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They just keep making things harder: Recent developments in California law governing class actions

In the last year California courts issued several important decisions that will affect how class actions, and which ones, may be prosecuted in California state courts. This article summarizes and briefly analyzes some of the most important decisions.

Speaking generally, a discouraging trend continues: The courts continue to make it more difficult for consumers to obtain redress in situations where large corporations have cheated or misled lots of people through unfair or deceptive practices.

The California Supreme Court's decisions in *Californians for Disability Rights v. Mervyn's, LLC* and *Branick v. Downey Savings & Loan Association*: Proposition 64 applies to previously pending UCL cases

In *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 [46 Cal.Rptr.3d 57], Californians for Disability Rights (CDR) sued Mervyn's, LLC (Mervyn's) for allegedly violating the unfair competition law, Business and Professions Code section 17200 et seq. (UCL or Section 17200) CDR alleged that the aisles between fixtures in Mervyn's stores were too narrow for people using mobility aids, such as wheelchairs, scooters, crutches and walkers. CDR did not claim to have suffered any harm; rather, CDR filed suit for the general public under Section 17204. CDR sought an order declaring Mervyn's practices to be unlawful, and an injunction barring those practices and requiring remedial action. After a bench trial, the superior court entered judgment for Mervyn's. CDR appealed.

While CDR's appeal was pending, Proposition 64 took effect. Arguing that Proposition 64 had eliminated CDR's standing to prosecute the action, Mervyn's moved to dismiss CDR's appeal. The Court of Appeal denied Mervyn's motion, concluding that Proposition 64's standing provisions do not apply to cases that were pending when the measure took effect.

Because Proposition 64's language was not sufficiently clear to compel the inference that voters intended, the proposition's standing provisions to apply to pending cases, the Court had to determine whether applying Proposition 64 to pending cases would constitute an impermissible, *retroactive* application of the law. The Court concluded that applying the proposition's standing provisions to previously pending cases would not be retroactive.

> [Proposition 64] does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL, and now, as before, a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest. (39 Cal.4th at 232 [46 Cal.Rptr.3d at 64] (internal citations omitted).)

The Court dismissed CDR's argument that to apply Proposition 64's standing rules to pending cases would "significantly impair" the parties' settled rights and expectations in prosecuting their already-filed actions. Justice Werdegar wrote, "[T]he only rights and expectations Proposition 64 impairs *hardly bear comparison* with the important right the presumption of prospective operations is classically intended to protect, namely, the right to have liability-creating conduct evaluated" under the rules in effect when the conduct occurred. (39 Cal.4th at 233 [46 Cal.Rptr.3d at 65] (emphasis added). The Court concluded, "Given that the interest in suing on another's behalf is not a property right beyond statutory control, to deny full effect to an initiative measure in which the voters have chosen their own legal representatives for cases brought ostensibly on their behalf *cannot be defended as a plausible interpretation of [Proposition 64]*." (39 Cal.4th at 233 [46 Cal.Rptr.3d at 65] (emphasis added).)

Like *Californians for Disability Rights*, *Branick v. Downey Savings & Loan Association* (2006) 39 Cal.4th 235 [46 Cal.Rptr.3d 66], was pending when Proposition 64 took effect. The *Branick* plaintiffs alleged that Downey Savings & Loan had misrepresented the fees for recording documents used in real estate transactions, like deeds, reconveyances, and powers of attorney, and that Downey had overcharged its customers for recording these documents. The *Branick* plaintiffs did not allege that they had paid these fees to Downey or that they had suffered any injury from Downey's alleged misconduct. Instead, they sued for "the general public" under the language of former Business and Professions Code sections 17204 and 17535.

In the superior court, Downey had moved for judgment on the pleadings. Downey asserted that the federal Home Owners' Loan Act and related regulations pre-empted the plaintiffs' claims. The superior court granted Downey's motion. The *Branick* plaintiffs appealed. While their appeal was pending, Proposition 64 took effect.

After considering the parties' supplemental briefs on Proposition 64's effect, the Court of Appeal reversed. The court ruled that Proposition 64's standing provisions governed pending cases, thus eliminating the *Branick* plaintiffs' standing because they had not alleged that they had "suffered injury in fact and

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[had] lost money or property as a result of [the alleged] unfair competition." The Court of Appeal remanded the matter to allow the *Branick* plaintiffs to amend their complaint and, assuming they did seek leave, to allow the trial court to determine whether granting leave would be appropriate.

Downey petitioned for review, and the California Supreme Court ordered the parties to brief and argue this issue:

> If the standing limitations of Proposition 64 apply to actions under the Unfair Competition Law that were pending on November 3, 2004, may a plaintiff amend his or her complaint to substitute in or add a party that satisfies [the] standing requirements of Business and Professions Code section 17204, as amended, and does such an amended complaint relate back to the initial complaint for statute of limitations purposes?

The Court answered the question by ruling that Proposition 64 does not affect the ordinary rules governing the amendment of complaints and their relation back:

> The policy objectives underlying Proposition 64 are fully achieved by applying the measure to pending cases, as we have concluded it must be applied. An additional rule barring amendments *to comply* with Proposition 64 does not rationally further any goal the voters articulated.

(39 Cal.4th at 241 [46 Cal.Rptr.3d at 70] (citation omitted).)

The Court declined "to render an advisory opinion" whether the *Branick* plaintiffs should be allowed to amend their complaint *in this instance* and affirmed the appellate court's decision to remand the case to the trial court. The *Branick* court emphasized, however, that the plaintiff to be substituted may not state facts that "give rise to a wholly distinct and different legal obligation against the defendant." (39 Cal.4th at 243, [46 Cal.Rptr.3d at 72].)

The bottom line from *Californians for Disability Rights* and *Branick*: Proposition 64 governs cases that were pending when the proposition took effect, but courts may allow plaintiffs with pending cases to amend their complaints to substitute plaintiffs *if* the plaintiffs to be substituted meet Proposition 64's new standing requirements and *if* the proposed amendment meets the other requirements for amending complaints in Code of Civil Procedure section 473.

Class certification after Proposition 64: *Pfizer* and *In re Tobacco II Cases*

In two recent decisions the appellate courts reviewed class-certification decisions that were made in private UCL class actions *before* Proposition 64 took effect and analyzed those decisions in light of the proposition: *Pfizer Inc. v. Superior Court* (2006) 141 Cal.App.4th 290 [45 Cal.Rptr.3d 840] and *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891 [47 Cal.Rptr.3d 917].

In *Pfizer*, the plaintiffs alleged that Pfizer's marketing for Listerine was misleading because it suggested that using Listerine was as effective as flossing in preventing plaque and gingivitis. The trial court expressed "numerous reservations" about class treatment but nevertheless issued an order on November 22, 2005, certifying a class "of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." In its written order the trial court noted that Proposition 64 changed the UCL's standing requirements but declined to address whether the proposition also changed the standing requirements *for absent class members* in private UCL class actions. Pfizer filed a petition for writ of mandate, and the Court of Appeal issued a show-cause order.

The *Pfizer* court considered the propriety of the trial court's class-certification ruling in light of Proposition 64's changes to the UCL's standing requirements. Because a class action is "merely a procedural device for consolidating matters properly before the court," the court reasoned, each class member must have standing to bring the suit in his own right. "If Galfano [the designated class representative] alone, but not class members, suffered injury in fact and lost money or property as a result of Pfizer's alleged unfair competition or false advertising, then *by definition* his claim would not be typical of the class. Rather, Galfano's claim would be demonstrably *atypical*." (141 Cal.App.4th at 302 [45 Cal.Rptr.3d at 849] (emphasis added).)

The *Pfizer* court then turned to Proposition 64's injury-in-fact requirement. The court noted that, before Proposition 64, the plaintiff in a private UCL action needed to prove only that members of the public were *likely* to be deceived. Thus, the plaintiff in a private UCL action did not need to allege or prove actual deception, reasonable reliance, or actual damages. The issue, the court wrote, "is whether the 'likely to be deceived' standard can be reconciled with Proposition 64's standing requirements."

The *Pfizer* court ruled it could not. To meet the "community of interest" requirement for Code of Civil Procedure section 382, the class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. Therefore, the *Pfizer* court concluded, unless a UCL action is brought by the Attorney General or local public prosecutors, "*the mere likelihood of harm to members of the public is no longer sufficient for standing to sue*. Persons who have not suffered any 'injury in fact' and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising *cannot state a cause of action based merely on the 'likelihood' that members of the public will be deceived*." (141 Cal.App.4th at 304, [45 Cal.Rptr.3d at 850] (emphasis added).)

The *Pfizer* court also ruled that because Proposition 64 requires the injury-in-fact to be "as a result of" the unfair practice, each plaintiff in a private UCL action – including absent class members – *must actually have relied on any alleged misrepresentation*.

> Inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice . . . is that a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby….
>
> A consumer who was unaware of, or who did not rely upon, Pfizer's claims comparing Listerine to floss did not suffer any "injury in fact" *as a result of* the alleged fraudulent business practice or false advertising. (141 Cal.App.4th at 305-06 [45 Cal.Rptr.3d at 851-52] (emphasis added, internal citations omitted).)

Applying this reasoning to the facts in *Pfizer*, the court concluded that Galfano and all the absent class members must allege and prove that each of them relied on Pfizer's alleged misrepresentations in buying Listerine. The court ordered the trial court to vacate its class-certification order and to enter an order denying the

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plaintiff's previously filed motion for class-certification.

The Fourth Appellate Court applied similar reasoning in *Tobacco II Cases*. *Tobacco II Cases* involved a proposed class of smokers who were "exposed" to cigarette-makers' "marketing and advertising activities in California" between 1993 and 2001. The plaintiffs claimed that various aspects of the defendants' marketing were false, violating the False Advertising Law (FAL) (Bus. & Prof. Code § 17500 *et seq*.), the Unfair Competition Law (UCL) (Bus. & Prof. Code § 17500 *et seq*.), the Consumer Legal Remedies Act (CLRA) (Civ. Code § 1750 *et seq*.), and various common laws. (45 Cal.Rptr.3d at 919.)

In the superior court the plaintiffs in *Tobacco II Cases* moved for class certification *twice*. In their first motion the plaintiffs sought class treatment for their CLRA claim. The trial court denied that motion, concluding that individual issues of causation and injury predominated over common issues. A year later the plaintiffs asked the court to certify their CLRA claim, their UCL claim, and their FAL claim. The trial court again denied certification for the CLRA claim but certified the UCL and FAL claims "because these statutes do not require individualized determinations" of reliance. *(Ibid.)*

After Proposition 64 took effect, the defendants in *Tobacco II Cases* successfully moved to decertify the class. The trial court ruled that Proposition 64's new standing requirements applied and that to establish standing the plaintiffs had to prove that they *and all the absent class members* had suffered "injury in fact consisting of lost money or property caused by the [defendants'] unfair competition." The trial court concluded that the requirement for individual reliance "meant the individual issues predominate over the common issues thus making the case unsuitable for a class action."

On appeal the court in *Tobacco II Cases* concluded that the trial court did not abuse its discretion when it decertified the class for the plaintiffs' unfair-competition and false-advertising claims.

> Class-action status does not alter the parties' underlying substantive rights. If a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class. Proposition 64 forecloses relief to a private plaintiff who has not suffered an injury in fact and lost money or property as a result of an unfair business practice. *Thus, the named plaintiff as well as class members must have suffered an injury in fact and lost money or property*. Only the Attorney General, district attorneys, county counsels, city attorneys, and city prosecutors are exempted from the UCL and class-action standing requirements and may pursue a class action on behalf of the general public without a showing of injury in fact. (47 Cal.Rptr.2d at 921) (emphasis added, internal citations and quotation marks omitted).

The appellate court agreed with the trial court that the *Tobacco II Cases* were not suitable for class treatment because individual issues would predominate over common issues.

> Individual determinations would have to be made as to when the class members began smoking, what representations they were exposed to, what other information they were exposed to, and whether their decision to smoke was a result of defendants' misrepresentations (and thus they suffered an injury due to defendants' conduct) or was for other reasons." (*Id.* at 926.)

The appellate court concluded that these "numerous individual determinations" made the case unsuitable for class treatment and affirmed the trial court's decision to decertify the class.

What about inferred reliance?

One worrisome aspect of *Pfizer* is an issue on which the decision is silent – inferred (or presumed) reliance. The California Supreme Court first articulated the principle of presumed reliance in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, [94 Cal.Rptr. 796]. *Vasquez* involved a class action in which the plaintiffs alleged common-law fraud. The plaintiffs alleged that the defendant's sales agents used a common sales pitch from a common manual and therefore made the same misrepresentations to all the class members. The California Supreme Court ruled that class certification would be proper in that instance because reliance under these circumstances could be *inferred*, making it unnecessary to hear individual testimony on reliance.

The *Vasquez* Court's comment in footnote 9 is particularly important:

> The requirement that reliance must be justified…may also be shown *on a class basis*. If the court finds that a reasonable man would have relied upon the alleged misrepresentations, *an inference of justifiable reliance by each class member would arise*. (Emphasis added.)

The court in *Tobacco II Cases* spent three paragraphs distinguishing the circumstances in that case from those in *Vasquez*. (47 Cal.Rptr.3d at 923-24.) In contrast, the *Pfizer* court did not even mention *Vasquez* or the principle of inferred (presumed) reliance, let alone analyze why the principles from *Vasquez* might apply. The *Pfizer* court's emphasis on individual proof of reliance and injury-in-fact suggests that some courts might decline to infer reliance for absent class members in private UCL class actions.

A petition for review in *Pfizer* is pending before the California Supreme Court.

The enforceability of class-action waivers after the California Supreme Court's 2005 decision in *Discover Bank*

In 2005, the California Supreme Court ruled in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 [30 Cal.Rptr.3d 76], that, at least under *some* circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unconscionable and unenforceable. Since *Discover Bank*, there have been five published opinions considering the enforceability of class-action waivers in arbitration agreements.

Unenforceable class-action waivers – *Aral v. Earthlink, Inc.* and *Klussman v. Cross Country Bank*

In *Aral v. Earthlink, Inc*. (2005) 134 Cal.App.4th 544 [36 Cal.Rptr.3d 229], the plaintiff – Aral – ordered DSL service from Earthlink. Aral did not receive the necessary equipment for five weeks, but Earthlink charged him from the date he ordered DSL service. Aral filed his complaint in July 2003. He brought the case as a class action for Earthlink customers "who have been victims of [Earthlink's] practice of overcharging consumers for broadband access to the Internet." The proposed class consisted of California res-

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idents who subscribed to Earthlink's Broadband Access Services and were "victims" of Earthlink's practice of charging for DSL service before the subscribers had the necessary hardware. The sole cause of action in *Aral* was brought under the UCL: the plaintiffs sought an injunction and restitution of all funds that Aral and the other members of the proposed class had paid because of Earthlink's unfair practice.

Based on an arbitration provision in its Internet service agreement, Earthlink sought to compel arbitration in Georgia and to dismiss or stay court proceedings. The trial court denied Earthlink's motion. The trial court's reasoning: claims for injunctive relief under the UCL are not arbitrable, and although arbitrable claims such as restitution, disgorgement, and unjust enrichment may be severed from non-arbitrable claims, here "the gravamen of the case" is the UCL claim for injunctive relief, so "there is essentially nothing to be severed." Earthlink appealed.

The trial court in *Aral* did not consider whether the parties had entered into a binding agreement or whether that agreement's arbitration clause was valid and enforceable. But the parties and the California attorney general urged the Court of Appeal to address these issues, so it did

Relying on the California Supreme Court's decision in *Discover Bank*, the *Aral* court concluded that Earthlink's arbitration agreement was unconscionable. The agreement's terms were presented on a take-it-or-leave-it basis with no opportunity to opt out, which the court concluded was "quintessential procedural unconscionability." The court also ruled that the arbitration agreement was substantively unconscionable: Aral alleged that Earthlink had deliberately cheated numerous consumers out of small sums of money, and given the status of the proceedings, the court had to accept these allegations as true. Thus, the *Aral* court concluded, Earthlink's class-action waiver must be deemed unconscionable under California law.

The *Aral* court concluded its opinion by weighing Georgia's interests against California's in determining the enforceability of Earthlink's class-action waiver. The court noted that Earthlink has a substantial relationship to Georgia because its principal place of business is in Georgia and that Earthlink therefore had a reasonable basis for choosing Georgia law. The court nevertheless concluded that California has a "materially greater interest" than Georgia in the determination of this issue.

> Aral resides in California, seeks to represent only California consumers, and relies solely on California's UCL to support his claim. The fundamental policy at issue is not simply the right to pursue a class-action remedy, but the right of California to ensure that its citizens have a viable forum in which to recover minor amounts of money allegedly obtained in violation of the UCL. *Forcing consumers to travel to a far location and depriving them of any hope of class litigation would pose an insurmountable barrier to recovery of small sums unjustly obtained, and undermine the protections of the UCL.* (134 Cal.App.4th at 564, [36 Cal.Rptr.3d at 244].)

The *Aral* court affirmed the trial court's order denying Earthlink's petition to compel arbitration and to dismiss or stay court proceedings.

The First Appellate District used similar reasoning and reached a similar result in *Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283 [36 Cal.Rptr.3d 728]. The plaintiffs in *Klussman* were California residents who filed a class action against Cross Country Bank and others. The bank – a Delaware corporation – had issued VISA and MasterCard credit cards. The plaintiffs alleged that preyed upon "unsophisticated and vulnerable" cardholders by misrepresenting payoff charges, by imposing unauthorized fees, by charging late fees for timely payments, and through other, similarly unlawful practices. The plaintiffs alleged, among other things, violations of the Consumer Legal Remedies Act (Civ. Code. § 1750 et seq.) and the UCL.

The cardholder agreements stated that Delaware law governed except where federal law applied. These agreements also included an arbitration clause. The clause did not mention class actions, but "it was the functional equivalent of a waiver because the rules of the [National Arbitration Forum] prohibits classwide arbitration unless all parties consent." The defendants moved to compel arbitration. The trial court denied their motion, and the defendants appealed.

The First Appellate District affirmed the trial court's order. Concluding that the enforceability of class-action waivers implicates a "fundamental public policy" in California, 134 Cal.App.4th at 1293, [36 Cal.Rptr.3d at 735], the court ruled that the bank's hidden class-action waiver was unconscionable and, consequently, that the arbitration clause was unenforceable. The court found it significant that the entire class was made up of California cardholders, and therefore California had a closer nexus to the case and claims asserted than Delaware.

Enforceable class-action waivers— *Discover Bank II*, *Gentry*, and *Jones*

Discover Bank v. Superior Court (*Discover Bank II*) (2005) 134 Cal.App.4th 886, [36 Cal.Rptr.3d 456], was before the appellate court on remand from the California Supreme Court after that Court's 2005 decision in *Discover Bank*. The Second Court of Appeal framed the issue to be resolved this way: "whether a contractual choice-of-law provision should be respected in determining the enforceability of a class-action waiver in the contract . . . where plaintiff alleges no violations of California substantive law and sues on behalf of a putative nationwide class." The court concluded "that the parties' choice of Delaware law should be respected, and that under Delaware law the class-action waiver is enforceable." The court therefore granted Discover Bank's petition to compel arbitration.

Two facts were most important to the court's decision: The plaintiffs did not allege *any* claims under California law, only Delaware law, and the putative class was not limited to California residents but, instead, was nationwide. Hence, Delaware was seen as having a stronger interest in having its law applied than California.

Gentry v. Superior Court (2006) 135 Cal.App.4th 944 [37 Cal.Rptr.3d 790], involved a wage-and-hour class action. The case had made its way to the California Supreme Court, which remanded it to the Court of Appeal for reconsideration in light of the Supreme Court's decision in *Discover Bank*. Unlike some of the other class-action waiver cases, there was no dispute regarding

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choice of law, and the court applied California law. The only issue in *Gentry* was "a narrow one": whether the class-action waiver in an employer's arbitration agreement was unconscionable, rendering the arbitration agreement unenforceable.

In *Gentry*, the plaintiff alleged that Circuit City, the defendant, had "illegally misclassified" him and other salaried customer-service managers as exempt from overtime pay when in fact they were required to be compensated for overtime. In 1995, while he was employed by Circuit City, the company gave Gentry a packet that included an "Associate Issue Resolution Package" and a copy of Circuit City's "Dispute Resolution Rules and Procedures." These "Rules and Procedures" gave employees various options – including arbitration – for resolving employment-related disputes. An employee who elected arbitration agreed to dismiss any civil action brought by him "in contravention of the terms of the parties' agreement." Circuit City's arbitration agreement also included a class-action waiver. (*Ibid.*)

The *Gentry* court distinguished the class-action waiver and arbitration agreement in *Discover Bank* from those that Circuit City provided to Gentry:

> The infirmities that plagued the *Discover Bank* class-action waiver are not present here. The Circuit City agreement is not a "consumer contract of adhesion" that the cardholder had no opportunity to reject. Nor is this a case in which the "disputes between the contracting parties predictably involve small amounts of damages," or where "the party with the superior bargaining power has carried out a scheme to deliberately cheat large number of consumers out of individually small sums of money." The Supreme Court held in *Discover Bank* that under such circumstances, enforcing a class-action waiver "becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'" *Here, Gentry has alleged statutory violations that could result in substantial damages and penalties should he prevail on his individual claims*. In fact, the Supreme Court acknowledged in *Discover Bank* that in some employment cases, large individual awards are commonplace. (37 Cal.Rptr.3d at 794-95 (emphasis added).)

The court concluded that Circuit City's class-action waiver was not unconscionable and that the company's arbitration agreement therefore was enforceable.

In *Jones v. Citigroup, Inc*. (2006) 135 Cal.App.4th 1491 [38 Cal.Rptr.3d 461], the Fourth Court of Appeal reversed a trial-court order denying Citibank's petition to compel arbitration. The plaintiffs in *Jones* alleged that Citibank had violated Civil Code section 1748.9 by failing to make certain disclosures about finance charges and interest rates. Jones brought her claim under the UCL and for a putative class limited to California residents.

Although the *Jones* court relied on the California Supreme Court's 2005 decision in *Discover Bank* to provide "the framework for resolution of this case," the Fourth Court of Appeal did not engage in any choice-of-law analysis, as the Supreme Court did in *Discover Bank*. Rather, the *Jones* court focused solely on unconscionability. It concluded that Citibank's class-action waiver and arbitration agreement were not *procedurally* unconscionable, since Citibank appeared to give its cardholders a chance to opt-out of arbitration, and were therefore enforceable.

Gentry is troubling for what the court did not consider. The trial court granted Circuit City's motion to compel arbitration less than six months after the plaintiffs filed their lawsuit. The plaintiffs had little, if any, time to conduct discovery regarding the circumstances surrounding Circuit City's distribution of its "Associate Issue Resolution Package." Thus, the trial court in *Gentry* almost certainly did not consider whether the employees understood what they were giving up when they agreed to forego their rights to present their claims in court instead of in arbitration, or whether Circuit City pressured its employees to elect arbitration by suggesting or implying that the company might penalize them or even fire them if they *did not* elect arbitration. The *appellate* court certainly did not consider these issues. Moreover, the *Gentry* court did not consider whether Circuit City provided its employees with any consideration for the arbitration agreement and, if not, why an arbitration agreement without consideration would be – or should be – enforceable.

Jones is similarly troubling because the majority ignores the economic realities of modern life. Justice Moore made this point – persuasively – in a brief dissent:

> While in this case the defendants do allow the cardholder to continue using the account for a limited period of time, this does not, in my view, save the provision from procedural unconscionability. Ultimately, whether in a few months or several years, the cardholder is left in the same position – either accept the arbitration clause or forfeit the ability to use a credit card. It does indeed present the terms of the agreement on a 'take it or leave it' basis with no opportunity to opt-out. The only difference here is that the consequences are less immediate, but they exist nonetheless. The short grace period is ultimately a distinction without a difference. In a relatively short amount of time, all of defendants' remaining customers will be bound by an arbitration clause, whether or not they want it. . . .
>
> For most consumers, a credit card is a necessity, not a luxury. A consumer cannot rent a car, reserve airline tickets, stay in a hotel or make purchases on the Internet without a credit card. Given this reality, it is an illusion to say that most consumers have a reasonable choice between surrendering their credit cards or their right to a jury trial. Seeking credit from another institution is not a viable option either, as the vast majority, if not all, credit card companies are now demanding that consumers accept arbitration clauses. (*Id.* at 466-67.)

Privacy rights of prospective class-action plaintiffs and class members – *Best Buy Stores* and *Tien*

In *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, [40 Cal.Rptr.3d 575], the plaintiff, Boling, was an attorney who was prosecuting the case in *pro per*. He alleged that Best Buy charged its customers an illegal "restocking fee" for returned merchandise. He alleged that this practice violated the Consumer Legal Remedies Act, the UCL, and constituted unjust enrichment.

After *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, [24 Cal.Rptr.3d 818], in which the California Supreme Court ruled that a lawyer may

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not serve both as a class representative and as class counsel, the trial court in *Best Buy Stores* issued an order to show cause why it should not dismiss Boling's case. Boling responded by moving the court for an order compelling pre-certification discovery so he could find new class representatives. The trial court granted Boling's motion and ordered Best Buy to provide a third-party administrator with the names and addresses of 200 Best Buy customers who had been charged and paid the restocking fee and authorized that administrator to send a court-approved notice to those customers. *Best Buy* filed a petition for a writ of mandate to reverse the pre-certification discovery order.

Upon review, the Court of Appeal ruled that the trial court did not abuse its discretion when it ordered the discovery. The court also concluded, however, that the trial court needed to do more to protect the privacy of Best Buy's customers.

> The use of a third person to communicate with these customers, as provided in the order, aids this purpose, but more is required. The letter [to Best Buy's customers] must state that recipients are free to ignore the letter and that, if they do so, the sender will not disclose their identities to Boling. The letter should not identify Boling by name, should not provide that the recipient contact Boling in the first instance, and should not contain any information that would facilitate such direct contact. The court should instruct the sender of the letter to disclose to Boling the identity of only those persons who affirmatively request this be done in a writing signed by the person. (137 Cal.App.4th at 778, [40 Cal.Rptr.3d at 580].)

The appellate court ordered the trial court to modify the letter accordingly.

In *Tien v. Superior Court* (2006) 139 Cal.App.4th 528 [43 Cal.Rptr.3d 121], the plaintiffs filed a class action against Tenet Healthcare Corporation. They sought relief for current and former Tenet employees who were denied meal breaks, rest breaks and overtime pay. During discovery, the plaintiffs served two special interrogatories. One asked Tenet how many members were in the putative class. The other asked for the class members' names, addresses and telephone numbers. Tenet answered that that were approximately 50,000 class members, but it asserted various objections to providing the class members' names and contact information.

The parties settled their dispute by stipulating to an order. That order required a third-party administrator to send an agreed-upon letter to a random sample of class members whom Tenet selected based on an agreed-upon procedure.

After the mailing, Tenet served special interrogatories. One asked for the name and contact information for all class members who had contacted plaintiffs' counsel in response to the letter. Another requested the same information for other class members who had contacted plaintiffs' counsel.

Plaintiffs moved for a protective order. They claimed that the information Tenet was seeking was protected from discovery by the attorney-client privilege, the attorney work-product doctrine, and the privacy rights of those class members who had contacted plaintiffs' counsel. Plaintiffs' counsel emphasized that the class members who had contacted him were concerned that they might be jeopardizing their jobs if Tenet learned they had spoken with him.

The trial court denied the motion but stayed it for 30 days. This gave plaintiffs' counsel time to advise the affected class members of the order. The delay also gave the affected class members time to "seek exemption" from that order.

Plaintiffs' counsel sent a letter to all 82 class members who had contacted them. Of these, 24 consented to disclosure, 24 refused consent and 34 did not respond. The trial court order plaintiffs' counsel to disclose to Tenet the names and information for the class members who had consented to disclosure and for those who had failed to respond.

Plaintiffs' counsel filed a writ petition challenging the court's order to the extent it required disclosure of the names and information for class members who did not *expressly* consent to disclosure. The Court of Appeal stayed the order and agreed to review the trial court's order.

In reviewing that order, the Court of Appeal concluded that the information Tenet sought was relevant. The court also decided that disclosing the names and contact information for class members who had contacted plaintiffs' counsel does not violate the attorney-client privilege because that privilege does not ordinarily protect a client's identity. The court nevertheless ruled that disclosing the class members' identities *would* violate their privacy rights, and that their privacy rights outweighed Tenet's need for this information. The court noted that Tenet knew the identity of everyone in the class and could have contacted them if it had wanted to. Tenet also knew how it compensated its employees and whether it provided meal breaks and rest breaks, so the company already was aware of the relevant facts. Thus, the court concluded, "withholding the identities of class members who contacted plaintiffs' counsel should not have a significant impact on Tenant's ability to defend itself in the action."

On the other hand, the court concluded, the class members' privacy rights are "significant."

> [T]he identity of an attorney's clients is sensitive personal information that implicates the clients' rights of privacy…. Clients routinely exercise their right to consult with counsel, seeking to obtain advice on a host of matters that *they reasonably expect to remain private*. A spouse who consults a divorce attorney may not want his or her spouse or other family members to know that he or she is considering divorce. Similarly, *an employee who is concerned about conduct in his workplace*, an entrepreneur planning a new business endeavor, an individual with questions about the criminal or tax consequences of his or her acts or a family member who desires to rewrite a will may also consult an attorney with the expectation that the consultation itself, as well as the matters discussed therein, will remain confidential until such time as the consultation is disclosed to third parties, through the filing of a lawsuit, the open representation of the client in dealing with third parties or in some other manner. (139 Cal.App.4th at 540-41 [43 Cal.Rptr.3d at 129-30] (citations, internal quotation marks, and ellipses omitted; emphasis added).

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Conclusion

These developments are not *entirely* discouraging. Courts remain willing to scrutinize class-action waivers and sometimes refuse to enforce them. They continue to allow plaintiffs to use discovery to identify class members. And they continue to protect the confidentiality of class members' communications with class counsel. Still, in reading all these cases back-to-back, it is difficult not to feel a little discouraged by the continuing trend of making it harder for consumers to obtain relief when large corporations have cheated them.

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