ultimately successful. The cases can also be complex and expensive for both sides, and involve many parties, making litigation burdensome.

Conversely, class settlements can be structured in a way that benefit the class members, while also providing defendants with certainty regarding the extent of their liability for particular conduct, while avoiding the risks, uncertainties, and expense of continued litigation. These and other reasons make class cases conducive to settlement, and it is why it is a rare class case that goes to trial. Indeed, as recently as May of this year, the California Supreme Court described a class action that "proceeded through trial" as a "rare beast." (*Duran v. U.S. Bank Nat. Ass'n* (2014) 59 Cal.4th 1, 12.)

While class-action trials remain a "rare beast," there does appear to be

anecdotal evidence that they are occurring with more frequency, and that a trend of more class actions going to trial may be developing. I recently heard a prominent class-action attorney say that she had noticed that trial courts have become more receptive to class-action trials. Her analysis was that both federal and state judges have seen their power curbed in various subtle ways over the past few years and have diminishing opportunities to try large cases. Partly because of this, she thought that trial judges are more open than they used to be (if not enthusiastic) about trying a class action.

I recently come out of a nearly two-month class action against a title company in Los Angeles Superior Court. I would echo the sentiment that trial courts are becoming more receptive to class-action trials. If a trial judge can be convinced a class action is meritorious and manageable, and a reasonable settlement is not attainable, class counsel should not shy away from pushing for and taking the case to trial. The judicial trend seems to favor allowing well-constructed class actions to proceed to trial, and the remedies available are often far better than could be achieved in a settlement. Class practitioners should take this to heart and consider trying more class actions.

Having recently tried a class action, I have concluded that the imagined complications and difficulties of trying a class case are often far less than the reality. Below are some of the insights I picked up on how these cases can be effectively presented should you find yourself in the position of taking a class action to trial.

Class vs. individual action at trial

The first thing that struck me on reflection about trying a class action, and it is something that I only really understood after experiencing it, is that there is really not that big a difference between trying an individual case and a class action. There are no procedures unique to a class-action trial. By the time trial takes place, the class has already been certified, so those issues have been dealt with. The Seventh Circuit recently described how individual and class action trials are similar.

> Class actions are rarely tried, but when they are the trial proceeds the same way it does in an ordinary case – there are no special trial procedures for class actions as such, though if the suit is particularly complex, as some nonclass actions are and some class actions, including this one, are not, the ordinary trial procedures may have to be modified.

(*Amati v. City of Woodstock* (7th Cir. 2011) 176 F.3d 952, 957.)

Basically, in a class-action trial, just as in an individual trial, you have to prove the elements of your causes of action. Yes, there are some unique issues that may relate to class status, but there are often unique issues in individual actions as well, requiring flexible management. Courts have made clear that trial courts enjoy broad flexibility and discretion in managing the class action so that they can be effectively tried. "Trial court must be accorded the flexibility 'to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process.'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.App.4th 429, 440.) Thus, under federal and state rules, "the trial judge maintains a great degree of control over the conduct of a class action trial." (*Gold Strike Stamp Co. v. Christensen* (10th Cir. 1970) 436 F.2d 791, 792, n.2.) The trial court's discretion allows it to fashion a class-action trial in a manner similar to an individual trial, which is likely the judge's natural proclivity anyway.

So in preparing for a class-action trial, think of it as any other trial.

Don't retry class certification

One thing to avoid during a class trial is retrying the elements of class certification, which is something defendants may strenuously attempt. This is because oftentimes in a class action the best defense a defendant has is to certification, not liability. The problem for the defense is that by the time trial comes around, certification has already been decided. Defendants should not be allowed to retry it.

The issue of whether a case will be certified as a class action is decided in connection with a motion for class certification. This is done pre-trial. Indeed, the rules suggest that class certification be decided at "an early practicable time" after initiation of the suit. (*In Re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298.) The class-certification motion is litigated based on evidence, and its conclusions and findings as to whether it is an appropriate class action are binding. Thus, by the time trial starts, the issues regarding class certification have been decided.

Class certification rules do provide, however, that "[a]n order that grants or denies class certification may be altered or amended before final judgment." (Federal Rules of Civil Procedure, rule 23(C)(1)(c).) (In this article we cite both federal and state rules on class actions, which for the purposes of this article are significantly similar. (See *In Re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 ["we look [to federal law] when seeking guidance on issues of class-action procedure"].))

Practically speaking, however, there must be new facts for a court to reconsider an order certifying a class. (Code of Civ. Proc., § 1008.) Without material new facts going to certification issues (i.e., commonality, typicality, numerosity, manageability, etc.), certification cannot be relitigated. Class counsel should be aggressive in making this point. Issues relating to absent class members, defendant's liability to them, their amount of damages, should be sharply curtailed, if allowed at all, because it has already been certified as a class action, and the named representative plaintiff's claims are the only ones to be litigated.

In that regard, it becomes critical to protect your named plaintiff's claims during the trial, as would be the case in any individual trial. The silver bullet for the class action defendant is to take out the named plaintiff, and thereby defeat the class action. This gives them res judicata as to any such claims by any of the other class members because a judgment in a class action "will be res judicata as to all persons as to whom the common questions of law and fact pertain." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.)

Therefore, the big goal at trial is to establish your plaintiff's claim, just like a regular trial, except the results affect more people (the absent class members). Thus, during trial, you have to worry less about class-certification issues and far more about winning your named-plaintiff's claims. This focus is just like any other trial.

Thus, as in any trial, your individually named plaintiff must be well-prepared, and you need to be confident in his or her claims. Any major problems with an individual plaintiff's claim should be well analyzed prior to class certification, because once certification occurs, class members are bound by trial results. Picking a plaintiff with the fewest problems at the outset, and then protecting that plaintiff through trial, is critical.

Because the case for all class members rises or falls with the named plaintiff, the stakes are high in a class-action trial when the plaintiff testifies. Any misstep can doom not just his or her individual case, but the whole class action.

The issue of needing the named plaintiff to prevail raises the potential strategic call of having more than one named plaintiff as class representative. Having more than one class representative is a double-edged sword, and is often a subject of debate amongst class counsel. On the positive side, having more than one class representative means that, if one falls away at trial or before, there is a backup. However, having multiple named class representations poses other problems, and can backfire particularly at the class-certification stage if differences between the class representatives' experiences make it appear class treatment is inappropriate. Thus, when thinking about naming class representatives, and how many to name, you should consider the likelihood the case could actually proceed to trial, as well as the risks multiple named plaintiffs present to class certification.

However, once you are in trial, you win or lose with your named plaintiff(s). Don't let the defense try to muddy and overcomplicate the case by injecting into the case issues relating to absent class members.

"Aggregate damages" is the name of the game

When trying a class action, perhaps the most important factor to keep in mind is that you only need to prove aggregate class damages. This is critical. Class counsel *does not* have to prove the amount of each individual class members' damages. The California Supreme Court made it clear years ago that class-action trials proceed by proving class-wide, not individual, damages.

> Due process does not prevent calculation of damages on a classwide basis. The Supreme Court has assumed the use of such a method. In many cases such an aggregate calculation will be far more accurate than summing all individual claims.

(*Bruno v. Sup. Ct.* (1981) 127 Cal.App.3d 120, 129 n.4.)

Defense counsel will often try to ignore this rule, and defend class trials by arguing that plaintiff must prove that each class member was damaged by the challenged conduct. This is simply wrong. The law supports calculation of aggregate, classwide damages. This rule greatly simplifies the trial of class actions.

Indeed, in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 747, the Court of Appeal cited *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, stating that it is "precedent for determining aggregate classwide damages through a process of logical inference . . . ." (*Bell, supra*, at 747.) The underlying rationale for this pragmatic approach is that "aggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objectives of Rule 23.'" (*Id.* at 751, n.24.)

Thus, when trying a class action, focus exclusively on classwide, aggregate damages. Do not let defense counsel distract you or the Court with arguments relating to proof issues as to individual class members' damage claims.

Distribution of class damages and cy pres – a non-adversarial administrative process

Another manner that defendants may attempt to confuse the issues, or defend a class action, is to argue that any class-action judgment must include a distribution award, and this necessarily requires that the Court take evidence of each class members' individual damages.



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As set forth above, the amount of each class member's individual damages does not have to be proven in a class-action trial. Rather, California courts have adopted a non-adversarial, administrative process for distribution of classwide damages following trial. California law is as follows with respect to distribution of classwide aggregate damages.

> If the defendant in a class action is found liable, and there is a finding at trial as to the amount of classwide damages, each class member's individual entitlement to damages may be litigated in a nonadversary administrative claims procedure with a lowered standard of proof. In such a claims procedure, the allocation of the total sum of damages among the individual class members 'is an internal class accounting question that does not directly concern the defendant . . .'

(*In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 417 (internal citations omitted).)

Thus, "'the allocation of that aggregate sum (of the judgment) among class members is an internal class accounting question that does not directly concern the defendant.'" (*Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 759.) The way the process works is that "[a]fter 'the defendant's total damage liability is paid over to a class fund . . . individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof.'" (*Ibid.*)

Once classwide, aggregate liability is determined at trial, judgment is entered in that classwide amount. Subsequently, in a non-adversarial, accounting proceeding overseen by the Court, the damages are distributed to class members. Issues regarding distribution of damages to class members pose no obstacle to the class trial. Class counsel should oppose all efforts to insert issues of distribution into the class action trial.

In that same vein, defendants will sometimes argue that classwide damages should not be awarded, or should revert to defendant, if the class member entitled to the award cannot be identified. This is incorrect under the law. Amounts from the aggregate, classwide liability that cannot be distributed do not revert to the defendant or defeat those class members' claims. Rather, they go to the next best use, also referred to as a cy pres fund. Judge Richard Posner of the Seventh Circuit Court of Appeal, in *Hughes v. Kore of Indiana Enterprises, Inc.* (7th Cir. 2013) 731 F.3d 672, recently described the importance of cy pres funds in distributing classwide awards:

> In a class action the reason for a remedy modeled on cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment, in the rare case in which a class action not dismissed pretrial goes to trial rather than being settled) to the class members.

(*Id.* at 676.)

Conclusion: Class-action trials are manageable

By the time you reach the stage where a class action is ready to go to trial, much work has been accomplished. The class has been certified. Discovery has been completed. Merits challenges have been defeated.

At that point, with so much successful work accomplished, class counsel should be ready and willing to try the case. It will often result in a recovery greater than would have been attainable in a settlement. It is not that difficult, complex, expensive, or different from an individual case, and it can be tried effectively. And class-action trials are fun – you are almost always dealing with big, high-stakes cases, and large defense firms with talented counsel. Defendants are, to an extent, shooting at ghosts: They so desperately want to defend against the class members' claims, but their only courtroom target is the named plaintiff. If you have done the work-up right, you can feel confident that your named plaintiff will survive, and there will be a class-wide judgment.

Taking big class actions to trial sends the right message to defendants that cases will not be settled for less than their fair value. There is no reason, except perceived complexity, that these cases should not be tried more often in California courtrooms.



Haffner

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Appellate Reports and cases in brief

Laffitte v. Robert Half International *confirms that courts in California may award class counsel a 33.33 percent fee based on common-fund recovery*

By Jeffrey Isaac Ehrlich

Laffitte v. Robert Half International

(2014) __ Cal.App.4th __ (2d Dist., Div. 7.)

Who needs to know about this case: Lawyers seeking fees in common-fund class-action lawsuits.

Why it's important: Confirms that in California, courts may award class counsel a 33.33 percent fee based on a common-fund recovery.

Synopsis: Plaintiff Mark Laffitte, on behalf of himself and other class members, settled a class-action lawsuit against defendants, Robert Half International Inc., for $19 million. David Brennan, a class member, objected to the settlement. The trial court overruled his objections and approved the settlement, which included an award of attorneys' fees to class counsel of one-third of the settlement, or approximately $6.3 million. Brennan appealed. Affirmed.

Brennan argued on appeal that the trial court erred by calculating the amount of class counsel's attorneys' fees based on a percentage of the common fund, rather than the lodestar method. He argued that the lodestar approach is the primary method for establishing the amount of attorneys' fees in class actions. The court explained that, "While Brennan is correct that, as a general rule, the lodestar method is the primary method for calculating attorneys' fees, the percentage approach may be proper where, as here, there is a common fund." The lodestar method is the primary method in fee-shifting cases, where the defendant is forced to pay the plaintiff's fees. But in common-fund cases, a percentage-of-the fee approach can be used, although the lodestar method may also be used.

The trial court's use of a percentage of 33.33 percent of the common fund was consistent with, and in the range of, awards in other class action lawsuits (citing *Chavez v. Netflix* [27.9 percent award]; *Bell v. Farmers Ins. Exch.* [25 percent



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award]; *Fischel v. Equitable Life Assur. Society* [25 percent award.] "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." Here, the trial court also used the lodestar method to "cross-check" the amount of the award, which was appropriate. The lodestar amount was approximately $3 million, and class-counsel sought a multiplier of 2, which was within the range of acceptable multipliers.

The Court also rejected Brennan's objection that, in connection with the court's lodestar calculations, class counsel did not submit detailed attorney time records. But such detailed time records are not required. "It is well established that 'California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent.'"

Graciano v. Mercury General Ins. Co.

(2014) __ Cal.App.4th __ (4th Dist., Div. 1.)

Who needs to know about this case: Lawyers who make policy-limits demands in an effort to "open" the policy.

Why it's important: Shows that, in order to violate the implied covenant of good faith and fair dealing, which is the predicate for forcing the insurer to pay for an excess judgment, the insurer's conduct in rejecting the settlement demand must have been unreasonable under all the circumstances. Since the court held that the carrier's conduct had not been unreasonable, it reversed a $2 million award for the plaintiff, as insured's assignee, based on the failure to settle.

Synopsis: Graciano suffered severe injuries from being struck by a Cadillac driven by Saul Ayala, who had been drinking. Saul had a $50,000 auto policy issued by CAIC. CAIC had also issued a separate policy to Saul's son, Jose Saul Ayala, which insured the same Cadillac as on Saul's policy. Saul reported the accident to CAIC. Based on its preliminary investigation after the accident – and before it even knew Graciano's identity – CAIC determined that Saul would be 100 percent liable for an amount in excess of his $50,000 policy limit.

Graciano retained counsel, DeDominicis. DeDominicis contacted CAIC's claim center and reported that her client had been injured by "Saulay Ala" and gave a policy number which corresponded to Jose's policy, which had previously been canceled before the accident. Based on DeDominicis's call, CAIC opened a second claim, which was against Jose. A few days later, on November 5, 2007, DeDominicis mailed CAIC a demand letter, which named Jose as the named insured and identified his policy number. The offer was for policy limits, and remained open for only 10 days. CAIC requested an extension, which DeDominicis refused to provide. On November 14, CAIC informed DeDominicis that its preliminary investigation revealed that Jose's policy was not in force on the date of the accident, and it therefore could not accept the policy-limits demand.

On November 15, CAIC connected the claim against Jose with the claim reported by Saul. It immediately prepared a letter offering Saul's $50,000 policy limit to Graciano, who received the letter before the 10-day expiration period on her demand letter to Jose had expired. Graciano rejected the offer and pursued a lawsuit against Saul. She obtained a judgment against him for over $2 million, and then obtained an assignment of his rights, which she pursued in a claim against CAIC.

An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure. A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance. But when a liability insurer timely tenders its full policy limits in an attempt to effectuate a reasonable settlement of its insured's liability, the insurer has acted in good faith as a matter of law.

An insured's claim for "wrongful refusal to settle" cannot be based on his or her insurer's failure to initiate settlement overtures with the injured third party, but instead requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The Court reversed the judgment against CAIC because it concluded that there was no substantial evidence that Graciano ever offered to settle her claims against *Saul* for an amount within Saul's policy limits. The only settlement "offer" CAIC could have accepted was DeDominicis's November 5, 2007 letter that identified Jose as the driver and the insured, and listed his policy number. The plain import of this letter is that Graciano offered only to settle her claims against Jose. Because Graciano never demanded payment of Saul's policy limits in exchange for a release of Saul's liability, Saul would not have been protected even had CAIC accepted the terms of Graciano's demand.

In addition, the undisputed evidence showed CAIC did timely tender Saul's full policy limits within the timeframe selected by Graciano in an attempt to settle Graciano's claim, and therefore acted in good faith as a matter of law by offering the policy limits in exchange for a release [thereby doing] all within its power to effect a settlement.

Short(er) takes:

Employment law; whistleblower protections; retaliation against perceived whistleblowers: *Diego v. Pilgrim United Church of Christ* (2014) __ Cal.App.4th __ (4th Dist., Div. 1.)

Diego worked for the Pilgrim United Church pre-school (PUCC) as the school's assistant director. Her employment was at will. After another employee anonymously reported the school to the Dept. of Social Services for alleged violations of the Health & Safety Code, the department conducted an unannounced inspection. The school's director accused Diego of making the report, and fired her several days later. Diego then sued PUCC for wrongful termination in violation of public policy. The trial court granted summary judgment to PUCC, finding that because Diego had not actually made the report, she was not a whistleblower and was not entitled to whistleblower protections. Reversed.

At-will employees can proceed against their employers if they are terminated in violation of fundamental California public policy. That public policy encourages employees to report suspected wrongdoing by the employer to the proper authorities. That policy also protects employees who report illegal conduct from retaliation by the employer. Here, although Diego was not actually a whistleblower, she was entitled to the protection of that public policy. Allowing employers to terminate "perceived whistleblowers" would frustrate the public policy encouraging employees to report illegal conduct by their employers.

Insurance; uninsured/underinsured motorist protection; which documents become part of policy: *Elliott v. Geico Indemnity Co.* (2014) __ Cal.App.4th __ (3rd Dist.)

Elliott's husband was killed when his motorcycle was struck by a truck driven by Shaffer, who had driven after becoming intoxicated at work. Shaffer had a $15,000 policy, which her insurer tendered to Elliott. Since Elliott's Geico auto policy contained $100,000 in UM/UIM coverage, she sought to recover $85,000 from Geico (the $100,000 policy limit less the $15,000 she recovered from Shaffer.) But Elliott also recovered $250,000 from Shaffer's employer. Because the $265,000 total that Elliott recovered exceeded the policy's $100,000 UM/UIM limit, Geico refused to pay. Elliott sued. The trial court granted Geico summary judgment. Affirmed.

Geico's policy, which was nearly identical in wording to Insurance Code section 11580.2, subd. (p)(4), clearly provided that its maximum liability for UM/UIM coverage would not exceed the policy's coverage limit "less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury." Elliott sought to avoid this provision by relying on an illustration provided with the policy, which suggested that the UM/UIM coverage was based only on the driver's policy limit. But that illustration was not part of the policy, and the policy's terms were clear. Any "reasonable expectations" that Elliott had based on the illustration were not legally relevant.


Ehrlich

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A child's eyes

Identify the issues and refocus your case to highlight the story that a jury will understand


Cooper

By Miles B. Cooper

"Why is that man sleeping there?" We were hosting my four-year-old niece. She had been wanting a sleepover at her aunt and uncle's house in the big city for some time. We had her over during Christmas. She lives in the suburbs. Nice place, the suburbs, but the suburbs don't have the City's bustle. Nor do they have the same number of people sleeping on the streets.

Hers was a valid question. I was stumped for a moment. I didn't even see him. Don't be too quick to judge me. There's an urban dweller devolution. I went through the "I-feel-terrible-so-here's-a-buck" phase. Then questioned whether I was helping or hurting. Plus, deciding whether to give a buck, when you walk past 40+ homeless folks a day on the way to work, is difficult. I ultimately switched into "I-volunteer-instead-of-giving-money" mode. And then tried not to be as affected. The guilt associated with walking past the cold, sodden and hungry every day is otherwise crippling.

They don't always see it your way

When you see your client, you see a deserving person – injured at the hands of another – who deserves compensation. But that's your view. What do others see? The defense lawyer, the adjuster, the jurors? Unfortunately, the default is that this is another frivolous lawsuit. Another person pulling the lever for jackpot justice. Protest all you want, the insurance industry's PR campaign worked. We start a few paces behind our opponents at the starting line, no matter what the jurors tell you.

Learn what they see

If you walk through the City with people who all see (or who all ignore) the same things, you'll never learn what others see. You probably spend a fair amount of time at the office. When you're not there, you then socialize with other plaintiffs' lawyers, and people like yourself. Every one of them sees things your way. Asking them about a case runs the risk of extending your blinders rather than shedding them.

You have a couple choices. Ask yourself, "Can I be a fair witness to my case?" If the answer is "yes," you are either supremely neutral – put your name in for the judiciary – or supremely deluded. Either way, get a second opinion. How do you get that? There are a few different ways.

The world is your focus group

To get a sense of the other views, talk to folks about your case. And I don't mean the people you surround yourself with. I mean the person who cuts your hair. The person in front of you in the 45-minute line at Disneyland or the DMV. The person next to you on your flight. These are easy and effective ways to get a sense of what evidence resonates (or doesn't.) To do this you must put forth all the information. You don't want confirmation bias – omitting the bad facts because you want this to be your home run case. Because this can be an issue, a focus group – full boat or stripped down – remains the best way to understand how others see the evidence.

Seize the lens and reframe the issue

You've talked to people and learned what facts they see as problematic. The problem fact: they view your client as an alcoholic homeless man who hasn't had a job since the '70s. You have the benefit of primacy to tell your story. Embrace the bad fact and give it context.

Primacy. You get to go first. Through jury selection. Through opening statement. And you can seize the lens to focus on the person, the emotion, the story. Get them to care.

"It is June 1967, John Doe is a U.S. Army sergeant in Vietnam. He's what they call a tunnel rat – a soldier who goes down into tunnels constructed by the Viet Cong to live and hide. He's deep in a tunnel. He lifts his head up into a chamber. An enemy soldier sees him and throws a grenade. The shrapnel and explosion injure John. The tunnel collapses. John is entombed underground for an hour, believing he will die. He survives. But the shockwave from the grenade damages his brain tissue. And the experience – trapped – makes it so he never again feels safe in an enclosed space. He spends his life outside – a tough life – living with the physical and emotional scars he got serving our country."

The walk home

"He sleeps there because he doesn't have a home," I told my niece. She thought about it for a minute. "Can we get him a home for Christmas?" "I wish it were that easy." We continued walking hand in hand. She didn't get him a home. But she did refocus my lens. And a jaded city dweller was refocused on the daily horror that is our failure to take care of our own.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time.)

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