Recent Developments: CAFA, Class Certification, and Class Arbitration

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TABLE OF CONTENTS

I. Broad Sweep of Federal Diversity Jurisdiction Provided under CAFA

A. Background

Before Congress passed the Class Action Fairness Act of 2005 (CAFA),[1] class actions asserting state-law claims had traditionally been heard in state court. For non-federal question class actions, the federal diversity jurisdiction statute (28 U.S.C. § 1332) made a federal forum available to any defendant sued under state law outside of its home state where the matter in controversy exceeded $75,000. Most state-law class actions did not meet federal diversity jurisdiction requirements. First, even though class-wide damages are typically far in excess of the threshold amount, courts had normally applied the amount in controversy requirement to the claim of each individual plaintiff, declining to aggregate the claim amount of each class member.[2] In addition, the complete diversity rule required every named plaintiff to be from a different state from every defendant. Third, under the home state rule, even if a case satisfied the amount in controversy requirement and the complete diversity rule, the defendant could not remove the case to federal court if sued in its home state.[3]

The Senate Judiciary Committee Report on CAFA identified a number of perceived "flaws" in state court class actions.[4] The Report noted the rules governing federal jurisdiction had "the unintended consequence of keeping most class actions out of federal court, even though most class actions are precisely the type of case for which diversity jurisdiction was created."[5] The Report cited the example of a case "in an Alabama county court on behalf of more than 20 million people alleging that the design of federally mandated airbags is faulty."[6] The Report argued that "[f]rom the standpoint of federalism, this suit defies logic. Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?"[7] The Report continued to note that some state courts faced with nationwide class actions

[1] 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2005).

[2] *See Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (non-aggregation rule), *superseded by statute as established in Exxon Mobil Corp. v. Allapattah Servs, Inc*., 125 S. Ct. 2611 (2005). As stated in *Exxon Mobil Corp. v. Allapattah Servs, Inc*., 125 S. Ct. 2611 (2005), *Zahn* was superseded by the federal supplemental jurisdiction statute, 28 U.S.C. § 1367. In *Exxon Mobil,* the Supreme Court clarified an ambiguity in the federal supplemental jurisdiction statute (28 U.S.C. § 1367) that resulted in a split among the circuit courts of appeal. The ambiguity was present in multi-plaintiff cases, such as class actions, in which federal jurisdiction is based upon diversity of citizenship. Under *Exxon Mobil*, the Supreme Court held that, as long as at least one plaintiff satisfies the amount-in-controversy requirement, federal courts can exercise supplemental jurisdiction over the claims of all other plaintiffs even if those claims are worth less than $75,000.

[3] 28 U.S.C. § 1441(b) (2002).

[4] Senate Judiciary Committee Report on CAFA.

[5] *Id.* at 10.

[6] *Id.* at 24 (citing *Smith v. General Motors Corp., et al.*, Civ. A. No. 97–39 (Cir. Ct. Coosa County, AL)).

[7] *Id.*

sometimes ignored differences in the law between the 50 states, thus effectively overriding laws enacted by other state legislatures.[8] The Senate Judiciary Committee believed that federal courts were the appropriate forum to decide nationwide class actions because they "have significant implications for interstate commerce and national policy."[9]

Additionally, there was a belief that "[i]n too many cases, state court judges are readily approving class action settlements that offer little – if any – meaningful recovery to the class members and simply transfer money from corporations to class counsel."[10] The Report listed numerous examples of state-court-approved settlements that allegedly awarded class counsel significant fees and provided worthless benefits to class members.[11]

A third concern was an overall perception of abusive state-court litigation. The Committee cited examples of "drive-by class certifications," in which "a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint."[12] The Report also cited a "judicial blackmail" effect when a class is certified in a meritless or even frivolous case: "when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success."[13] The Report continued to note the widespread belief that

[8] *Id.* at 24-26. While no California cases were cited, the Report cited the following cases in which a nationwide class action was brought before a single state court, implicating the laws of many other states: *Snider v. State Farm Mutual Automobile Insurance Co.*, Cir. Ct. for Williamson City, IL, Docket No. 97–L–114 (1999) (in a class action challenging the insurer's use of non-OEM parts to repair cars, the court permitted the jury to reach a group judgment on the class action, disregarding the fact that the laws of many states permit usage of non-OEM parts); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254 (Ill. Ct. App. 2001) (same); *PJ's Concrete Pumping Serv. v. Nextel W. Corp.*, 803 N.E.2d 1020, 1030 (Ill. Ct. App. 2004), *appeal denied*, 813 NE.2d 223 (Ill. 2004), *cert. denied*, 125 S. Ct. 410 (2004) (noting that because "50-state class actions are not uncommon in Illinois" it was not problematic that "the laws of 17 states are potentially implicated here"); *Clark v. TAP Pharm. Prods., Inc.*, 798 N.E.2d 123 (Ill. Ct. App. 2003); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003) (affirming certification of a nationwide product liability class action, applying the laws of a single state to transactions that occurred in all 50 states); *Black Hawk Oil Co. v. Exxon Corp.*, 1998 Okla. LEXIS 82 (Okla. 1998) (affirming certification of a nationwide class, ignoring the fact that the case would require resolution of the laws of twenty states); *Peterson v. BASF Corp.*, 657 N.W. 2d 853 (Minn. Ct. App. 2003), *aff'd*, 675 N.W. 2d 57 (Minn. 2004) (affirming nationwide class action, applying the laws of a single state to transactions that occurred in many different jurisdictions (and virtually none of which occurred in the state whose laws were applied)); *Rosen v. PRIMUS Automotive Fin. Servs., Inc.*, No. CT 98–2733 (Minn. D. Ct., 4th Jud. Dist. May 4, 1999) (in certifying a class of individuals who sued to recover interest on refundable deposits, the court adopted the Minnesota version of the Uniform Commercial Code that was contrary to the interpretation of every other state to have considered the issue under their own version of the UCC).

[9] *Id.* at 27.

[10] *Id.* at 4.

[11] *Id.* at 15-20. The Report cited the following California examples: the 2003 coupon settlement against GameStop Corp. for misrepresenting certain video games it was selling as new (*Chavez v. GameStop Corp.*, No. CGC-02-406658, San Francisco Super. Ct., 2003); the 2002 coupon settlement with hotel chains over energy surcharges; the 1997 coupon settlement with wireless phone service providers for price-fixing claims. *Id.* at 17, 19, 20.

[12] *Id.* at 22.

[13] *Id.* at 21.

some state courts had become magnets for nationwide class actions due to their sympathy to class action plaintiffs.[14]

The Report included the minority's view opposing the legislation. The minority argued that CAFA was written to favor corporate defendants at the expense of consumers.[15] "At a minimum, the legislation will force most state class action claims into federal courts where it is generally more expensive for plaintiffs to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings. It is also typically more difficult and time consuming to certify a class action in federal court. By pushing cases from state to federal court, [CAFA] creates more problem than it solves."[16]

The minority noted that Rule 23 requirements of the Federal Rules of Civil Procedure were different from the class actions criteria in at least 14 states.[17] California is one of the states which provide different requirements for the maintenance of class actions. To sustain a class action under Section 382 of the California Code of Civil Procedure, the burden is on the party seeking certification to establish the existence of a sufficiently numerous, ascertainable class and a well-defined community of interest among the class members.[18] Certification also requires proof that certification will provide substantial benefit to litigants and the courts – that is, that proceeding as a class is superior to other methods.[19] Occasionally the California Supreme Court has looked to Federal Rule of Civil Procedure 23 as guidance when presented with novel class

[14] *Id.* at 22-23.

[15] *Id.* at 84-85.

[16] *Id.* at 85.

[17] *Id.* at 86, n.15 ("Three states still use their common law rules, rather than statutes, to permit class actions (Mississippi, New Hampshire, and Virginia); four states use Field Code-based rules based on the ''community of interest'' test (California, Nebraska, South Carolina, and Wisconsin); and seven states use class action rules modeled on the original Federal Rule 23 (1938) which creates a distinction among class members which depends on the substantive character of the right asserted (Alaska, Georgia, Louisiana, New Mexico, North Carolina, Rhode Island, and West Virginia). *See* 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 13.04 (3d ed. 1992 & Supp. 1997)").

[18] *See, e.g., Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012). The Consumers Legal Remedies Act (Cal. Civ. Code §§1750-1784) also allows consumers who allege a violation of the Act to bring a claim on behalf of "other consumers similarly situated." Cal. Civ. Code §1781. Attached is an appendix comparing the texts of Federal Rule of Civil Procedure 23 and the California class action statutes (Cal. C.C.P. §382 and Cal. Civ. Code §1781).

[19] *See, e.g., Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089, 155 P.3d 268, 281 (2007).

action issues.[20] However, [i]t is only in the *absence* of relevant state precedent that courts turn to federal law and rule 23 for guidance" and even then, federal law may differ.[21]

With respect to those states which have enacted an analog to Rule 23, the minority stated that "the federal courts are likely to represent a more difficult forum for class certification to occur."[22] The minority argued that "[f]ederalizing class action cases creates an incentive for violators to break the law of multiple states, as any collective action to hold them accountable will likely be dismissed."[23] In addition, the minority argued that CAFA, in practice, would also "severally limit the ability of consumers to pursue class action in state court, even when state consumer protection laws are implicated."[24]

B. Changes Enacted in CAFA

Expansion of Federal Diversity Jurisdiction

CAFA provides expansive diversity-based original jurisdiction over multistate class actions. Under CAFA, federal courts have jurisdiction if the amount in controversy exceeds $5 million and any member of the proposed class (A) is a citizen of a state different from any defendant; (B) is a foreign state or citizen or subject of a foreign state and any defendant is a citizen of a state; or (C) is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.[25]

CAFA includes several exceptions. A federal court may decline to exercise jurisdiction if more than one-third but less than two-thirds of class members and the primary defendants are citizens of the forum state.[26] And it must decline to exercise jurisdiction if (A) more than two-thirds of class members are citizens of the forum state, at least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims is a citizen of the forum state, and principal injuries occur in the forum state, or (B) two-thirds or more of the class members and the primary defendants are citizens of the forum state.[27] These

[20] *Vasquez v. Superior Court*, 4 Cal. 3d 800, 821 (1971) ("In the event of a hiatus, rule 23 of the Federal Rules of Civil Procedure prescribes procedural devices which a trial court may find useful"); *Linder v. Thrifty Oil Co*., 23 Cal. 4th 429, 437, 2 P.3d 27 (2000) ("In the past, however, we have looked to the procedures governing class actions under the CLRA and Rule 23 for guidance on novel certification issues").

[21] *Stephen v. Enter. Rent-A-Car*, 235 Cal. App. 3d 806, 814 (Cal. Ct. App. 1991) (emphasis in original); *see also Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1118 (1998).

[22] *Id.* at 86.

[23] *Id.* at 87.

[24] *Id.* at 88.

[25] 28 U.S.C. §1332(d)(2).

[26] 28 U.S.C. §1332(d)(3).

[27] 28 U.S.C. §1332(d)(4).

two primary exceptions – "home state" and "local controversy" cases in which most or all parties reside in a single state – are seldom applicable, especially in antitrust class actions.[28] CAFA also contains exceptions for state action and corporate governance cases.[29]

Procedures for Removal

CAFA also creates new procedural rules that apply to the removal of class actions.[30] The most significant aspects of the changes enacted by CAFA regarding removal are (1) *any* single defendant can remove a class action to federal court; the concurrence of the other defendants is no longer necessary;[31] (2) the deadline to remove a case is still 30 days after it *becomes removable*, but the one-year limit from the date the case *first commenced* no longer applies; [32] (3) removability is independent of whether or when class certification is granted;[33] and (4) CAFA creates a procedure for interlocutory appeal of an order granting or denying a motion to remand a class action. The district court decisions are reviewable if review is sought no more than 10 days after entry of the order, and must be decided within 60 days of acceptance (with a possible 10-day extension).[34]

The Consumer Bill of Rights

Section 3 of CAFA enacts a "Consumer Bill of Rights" for class actions in federal court. These rules apply not only to CAFA-enabled class actions, but to all federal class actions, including those arising under federal law.

There are four aspects of the Consumer Bill of Rights. First, it includes substantive coupon settlement provisions: (1) CAFA authorizes federal judges to receive expert testimony as to the actual value of coupons to the class members;[35] (2) CAFA requires that before approving a coupon settlement, a judge must hold a fairness hearing and make a *written* finding that the

[28] *Id.*

[29] CAFA jurisdiction does not apply to a class action in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief." 28 U.S.C. §1332(d)(5). It also does not apply to a class action "concerning a covered security" as defined by the Securities Act of 1933 and the Securities Exchange Act of 1934, or that "relates to the internal affairs or governance of a corporation or other form of business enterprise" or that "relates to the rights, duties (including fiduciary duties), and obligations" relating to any security. *See* 28 U.S.C. §1332(d)(9).

[30] *See* 28 U.S.C. §1453.

[31] 28 U.S.C. §1453(b).

[32] *Id.* This means if a complaint is amended very late in the course of a state-court proceeding, the case may then be removed if it satisfies the other prerequisites of CAFA jurisdiction.

[33] 28 U.S.C. §1332(d)(8). Therefore, the denial of class certification in federal court does not mean that CAFA jurisdiction is lost over a case.

[34] 28 U.S.C. §1453(c)(1).

[35] 28 U.S.C. §1712(d).

settlement is fair, reasonable, and adequate;[36] (3) CAFA authorizes federal courts to redirect funds unclaimed by class members to charity or to the government.[37] It also prohibits the attorney's fee calculation to be based on these *cy pres* funds.[38]

Second, the Consumer Bill of Rights enacts a substantial change to contingency attorney fee awards in coupon settlements. It provides that "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed," not issued.[39] Alternatively, in a coupon settlement, an attorney fee award may be "based upon the amount of time class counsel reasonably expended working on the action."[40]

Third, the Consumer Bill of Rights enacts a prohibition on geographic discrimination. It provides that a court "may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court."[41]

Finally, the Consumer Bill of Rights requires that governmental officials be notified of pending class action settlements and be given time to comment upon them before the settlement is finalized.[42]

C. CAFA Shifts State-Law Class Actions from State to Federal Court

Under CAFA, most multi-state class actions have been removed from state to federal court. It has sharply reduced the number of cases in which the pendency of state court class actions prevented effective consolidation of all related class actions into a single forum pursuant to longstanding Judicial Panel procedures.[43] There has been criticism that CAFA shifts much of the primary responsibility for construing many state laws to federal courts, thereby intruding on traditional state prerogatives.[44]

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[36] 28 U.S.C. §1713.

[37] 28 U.S.C. 1712(e). This *cy pres* approach to unclaimed funds was already standard practice in class action settlements before CAFA was enacted.

[38] 28 U.S.C. 1712(e).

[39] 28 U.S.C. 1712(a).

[40] 28 U.S.C. 1712(b)(1).

[41] 28 U.S.C. 1714.

[42] 28 U.S.C. 1715.

[43] THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT AND COMPETITION LAW, Chpt. 8, at 126.

[44] *See, e.g.,* Jay Himes, *The Class Action Fairness Act: A Wolf in Wolves' Clothing,* Class Litigation Report, 10 CLASS 452 (May 8, 2009). For example, numerous class action lawsuits asserting state law claims against motor fuel retailers and suppliers were consolidated before the federal district court in Kansas City in the multidistrict

The post-CAFA shift of nationwide state-law class actions from state court to federal court has not been uniform across federal courts. The most recent empirical research regarding post-CAFA filings was conducted by the Federal Judicial Center (FJC) in 2007:[45]

> The FJC data show that, while every circuit experienced some post-CAFA increase in diversity class action filings, the growth varied dramatically. The district courts within the Ninth Circuit saw by far the biggest post-CAFA increase, growing nearly sixfold from 2004. Given lawyers' perception of the Ninth Circuit as relatively liberal on class certification, the disproportionate growth of filings in its districts should come as no surprise. Nor is it surprising to see large jumps in diversity class action filings within the Third Circuit, where they nearly quadrupled, and within the Second and Eleventh Circuits, where they more than doubled. The growth was much smaller in the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.

According to the FJC data, differences were even more dramatic at the district court level. Specifically, there were significant post-CAFA increases in the number of class actions filed in the Central District of California, the District of New Jersey, the Northern District of California, the Eastern District of Pennsylvania, and the Eastern District of New York.[46]

II. CAFA Removal Cases

The following cases represent recent CAFA removal developments.

- *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013): the Supreme Court held that a class-action plaintiff who stipulates, prior to certification of the class, that he and the class he seeks to represent will not seek damages that exceed $5 million in total cannot prevent removal of the case under CAFA. The Court reasoned that because a "precertification stipulation does not bind anyone [but the party proffering the stipulation]," the stipulation could not be considered in assessing proper jurisdiction).

  In *Standard Fire*, the plaintiff, Greg Knowles, filed a class action in Arkansas state court on behalf of a class of Arkansas policyholders. Knowles alleged that Standard Fire

litigation proceeding *In re Motor Fuel Temperature Sales Practices Litig.*, MDL No. 1840 (D. Kan.). The case involved claims under the laws of 26 states, the District of Columbia, Puerto Rico and Guam, including claims for breach of contract, breach of warranty, unjust enrichment and statutory unfair practices, all of which would have to be decided by a federal district court.

[45] *See* Howard M. Erichson, CAFA's Impact on Class Action Lawyers, 156 U. PA. L. REV. 1593, 1613 (2008) (citing Thomas E. Willging & Emery G. Lee III, Fed. Judicial Ctr., The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules (2007)) (footnotes omitted).

[46] *Id.* at 1614.

unlawfully failed to include a general contract fee when it made certain homeowner's insurance loss payments. With respect to the relief sought, he alleged in his complaint that the "plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars." He also attached an affidavit in which he stipulated that he "will not at any time during this case … seek damages for the class … in excess of $5,000,000 in the aggregate." Standard Fire removed the case to federal court under CAFA. The district court remanded the case back to state court, finding that the stipulation controlled even though the total amount in controversy would exceed the $5 million threshold.

The Supreme Court disagreed, holding that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." At the time plaintiff filed his complaint (pre-certification), he lacked authority to bind anyone but himself and thus "has not reduced the value of the putative class members' claims." "To hold otherwise," the Court stated, "would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA's primary objective: ensuring Federal court consideration of interstate cases of national importance."

- *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014): the Supreme Court reversed the Fifth Circuit's decision and held that a statewide antitrust lawsuit brought by the state attorney general seeking restitution for its citizens is not a CAFA mass action and is therefore not removable under CAFA.

  Writing for the majority, Justice Sonia Sotomayor relied on CAFA's plain text and said that a true mass action must involve monetary claims brought by 100 or more persons who are actually proposing to try claims jointly as named plaintiffs in a lawsuit. And, because the state of Mississippi was the only named plaintiff, CAFA's removal requirements were not met. Specifically, the Court held that CAFA's "100 or more persons" phrase meant actual named plaintiffs and does not include unnamed parties in interest to claims brought by the state AG. To rule otherwise, the Court held, would result in an "administrative nightmare" where courts would have to identify hundreds of thousands of unnamed parties and then decide how to manage each of those claims within the context of a mass action.

- *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887 (8th Cir. 2013): the Eight Circuit held that a defendant seeking removal to federal court need not prove that damages in fact exceed the $5 million jurisdictional threshold, but must show only that the fact-finder "might legally conclude" that damages exceed $5 million.

  In *Raskas*, three plaintiffs filed separate class action suits against drug manufacturers Johnson & Johnson, McNeil-PPC, Pfizer, Inc., and Bayer Healthcare LLC alleging that each violated Missouri state consumer protection laws by conspiring with unknown third parties to print premature expiration dates on medicines, so that patients would throw away perfectly safe medicines to buy more. Each defendant removed under CAFA based

in part on evidence that total sales of the medications during the relevant period exceeded CAFA's $5 million jurisdictional threshold. The federal district court rejected the defendants' evidence and remanded the cases to state court because, in its view, the evidence of a manufacturer's total sales overstated the potential class-wide damages.

The Eighth Circuit reversed. Taking a broader view of "amount in controversy," the appellate court held that CAFA does not require a defendant to admit or prove that class-wide damages "are greater" than $5 million, only that "a fact finder *might* legally conclude that they are."[47] And the manufacturers' evidence of total sales satisfied amount in controversy under CAFA.

- *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1125 (9th Cir. 2013): the Ninth Circuit held that a defendant is not limited to removing within 30 days of service or within 30 days of receipt of an "other paper." 28 U.S.C. §§ 1146(b)(1) and (b)(3). Rather, if a defendant's own investigation turns up facts supporting removal, the defendant can remove a case to federal court on its own timetable, so long as the plaintiff has not triggered a 30-day period for removal by putting the defendant on notice through the initial pleading or "other paper."

  The federal removal statute provides that a defendant can remove a case to federal court either within 30 days after the filing of a complaint or within 30 days after the defendant receives some other document containing facts supporting removal. 28 U.S.C. §§ 1146(b)(1) and (b)(3).

  In *Roth*, the defendants sought removal to federal court. When the plaintiffs moved to remand to state court, the defendant submitted (among other things) three declarations, one from a member of the putative class establishing the minimal diversity of citizenship needed under CAFA and two others from defendant CHA's president of human resources and general counsel attesting that the wages at issue were more than $5 million. The district court rejected the defendants' evidence, interpreting 28 U.S.C. § 1446 to permit removal only within the two prescribed 30-day periods and based only on information that a defendant receives from the plaintiff.

  The Ninth Circuit disagreed, holding that the two 30-day periods in § 1446(b) apply only when the plaintiff has put a defendant on notice that a case is removable, not when a defendant seeks removal based on its own information. Under *Roth*, a plaintiff cannot prevent removal by not revealing information that supports removal and then objecting when the defendant discovers information through its own investigation and removes the case outside the two 30-day periods.[48]

[47] *Raskas*, 719 F.3d at 887 (emphasis in original).

[48] There is a current circuit split on this issue. Other courts have held that those two 30-day periods are the only two windows for removal. *See, e.g., S.W.S. Erectors, Inc., v. Infax, Inc.*, 72 F.3d 489, 491 (5th Cir. 1996).

III. Class Certification Standard after *Comcast*

A. Recent Supreme Court Jurisprudence on Class Certification

The U.S. Supreme Court has recently significantly altered class action practice in federal courts.

Lower courts had traditionally read *Eisen v. Carlisle & Jacquelin*[49] to ban any consideration of merits issues at class certification. But in *Gen. Tel. Co. of Sw. v. Falcon*,[50] a 1982 employment class action decision, the Supreme Court stated that a court must satisfy itself after a "rigorous analysis" that the prerequisites of Rule 23(a) have been satisfied.[51] The Court stated that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[52]

More recently, the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*[53]held that the plaintiffs had not satisfied the commonality requirement because their Title VII claims did not "depend on a common contention" that was "of such a nature that it is capable of classwide resolution."[54] The Court's conclusion was based on the fact that neither testimony from the plaintiffs' experts nor their anecdotal evidence constituted "significant proof" that Wal-Mart "operated under a general policy of discrimination."[55]

In *Dukes*, a 54-year-old worker at a California Wal-Mart Store, Betty Dukes, alleged that she was a victim of sex discrimination. She had six years of positive performance reviews. Nonetheless, she was denied the training she needed to advance to a higher salary position. Wal-Mart argued that she was denied the opportunity to advance because she clashed with a female supervisor and was disciplined for returning late from lunch breaks. Ms. Dukes argued that Wal-Mart had a policy of discriminating against women. She filed a lawsuit in federal district court, along with three other women, seeking to represent 1.6 million women who worked or previously had worked at a Wal-Mart store since 1998. The plaintiffs sought on behalf of this massive class injunctive relief, a declaratory judgment, backpay, and punitive damages. The district court certified under Rule 23(b)(3) the largest employment discrimination class in history.

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[49] 417 U.S. 156 (1974).

[50] 457 U.S. 147 (1982).

[51] *Id.* at 160.

[52] *Id.*

[53] 131 S.Ct. 2541 (2011).

[54] *Id.* at 2545.

[55] *Id.* at 2553-54.

The class certification was affirmed by the Ninth Circuit.[56] On rehearing *en banc*, the Ninth Circuit again affirmed the class certification.[57] The Supreme Court reversed.[58]

The Supreme Court's decision in *Dukes* established that claims for individual monetary relief may be certified under Federal Rule of Civil Procedure 23(b)(2) only when monetary relief is "incidental" to injunctive or declaratory relief.[59] The Court's decision also announced a more restrictive view of the meaning of a "common question" under FRCP 23(a). Justice Scalia, writing for the majority, wrote that *Eisen* did not preclude factual inquiries on certification that overlapped with the merits.[60] He flatly declared that Rule 23 did not merely announce some "pleading standard"; the plaintiff needs to "prove that there are *in fact* … common questions of law or fact."[61] It is "not the raising of common 'questions'" that is significant to class certification, "but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."[62] The Court also strongly suggested but stopped short of explicitly requiring a *Daubert* inquiry into expert testimony at the class certification stage.[63]

In California, the state's highest court recently held that the trial court may "properly evaluate" the merits of a case when "evidence or legal issues germane to the certification question bear as well on aspects of the merits." [64] In *Brinker Rest. Corp. v. Superior Court*, the California Supreme Court held that meal and rest period claims can be suitable for class action adjudication where the employer has a uniform policy or practice which is in conflict with meal and rest period requirements.[65] The Court rejected Brinker's argument that a trial court must resolve all legal or factual issues relevant to the elements of plaintiffs' alleged claims, emphasizing that courts need not, and should not ordinarily, reach questions pertaining to the ultimate merits of plaintiffs' claims unless doing so is "necessary to a determination whether

[56] *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, *opinion withdrawn and superseded on denial of reh'g*, 509 F.3d 1168 (9th Cir. 2007), *on reh'g en banc sub nom. Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (U.S. 2011).

[57] *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

[58] *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

[59] *Id.* at 2557. Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

[60] *Id.* at 2552 & n.6.

[61] *Id.* at 2551.

[62] *Id.*

[63] *Id.* at 2554.

[64] *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1024 (2012) (citing *Wal-Mart Stores*, 131 S.Ct. at pp. 2551-2552 & n.6).

[65] *Id.*

class certification is proper."[66] "Such inquiries are closely circumscribed. As the Seventh Circuit has correctly explained, any 'peek' a court takes into the merits at the certification stage must 'be limited to those aspects of the merits that affect the decisions essential' to class certification."[67]

In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,* 133 S.Ct. 1184 (2013), the Supreme Court reaffirmed the point that the class certification decision requires "rigorous scrutiny" that might entail some form of merits inquiry, but clarified that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1194-95. "Rule 23(b)(3) . . . does not require a plaintiff seeking class certification to prove that each "elemen[t] of [her] claim [is] susceptible to classwide proof." *Amgen*, 133 S. Ct. at 1196 (quotations omitted).[68]

Most recently, in *Comcast Corp. v. Behrend*,[69] the Supreme Court reversed Rule 23(b)(3) certification because the lower court refused "to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination" ran afoul of Supreme Court precedent requiring precisely that inquiry.[70]

Comcast involved a putative class of Comcast cable television subscribers who claimed certain Comcast business practices constituted antitrust violations under Section 1 and 2 of the Sherman Act. The plaintiffs moved to certify a class under Rule 23(b)(3), proposing four separate and alternative theories of antitrust impact. In granting class certification, "[t]he [d]istrict [c]ourt accepted [one] theory of antitrust impact as capable of classwide proof and rejected the rest."[71] The plaintiffs' expert, however, presented a damage model that addressed impact based on all four impact theories. He "did not isolate damages resulting from any one

[66] *Id.*

[67] *Id.* (citing *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010)); *see also id.* at 1022 ("As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages").

[68] The remainder of the Supreme Court's decision in *Amgen* is specific to the securities cases in which the fraud on the market theory is used to show reliance at the class certification stage. The Court held that materiality is a common question and that proof of materiality is not a prerequisite to Rule 23(b)(3) class certification, but raises questions about the continued viability of the basic fraud on the market presumption in securities cases.

[69] 133 S.Ct. 1426 (2013).

[70] *Comcast,* 133 S.Ct. at 1432-33. A class seeking monetary relief can be certified upon a showing that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

[71] *Id.* at 1431.

theory of antitrust impact."[72] The Supreme Court agreed with defendants that the model's failure to assess impact and damages resulting only from the single, viable theory of impact precluded certification.[73]

The majority reaffirmed that a district court's "rigorous analysis" of the Rule 23 factors "will frequently entail 'overlap with the merits of the plaintiff's underlying claims.'"[74] The Court expressly recognized that "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[75] The Court held that plaintiffs seeking class certification in antitrust cases must tie their theory of harm and damages to their liability theory, and, in appropriate circumstances, individual questions of damages can predominate over liability issues common to the class.[76] That latter aspect of the *Comcast* holding could be read expansively to require that the question of damages is susceptible to common, classwide proof. Four dissenting Justices asserted that the majority opinion is a narrow one that "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'"[77]

The majority in *Comcast* concluded that the case "turns on the straightforward application of class certification principles,"[78] and the dissent concurred that "the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3)."[79] The dissent further noted that "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate."[80]

B. Summary of Post-*Comcast* Cases

Post-*Comcast* decisions can be broadly divided into three groups: (1) those distinguishing *Comcast* and finding a common formula existed for determining damages on a classwide basis;[81] (2) those maintaining class certification as to liability only, leaving damages for a separate,

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1432 (quoting *Dukes*, 131 S. Ct. at 2551).

[75] *Id.*

[76] *Id.* at 1435-36 & n.6.

[77] *Id.* at 1436 (J. Ginsburg, dissenting).

[78] *Id.* at 1433.

[79] *Id.* at 1436 (J. Ginsburg, dissenting).

[80] *Id.* at 1437.

[81] *See, e.g., Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 511 (9th Cir. 2013); *In re: Cathode Ray Tube Antitrust Litig.*, No. C–07–5944–SC, 2013 WL 5391159, at *5 (N.D. Cal. Sept. 24, 2013).

individualized determination;[82] and (3) those rejecting class certification based upon the lack of a common formula for determining damages.[83]

Common Formula

1) *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. 240 (N.D. Cal. 2013): The court held, in a securities fraud class action, that Rule 23(b)(3) class certification was proper, despite *Comcast*, because "Plaintiff's expert has provided an event study that analyzes the impact of Diamond's disclosures on the share price. He further state that damages 'will be calculated using an event study analysis similar to the event study analysis' regarding market efficiency. He claims that the event study already provided demonstrates that damages are calculable on a classwide basis using this standard methodology."

   The court construed *Comcast*'s holding narrowly and emphasized that "[w]hether plaintiff will ultimately prevail in proving damages is not necessary to determine at this stage. Instead, the question for class certification is whether plaintiff has met its burden of establishing that damages can be proven on a classwide basis."[84]

2) *In re Urethane Antitrust Litig.*, 2013 WL 2097346 (D. Kan. May 15, 2013), *amended*, 2013 WL 3879264 (D. Kan. July 26, 2013): This decision was rendered in the context of a post-trial motion to decertify the class after the plaintiffs secured a $1.2 billion treble damages award against Dow Chemical Co. for its involvement in fixing the prices of certain urethane chemicals. Plaintiffs' expert was Dr. James McClave, the same expert involved in *Comcast*. Dow sought decertification in light of *Comcast*. The court denied the motion and refused to set aside the judgment, based on the fact that the expert and non-expert proof of classwide impact established the causal connection found lacking in *Comcast*.[85]

   The court explained: "[a]t trial, Dr. McClave gave his opinion that the conspiracy alleged by plaintiffs—a horizontal price-fixing conspiracy—impacted nearly every class member because prices during the alleged conspiracy period exceeded those that would have prevailed absent that conspiracy, which competitive prices were determined from an analysis of prices during a post-conspiracy benchmark period. Thus, in his testimony, Dr.

[82] *See, e.g., Miri v. Dillon*, 292 F.R.D. 454, 463-64 (E.D. Mich. 2013); *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013).

[83] *See, e.g., Roach v. T.L. Cannon Corp.*, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013); *Smith v. Family Video Movie Club, Inc.*, 11 CV 1773, 2013 WL 1628176, at *9-10 (N.D. Ill. Apr. 15, 2013); *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *15-16 (C.D. Cal. July 1, 2013).

[84] *In re Diamond Foods, Inc., Sec. Litig.*, 295 F.R.D. at 252.

[85] *In re Urethane Antitrust Litig.*, 2013 WL 2097346, at *4.

McClave did provide a causal link between the single price-fixing conspiracy alleged by plaintiffs at trial and the impact to plaintiffs."[86]

3) *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013): *Leyva* is a class action involving employees of a medical product manufacturer and deliverer. The Ninth Circuit interpreted *Comcast*'s discussion of damages as requiring "that the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability."[87]

The court held that *Comcast* did not preclude class certification of a state law wage and hour claim, despite the fact that each class member's damages were different, because evidence suggested that the employer could "efficiently" calculate damages using information in a computer database. The court reasoned that "if the putative class members prove [the defendant's] liability, damages will be calculated based on the wages each employee lost due to [defendant's] unlawful practices" and that "damages could feasibly be calculated once the common liability request are adjudicated".[88]

4) *In re: Cathode Ray Tube Antitrust Litig.*, 2013 WL 5391159 (N.D. Cal. Sept. 24, 2013): The class action suit was brought by indirect purchasers who allege that electronics manufacturers conspired to fix cathode ray tube prices.

With regard to the issue of antitrust impact, the court rejected defendants' argument that all or almost all of the class members must demonstrate injury by the alleged antitrust violation: "Defendants' argument on this point is essentially that the IPPs must be able to prove at the class certification stage that every single (or basically every single) class member was injured by Defendants' conduct. This contention is wrong. The Court's job at this stage is simple: determine whether the IPPs showed that there is a reasonable method for determining, on a classwide basis, the antitrust impact's effects on the class members. This is a question of methodology, not merit."[89]

With regard to the issue of damages, the court found that the *Comcast* fact pattern did not exist in the CRT case where the indirect-purchaser plaintiffs asserted a single theory of antitrust harm: that the cartel overcharged direct purchasers of CRTs, who passed on the overcharge through the distribution chain down to the consumers, who were harmed by the antitrust impact. The court concluded that Plaintiffs' expert's damage calculation properly addressed that theory and that, "neither *Comcast* nor any other precedent

[86] *Id.*

[87] *Leyva v. Medline Indus. Inc.*, 716 F.3d at 514

[88] *Id.*

[89] *In re: Cathode Ray Tube Antitrust Litig.*, 2013 WL 5391159, at *5 (internal citations omitted).

requires the [indirect purchaser plaintiffs] to provide exact calculations of their damages at the certification stage."[90]

5) *In re High-Tech Employee Antitrust Litig.*, 2013 WL 5770992 (N.D. Cal. Oct. 24, 2013): In this case, the court certified a class of former employees who sued against their former employers for alleged conspiracy to suppress employees' compensation to artificially low levels by agreeing not to solicit each other's employees. The court summarized the teaching of *Dukes, Amgen, Comcast, and Rail Freight* in the following discussion:[91]

> Certain principles regarding the legal standard that this Court must apply in determining whether the Technical Class should be certified emerge from *Wal*–Mart, *Amgen, Comcast,* and the circuit court cases applying this Supreme Court authority. First, and most importantly, the critical question that this Court must answer is whether common questions predominate over individual questions. *Amgen,* 133 S.Ct. at 1191. In essence, this Court must determine whether common evidence and common methodology could be used to prove the elements of the underlying cause of action. *Id.* Second, in answering this question, this Court must conduct a "rigorous" analysis. *Comcast Corp.,* 133 S.Ct. at 1432. This analysis may overlap with the merits, but the inquiry cannot require Plaintiffs to prove elements of their substantive case at the class certification stage. *Amgen,* 133 S.Ct. at 1194. Third, this Court must determine not only the admissibility of expert evidence that forms the basis of the methodology that demonstrates whether common questions predominate. *Ellis,* 657 F.3d at 982. Rather, this Court must also determine whether that expert evidence is persuasive, which may require the Court to resolve methodological disputes. *Id.*; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.,* 725 F.3d at 255. Fourth, the predominance inquiry is not a mechanical inquiry of "bean counting" to determine whether there are more individual questions than common questions. *Butler,* 727 F.3d at 801. Instead, the inquiry contemplates a qualitative assessment, which includes a hard look at the soundness of statistical models. *Id.*; *In re Rail Freight Fuel Surcharge Antitrust Litig.,* 725 F.3d at 255. Fifth, Plaintiffs are not required to show that each element of the underlying cause of action is susceptible to classwide proof. *Amgen,* 133 S.Ct. at 1196. Rather, they need

[90] *Id.* at *6; *see also id.* at *5 ("It is true that the Court's rigorous analysis overlaps with the merits of the IPPs' claims and requires that the IPPs make an evidentiary case for predominance, *Comcast*, 133 S.Ct. at 1431; *Amgen,* 133 S.Ct. at 1196; *Dukes*, 131 S.Ct. at 2551, but Defendants are trying to push the ISM and the Court toward a full-blown merits analysis, which is forbidden and unnecessary at this point, *Amgen*, 133 S.Ct. at 1194–95.").

[91] *In re High-Tech Employee Antitrust Litig.*, 2013 WL 5770992, at *14.

only show that common questions will predominate with respect to their case as a whole. *Id.*

6) *In re Nexium (Esomeprazole) Antitrust Litig.*, 2013 WL 6019287 (D. Mass. Nov. 14, 2013): The court certified a class of Nexium end-buyers who accused AstraZeneca PLC and others of violating antitrust laws by delaying a generic version of AstraZeneca's heartburn drug, ruling the class met adequacy and predominance requirements. The court noted that "*Comcast* has not changed the rule on what is required for damages models in establishing Rule 23(b)(3) predominance. *Comcast* simply requires the moving party to present a damages model that directly reflects and is linked to an accepted theory of liability under Rule 23(b)(3). The Supreme Court in *Comcast* very specifically pointed to the failure of the Indirect-Purchaser Plaintiffs in that case to provide a measurement of classwide damages attributed solely to the accepted overbuilder theory of liability, which inevitably meant that '[q]uestions of individual damage calculations' would overwhelm questions common to the class."[92]

The court also rejected defendants' argument that *Dukes* requires that the moving party "show that each class member was injured by the defendants' allegedly wrongful conduct." The court noted that "[s]everal courts, however, have held that at this class certification stage of litigation, the inclusion of uninjured class members is not fatal to class certification. Assuming these decisions are consistent with *Wal–Mart*—and this Court so concludes—the markers of the antitrust border have been reached."[93]

Certification as to Liability Only

One solution to problems of individualized damages is bifurcating trial into separate liability and damages phases. Bifurcation enables a court to certify a class action on the issue of liability only, while leaving damages calculation issues to more individualized proceedings.[94]

7) *Miri v. Dillon*, 292 F.R.D. 454 (E.D. Mich. 2013): The court certified a class for liability purposes in the §1983 putative class action against the state's treasurer, alleging that the Michigan Department of Treasury's uniform practice of entering and seizing property without an authorized warrant violated the Fourth Amendment. The defendants argued that predominance was not satisfied as there were myriad questions as to what type of

[92] *In re Nexium (Esomeprazole) Antitrust Litig.*, 2013 WL 6019287, at*14 (citing *Comcast*); *see also In re Nexium (Esomeprazole) Antitrust Litig.*, 2013 WL 6486917 (D. Mass. Dec. 11, 2013) (certifying a class of wholesalers and retailers that purchased AstraZeneca's heartburn drug and would purchase generic drug directly from generic manufacturers).

[93] *Id.* at *11 (citing *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009); *In re Flonase*, 284 F.R.D. 207, 226-27 (E.D .Pa. 2012); *In re: Cathode Ray Tube Antitrust Litig.*, 2013 WL 5391159, at *6 (N.D. Cal. Sept. 24, 2013)).

[94] *See Comcast Corp. v. Behrend,* 133 S.Ct. 1426, 1437 n.* (2013) (Ginsburg and Breyer, J.J. dissenting) (observing that "at the outset, a class may be certified for liability purposes only, leaving individual damages calculation to subsequent proceedings").

damages, if any, the putative class members suffered as a result of the purported Fourth Amendment violation.

Citing the *Comcast* dissent, the court stated that historically, courts have recognized that "individual damages calculation do not preclude class certification under Rule 23(b)(3)."[95] However, "[i]n an abundance of caution," the court chose to certify the class for liability purposes only.[96] The court found support of this approach under Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[97] The court found that "a class action for liability purpose only is both a superior and manageable method of adjudication. It will provide significant economies of time, effort, and expense for the litigants and the Court in light of the predominance of common questions of fact and law regarding liability."[98]

8) *Whirlpool* and *Butler* Applying *Comcast* on Remand: The Supreme Court vacated rulings on certification by the Sixth and Seventh Circuits, and instructed them to reconsider the rulings in light of *Comcast*.[99] Both courts again upheld certification of classes of washer buyers who claimed the products had a defect. Thereafter, defendants Whirlpool and Sears returned to the Supreme Court, urging that consumers hadn't met class certification predominance requirements and that most of the alleged members weren't harmed. The Supreme Court denied Whirlpool and Sears' cert. petitions.

Glazer v. Whirlpool Corp., 722 F.3d 838, 860-61 (6th Cir. 2013), *cert. denied*, 2014 WL 684065 (U.S. Feb. 24, 2014): ("A plaintiff class need not prove that each element of a claim can be established by classwide proof: What the rule does require is that common questions 'predominate over any questions affecting only individual [class] members,'" citing *Amgen*) (the court distinguished *Comcast* on the ground that the trial court had only certified a liability class and reserved damages for individual determinations. It also noted that *Comcast* and *Amgen* are merely "premised on existing class-action jurisprudence").

Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 2014 WL 684064 (U.S. Feb. 24, 2014): The court ruled that "[u]nlike *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control

[95] *Id.* at 464.

[96] *Id.*

[97] *Id.* Fed. R. Civ. P. 23(c)(4).

[98] *Id.*

[99] *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013).

unit."[100] The court noted that, as in *Glazer*, only a liability class was certified, so no classwide issues of damages were presented.[101] The court went on to state that "[i]t would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits."[102]

9) *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013): The class action was brought by assistant store managers against their employer, alleging it failed to pay them overtime in violation of the Fair Labor Standards Act and New York Labor Law. After the court certified plaintiffs' NYLL claims, defendants moved for reconsideration in light of *Comcast*. The Court held that issues of damages could not be resolved based on classwide proof, but bifurcation of issues of liability and damages, rather than decertification, was warranted on motion for reconsideration. The Court concluded:[103]

> "To summarize, *Comcast* requires that a putative class seeking Rule 23(b)(3) certification demonstrate a linkage between its theory of liability and its theory of damages. The Court must examine this relationship at the class certification stage, even where the inquiry overlaps with, or is 'pertinent to[,] the merits determination.' 133 S.Ct. at 1432–33. After establishing this linkage, certification of both liability and damages together may nevertheless prove untenable in light of *Dukes,* as due process concerns imbue defendants with the right to defend each claim when damages are too individualized. Nothing in *Comcast,* however, vitiates the longstanding principle in this Circuit that courts may certify a class as to liability, but not damages, utilizing Rule 23(c)(4), so long as the proposed liability class meets the

[100] *Id.* at 799.

[101] *Id.* ("A determination of liability could be followed by individual hearings to determine the damages sustained by each class member. The parties probably would agree on a schedule of damages based on the cost of fixing or replacing class members' mold-contaminated washing machines. In that even the hearings would be brief; indeed the case would probably be quickly settled. We added that if it turned out as the litigation unfolded that there were large differences in the mold problem among the differently designed washing machines, the district judge might decide to create subclasses . . . but that this possibility was not an obstacle to certification of a single mold class at the outset").

[102] *Id.* at 801.

[103] *Jacob v. Duane Reade, Inc.*, 293 F.R.D. at 588-89.

> requirements of Rule 23(a) and (b). . . . Of course, '[c]ourts should use Rule 23(c)(4) only where resolution of the particular common issues would materially advance the disposition of the litigation as a whole.' Accordingly, where so-called 'noncommon issues are inextricably entangled with common issues or . . . the noncommon issues are too unwieldy or predominant to be handled adequately on a class action basis,' bifurcation or limited certification under Rule 23(c)(4) is inappropriate."

No Common Formula

10) *Roach v. T.L. Cannon Corp.*, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013): The *Roach* court interpreted *Comcast*'s holding as requiring a heightened damages injury at the class certification stage. According to this expansive reading, in order to advance as a certified class, plaintiffs must provide "a damages model susceptible of measurement across the entire class," and this determination cannot be extracted from the inquiry governing liability.[104]

Roach involved class action claims that an employer had not calculated and paid its employees' wages in accordance with New York law. The plaintiffs did not provide a damages model, instead arguing that damages are separate from liability, contending that "damages need not be considered for Rule 23 certification even if such damages might be highly individualized."[105] The court found that plaintiffs' position was "in contravention of the holding of *Behrend*."[106] The court found that the evidence suggesting that the plaintiffs were only sometimes not paid in accordance with the law demonstrated that damages "are in fact highly individualized," which render class certification improper under *Comcast*.[107]

11) *Smith v. Family Video Movie Club, Inc.*, 11 CV 1773, 2013 WL 1628176, at *9-10 (N.D. Ill. Apr. 15, 2013): Relying on a similar broad reading of *Comcast*, the court denied class certification of an Illinois state law claim asserting that employees had not been paid for off-the-clock work. The court found that determining how much unpaid work each class member performed – which was necessary to computer damages – would be an individualized task that would overwhelm common questions because the evidence demonstrated that the amount of off-the-clock worked "varie[d] greatly from store to store and from store manager to store manager."

[104] *Roach v. T.L. Cannon Corp.*, 2013 WL 1316452, at *3.

[105] *Id.*

[106] *Id.*

[107] *Id.*

12) *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *15-16 (C.D. Cal. July 1, 2013): The *Guido* court also endorsed a broad interpretation of *Comcast*'s holding regarding proof of damages at the class certification stage.

In this false advertising case, the court denied motion for class certification without prejudice because plaintiffs had "not submitted expert testimony actually demonstrating a gap between the true market price of [the product at issue] and its historical market price," meaning plaintiffs had "not met their burden of demonstrating that common questions predominate over individual issues regarding classwide relief." The court cited *Comcast* for the proposition that "courts can only certify a Rule 23(b)(3) class if there is evidence demonstrating the existence of a classwide method of awarding relief that is consistent with the plaintiffs' theory of liability."

13) *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013): This case is the major circuit-level decision in the antitrust sector, but the weight of the decision appears to be limited to its peculiar facts.

In *Rail Freight,* the court vacated a ruling by the district court certifying a damage class with respect to claims by shippers that certain railroads fixed rail freight surcharges and remanded the matter for further proceedings in light of *Comcast*. The criticism leveled at the plaintiffs' damage model was that it yielded "false positives" ─ positive damage numbers for shippers who entered into freight contracts before the onset of the alleged conspiracy.

The Court reasoned that Rule 23 does not allow plaintiffs to sail past the class-certification stage based on damages models that are merely "plausible" or "workable." The Court noted that *Comcast* rejected the notion that "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be."[108] Instead, under *Comcast*, "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" The court noted that "[b]efore *Behrend,* the case law was far more accommodating to class certification under Rule 23(b)(3). . . . It is now clear, however, that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."[109]

[108] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 254.

[109] *Id.* at 255.

IV. Class Arbitration

A. Class Arbitration Waiver Enforceable

The latest string of decisions vindicating the ability of businesses to arbitrate consumer disputes poses a significant threat to class action, which is frequently the only vehicle for consumers or employees to challenge unlawful actions that cause limited damages to each individual while often reaping millions for the business. In particular, the U.S. Supreme Court has upheld arbitration agreements that seek to bar class procedures and leave available only individual arbitration. On June 20, 2013, the Supreme Court ruled emphatically in *American Express Co. v. Italian Colors Restaurant* that a party cannot escape individual, non-class arbitration by asserting that class action procedures are necessary to effectively prosecute the claim. That is true even if the economics of a non-class arbitration are not viable: "[The FAA's] command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." The Court's decision forecloses attempts to evade *AT&T Mobility LLC v. Concepcion*, which "rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"

- *AT& T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011): The Supreme Court held that the Federal Arbitration Act (FAA) preempts state laws that purport to invalidate class arbitration waivers.

  In *Concepcion*, consumers brought a class action against Cingular Wireless, AT&T's predecessor, for allegedly charging them sales tax on "free" or heavily discounted cell phones in violation of California's consumer protection statutes. AT&T moved to compel arbitration under AT&T's contract which provided for arbitration but required that the claims be brought in the parties' individual capacity. The district court denied the motion and held that the class action waiver was void under California's *Discover Bank* rule. The court found that under *Discover Bank v. Superior Court*,[110] class action waivers are "voidable" when certain conditions (contracts of adhesion, claims for small amounts of damages, and allegations of deliberate cheating) are met, and that those conditions were met by the record evidence before it. The Ninth Circuit affirmed. Reversing the Ninth Circuit, the Supreme Court held that class action waivers in AT&T's consumer contracts, i.e., provisions which required all claims to proceed in arbitration but which prohibited classwide arbitration – could not be invalidated on the basis of the California public policy considerations as embodied in the *Discover Bank* rule. The Court held that California's *Discover Bank* rule, which essentially banned class action waivers in most consumer contracts, was preempted by the FAA.

  Concepcion left open the issue of whether such waivers may be invalidated on the basis of the "federal common law" due to their deterrent effect on private enforcement of the federal antitrust laws, and the corresponding risk that enforcing them may prevent

[110] 36 Cal.4th 148 (2005).

consumers from vindicating their federal statutory rights. The Supreme Court closed this loop in *American Express*.

- *American Express Co. et al. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013): The Supreme Court held that a contractual waiver to class arbitration is enforceable under the FAA even when the plaintiffs' cost of individually arbitrating a federal statutory claim is prohibitively expensive.

  The case arose out of an antitrust dispute in which a merchant, Italian Colors, brought a class action under Section 1 of the Sherman Act, alleging that American Express Co. ("AmEx") charged higher credit card fees than competing cards. AmEx moved to compel arbitration based on a class arbitration waiver in the cardholder agreements, which the district court granted. The Second Circuit reversed and remanded. The Second Circuit held that the class arbitration waiver was unenforceable because arbitration would be prohibitively expensive to pursue on an individual basis. The Supreme Court reversed the Second Circuit's ruling. In a 5-3 decision authored by Justice Scalia, the Supreme Court upheld the validity of American Express' arbitration and class waiver provisions, and held that a court cannot invalidate a contractual waiver of class arbitration because the cost of individual arbitration allegedly exceeds the potential recovery. The Court reiterated the overarching principle that arbitration is a matter of contract and emphasized that courts must "rigorously enforce" arbitration agreements according to their terms[111]. Although Justice Kagan argued in dissent that the "effective vindication doctrine" barred enforcement of the AmEx class arbitration waiver because that agreement effectively insulated AmEx from federal antitrust claims, the majority reasoned that the fact that individual arbitration "is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."[112]

- *Carmax Auto Superstores v. Fowler,* __S.Ct.__, 2014 WL 684014 (Feb. 24, 2014): On February 24, 2014, the U.S. Supreme Court vacated the decision of the Second Appellate District of the Court of Appeal of California in *Carmax Auto Superstores v. Fowler* and remanded the case back to the California state appellate court for further consideration in light of *Italian Colors*.[113]

  The plaintiff employees in this case signed a dispute resolution agreement, as a condition of applying for employment with Carmax. The agreement provided that any claims arising out of employment with CarMax be "settle[d] ... exclusively by final and binding

[111] *Id.* at 2309.

[112] *Id.* at 2310-11.

[113] The *Carmax* appellate decision was issued March 26, 2013, about three months before the U.S. Supreme Court ruled in *Italian Colors*, but the denial of further review by the California Supreme Court in *Carmax* came in July 2013, a month after the *Italian Colors* ruling. Carmax petitioned the U.S. Supreme Court on Oct. 8, 2013. The issue in the Carmax certiorari petition was whether California's "*Gentry* rule" is preempted by the Federal Arbitration Act in light of Italian Colors.

arbitration before a neutral Arbitrator," and any arbitration "will be conducted in accordance with the CarMax Dispute Resolution Rules and Procedures." The arbitration agreement also prohibited class arbitration. Plaintiffs filed a class action alleging wage and hour violations. In opposing CarMax's motion to compel, plaintiffs argued, *inter alia*, that *Concepcion* did not preempt the California Supreme Court decision in *Gentry v. Superior Court*.[114] Under the so-called "*Gentry* rule," class-action waivers in employment arbitration agreements are invalid if "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration."[115] The trial court concluded that *Concepcion* rejected *Gentry* and granted Carmax's motion to compel arbitration.

The California Second Appellate District reversed. The Second Appellate District distinguished *Concepcion*, in which the Supreme Court overruled the *Discovery Bank*'s conclusion that "most collective-arbitration waivers in *consumer* contracts are unconscionable."[116] It noted that "[t]he Supreme Court [in *Concepcion*] did not address a situation in which an employee's unwaivable statutory rights were involved, and therefore *Concepcion* does not preclude our application of a *Gentry* analysis."[117] The Second Appellate District remanded the case for a determination as to whether plaintiffs could proceed in court with a class action under the *Gentry* analysis.

B. Circuits Split When Arbitration Clause is Silent on Class Arbitration

The circuit courts of appeals are split on whether class arbitration is available when the arbitration agreement is silent on the matter. The Supreme Court declined to address this circuit split in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), and appears to have merely reaffirmed the role of the arbitrator as a nearly unchallengeable decision maker, without addressing the issue of the availability of class arbitration.[118]

- *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013): The case involved a dispute between doctors and a health plan over reimbursement for service. The arbitration agreement at issue stated in part that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court," but said nothing about class

[114] 42 Cal. 4th 443 (2007).

[115] *Gentry v. Superior Court of Los Angeles Cty.*, 42 Cal.4th 443, 457, 463 (2007) (holding that a class action waiver in an arbitration agreement not in a consumer contract, but between an employee and his employer, would be invalid "under some circumstances [in which] such a provision would lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws.").

[116] *Fowler v. Carmax, Inc.*, 2013 WL 1208111, at *7 (Cal. Ct. App. Mar. 26, 2013), *cert. granted*, *judgment vacated sub nom. CarMax Auto Superstores California, LLC v. Fowler*, 2014 WL 684014 (U.S. Feb. 24, 2014) (emphasis added).

[117] *Id.*

[118] *See Silence is Golden: How Oxford Health Affects Class Arbitration,* Westlaw Journal of Class Action, 2013 WL 4483441 (Aug. 23, 2013).

arbitration. The parties submitted the dispute to arbitration under American Arbitration Association rules, and the arbitrator ruled that the matter could proceed as a class arbitration, because, in his view, the language permitted arbitration of the same "universal class of disputes," including class cases, that it barred the parties from bringing in court.

The Supreme Court granted *certiorari* to address the circuits' split on whether an arbitrator who has allowed class arbitration in circumstances in which the agreement is silent on the matter "exceeded [his] powers" under Section 10(a)(4) of the FAA.[119]

In a unanimous opinion, the Supreme Court ruled that under Section 10(a)(4), the "sole question" for a reviewing court "is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all."[120] Therefore, the Supreme Court refrained from addressing the substantive question: whether the arbitrator's interpretation of the parties' agreement to permit class arbitration was correct. As Justice Elena Kagan explained, "[t]he arbitrator's construction holds, however good, bad, or ugly ... Oxford chose arbitration, and it must now live with that choice."[121]

The Court distinguished its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., in which the Court ruled that an arbitration panel exceeded its powers under the FAA by imposing class arbitration where the agreement was similarly silent on whether class arbitration was authorized. The Court noted that the parties in *Stolt-Nielsen* "had entered into an unusual stipulation that they had never reached an agreement on class arbitration." Thus, the Court said, the arbitrator's imposition of class arbitration was not based on a determination of the parties' intent, but on a policy choice in favor of class proceedings.

In contrast, here, the Court said that the Oxford Health arbitrator did base his decision, "through and through," on the parties' contract, which the parties had authorized him to interpret. Because the arbitrator "did what the parties had asked," i.e., he considered the parties' contract and decided whether it reflected an agreement to permit class proceedings, he could not be said to have exceeded his powers, regardless of what the Justices may have thought about the merits of his ruling.[122]

[119] *Id.* at 2068.

[120] *Id.* at 2071.

[121] *Id.*

[122] *Id.* at 2069-70.

C. Arbitration Clause Does Not Extend to Nonsignatories[123]

Since arbitration is a matter of contract, the contractual right to compel arbitration does not extend to nonsignatory litigants.

- *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1124 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 62 (2013): In this case, the Ninth Circuit ruled that a class of car owners could pursue their court claims against the manufacturer, Toyota, for product defects and false advertising, despite the existence of an arbitration agreement in each of the owners' purchase agreements with the car dealerships. The Court held that as a nonsignatory to the agreements, Toyota could not force arbitration on the plaintiffs under an equitable estoppel theory unless the claims against Toyota were "intimately founded in and intertwined with" the underlying contract or unless the plaintiffs alleged that Toyota and the dealership (the arbitration contract signatories) engaged in interdependent misconduct "founded in or intimately connected with" the contract. Neither test was met. Toyota petitioned for certiorari. The Supreme Court denied Toyota's petition on Oct. 7, 2013.

  The plaintiffs' claims related to defects in the antilock brake systems of 2010 models of the Toyota Prius and Lexus HS 250h. Plaintiffs asserted multiple claims against Toyota, including violation of California laws prohibiting unfair competition and false advertising, breach of the implied warranty of merchantability, and common law breach of contract. After "vigorously litigating the action" for almost two years, Toyota moved to compel arbitration a few months after the U.S. Supreme Court issued *Concepcion*. Toyota pointed to language in the purchase agreements allowing arbitration, delegating scope issues to the arbitrator, and waiving any right to arbitrate as a class. The district court denied the motion to compel arbitration.

  The Ninth Circuit affirmed. First, the court concluded that there was not the necessary "clear and unmistakable evidence" that the plaintiffs agreed to arbitrate arbitrability with Toyota. "The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement."[124] Second, the court concluded that Toyota had not shown either of the equitable estoppel theories under California law. The court concluded Toyota had not shown the first type of equitable estoppel, because the plaintiffs' claims against Toyota were not sufficiently intertwined with their purchase agreements. The court noted that the complaint never even referenced the purchase agreements. With respect to the plaintiffs' implied warranty claim, the purchase agreements clarified the dealer was not a party to the manufacturer's warranty. Therefore, the warranty claim against Toyota was not intertwined with the purchase agreements.

[123] There is no question that contractual arbitration provision is unenforceable when there is not an underlying agreement to arbitrate. We note that in a recent Hawaiian Supreme Court decision, *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869 (Haw. 2013), the court rejected a health insurer's attempt to force into arbitration its insured's suit for nonpayment where the insurer could not establish that the plaintiff had even received the "terms and conditions" containing the ostensible agreement (or any of the periodic amendments thereto).

[124] *Id.* at 1126-27.

Similarly, though plaintiffs asserted breach of contract against Toyota, it was based on their alleged status as third-party beneficiaries to the contracts between the dealers and Toyota, and therefore did not relate to their purchase agreements. The court also clarified that plaintiffs' requested remedies were immaterial to an equitable estoppel analysis, only their claims were relevant. Next, the court concluded Toyota had not shown the second type of equitable estoppel. It found the plaintiffs did not allege collusion between the dealerships and Toyota, and even if they had, that collusion was not connected to the purchase agreements at all, which is necessary for application of equitable estoppel.[125]

- *Murphy v. DirecTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013): Similarly, in *Murphy*, the Ninth Circuit held that consumers were not equitably estopped from avoiding arbitration of claims against retailer, which was not a signatory to arbitration agreement. Here, consumers alleged that Best Buy and DirecTV present certain DirecTV service equipment as though it was for sale at Best Buy stores when in fact the defendants consider the transaction to be a lease rather than an outright purchase.

  Only DirecTV had an arbitration agreement with the consumers and it precluded class actions. Best Buy moved to compel arbitration and the district court granted the motion, finding that equitable estoppel compelled that result. The Ninth Circuit reversed. It found that neither of the two tests for equitable estoppel had been met. First, the plaintiffs' claims against Best Buy did not rely on the substance of their agreement with DirecTV, since the claims focused on the methods of selling the product. And second, the alleged concerted action between the signatory (DirecTV) and nonsignatory (Best Buy) was not "intimately connected with the obligations of the underlying agreement."[126] The Ninth Circuit also rejected Best Buy's claims that it was entitled to benefit from the arbitration provision either under an agency theory or as a third-party beneficiary.[127]

[125] *Id.* at 1128-34.

[126] *Id.* at 1229-32.

[127] *Id.* at 1232-34.

APPENDIX

Federal Rules of Civil Procedure
Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and **nature** of any litigation concerning the controversy already begun by or against class members;

(C) the desirability **or** undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that **grants** or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified **under** Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

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

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

California Code of Civil Procedure
§ 382. Nonconsent to joinder as plaintiff; representative actions

If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Credits

(Enacted in 1872. Amended by Stats.1971, c. 244, p. 375, § 12, operative July 1, 1972.)

California Civil Code
§ 1781. Consumer's class action; conditions; notices; judgment

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).

(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

(e) The notice required by subdivision (d) shall include the following:

(1) The court will exclude the member notified from the class if he so requests by a specified date.

(2) The judgment, whether favorable or not, will include all members who do not request exclusion.

(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion.

(g) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion.

Credits

(Added by Stats.1970, c. 1550, p. 3157, § 1.)