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Class actions under attack . . . *again!*

Proposed initiative would be the most significant change in California class-action law in decades.

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They're at it again! Like the latest installment in a bad summer movie franchise that simply will not die (think *Rocky Balboa*), big business interests are once more attacking the public's ability to bring class actions. On July 13, 2007, the Civil Justice Association of California (CJAC) filed a proposed ballot initiative with the California Attorney General's Office for a new law to be known as the "California Class Action Lawsuit Fairness Act." According to its Web site, CJAC hopes to have the initiative qualified to be placed on the ballot for the June 2008 election. For those of you not familiar with CJAC, its backers read like a Who's Who of corporate America, with board member organizations like ExxonMobil, GE, General Motors and a whole slew of tobacco, drug and insurance companies.

Corporate America has been chipping away at class-action remedies for more than a decade now. This effort to water down class-action law began in 1995, with Congress's passage of the Private Securities Litigation Reform Act which made it significantly more difficult to bring federal securities class actions. It continued in 1998 when Congress enacted the Securities Litigation Uniform Standards Act which eliminated virtually all securities class actions in state courts. Then, in California in 2004, big business convinced voters to adopt Proposition 64 which severely limited private enforcement of the State's Unfair Competition Law, eliminating representative actions under the UCL and requiring actions on behalf of the public to be brought solely as class actions. Finally, in 2005, Congress enacted the so-called Class Action Fairness Act which, in essence, "federalized" the vast majority of large, multi-state class actions, henceforth requiring them to be litigated in federal court.

The inaptly named California Class Action Lawsuit Fairness Act (CALFA) is but the latest salvo across the bow of class-action law. If passed into law, this voter initiative would essentially toss out California's venerable class-action statute, Civil Procedure Code section 382, and replace it with a significantly modified version of the federal class-action standards set forth in Rule 23 of the Federal Rules of Civil Procedure. In the preamble in the CALFA initiative, its proponents from CJAC try to justify this change to voters by making the same tired and hackneyed arguments that class actions favor only rich plaintiff lawyers and fail to benefit consumers. Indeed, in a not-so-veiled reference to the much-publicized situation involving the plaintiff securities firm, Milberg, Weiss, the preamble vaguely refers to prosecutors having "obtained at least one guilty plea from a plaintiff attorney who has abused the class-action process by recruiting and illegally paying plaintiffs to facilitate class-action lawsuits." What CJAC forgets to tell the voters is that this guilty plea from a former Milberg, Weiss partner, related to conduct in federal securities class actions and has nothing to do with state class actions under California law.

Whatever the supposed justification, by adopting a modified version of federal class-action procedures contained in Rule 23, the proposed CALFA initiative would make several important changes in California's decades-old class-action laws and procedures:

Consumer Attorneys of California launches counter-initiatives

As the magazine went to press, CAOC, the statewide organization for plaintiffs' attorneys, announced that it was sponsoring three consumer-protection initiatives. The first would target "illegitimate pay and investment income" of corporate executives convicted of fraud; the second would require public disclosure of the 10 highest-paid executives in a corporation and shareholder approval of their compensation; the third would take 25 percent of punitive-damages awards and give the money to state prosecutors to enforce consumer laws. CAOC needs the support or plaintiffs' attorneys for these initiatives. To learn more, contact CAOC's Director of Communication, Jordan Traverso, at jordan@caoc.org.

Court consideration of case merits

Currently, under both California and federal class-action law, courts are generally not supposed to consider the merits of an action in deciding whether to certify a case as a class action. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438-439; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 177-178.) A narrow exception exists if the merits of the action are "enmeshed" in the class certification issues. (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829; *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 469.) However, CJAC has inserted language in the proposed initiative that does *not* exist in Rule 23 and that would give courts more leeway to consider merits as part the class certification decision. Specifically, the initiative would authorize a court to consider "the *full record* on the relevant issues" and "the *substantive* elements of the plaintiff's case as well as any defenses" (emphasis added). Such merits consideration is specifically authorized regardless of whether the merits "overlap" with the class certification issues. This change will open the door to defendants who want to turn the certification hearing – which is supposed simply to decide whether a case can be litigated fairly as a class action – into a full-blown trial of the plaintiff's claims.

Addition of new certification criteria

CJAC's proposed initiative also plays fast and loose by slipping in new provisions that are nowhere to be found in Rule 23. These new provisions may at first blush appear minor but upon closer examination they reveal themselves to be highly significant. For example, the proposed initiative adds, to the standard elements set forth in Rule 23(b)(3), entirely new criteria that a court may consider in deciding whether to certify a case as a class action. Among other things, this new criteria permits a court to consider whether "the allegations at issue" in the case "are subject to the jurisdiction of federal or state regulatory agencies." No explanation is given as to how this factor is to be weighed but presumably if the defendant's misconduct alleged in the complaint is subject to regulation by a federal or state agency (and what conduct is not?) a court may consider that fact in deciding not to certify a case. Likewise, the initiative includes a new criterion permitting a court to determine whether "the evidence likely to be admitted at trial" will be "substantially the same as to all class members." Presumably, if there is any deviation in the evidence – no matter how small – a court can point to that factor in denying certification.

Placing expense of class notice on plaintiff

Under current California and federal law, a plaintiff obtaining class certification will most often be responsible for paying for the costs of notice to the class, unless the certification is part of an agreed settlement. Given the expense of publication, such pre-settlement notice costs can be formidable. However, California law recognizes some circumstances under which a court may shift some or all of the costs of notice to the defendant, depending on such matters as the merits of the plaintiff's claim, the size of the costs and the plaintiff's ability to fund the costs. (*Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 376-380.) Cost-shifting under federal class-action procedure is less frequent. In the proposed initiative, however, CJAC has inserted an entirely new provision regarding the expense of class notice that is not contained in Rule 23. Not surprisingly, this new provision reinforces the notion that the costs of class notice should be borne by the plaintiff in most instances. The only exception is where "the parties agree or justice requires otherwise." Worse still, this new provision would require the plaintiff to pay the defendant's expenses for collecting the names and addresses of class members to whom notice is to be given – even if the information is already in the defendant's possession.

Immediate right of appeal

In California, certain cases hold that the denial of class certification is tantamount to the "death knell" of the entire action, and, accordingly, that the plaintiff may have an immediate right of appeal from an order denying certification, even though it is not a final judgment. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 698-699.) However, an order granting class certification is not a final judgment and is *not* immediately appealable. (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387, n.4.) In contrast, in federal court there is no immediate right of appeal from an order granting *or* denying class certification. (*Plata v. Davis* (9th Cir. 2003) 329 F.3d 1101, 1106; *Coopers & Lybrand*, 437 U.S. at 465.) Nevertheless, under Rule 23(f), a court of appeals has discretion to permit such an immediate appeal if an application is made with 10 days of the certification order. The proposed initiative would change all these rules by expressly making an order granting or denying class certification immediately appealable by either party. The obvious consequence of this change would be that a defendant losing a class certification motion will no longer have to proceed to trial. Instead, the defendant can bring an instant halt to the litigation simply by filing a notice of appeal and thereby wear down the plaintiff through delay and additional expense.

Permitting second opt-out opportunity

Under California's class-action procedures, a class member almost always has only one opportunity to opt out of a class action and that opportunity occurs after the class has been given notice that the case has been certified as a class action. If, after the

certification stage, the parties submit a settlement to the Court for approval, the class members will receive notice of the proposed settlement and may object to it, but they are generally not given another opportunity to opt out of the class action at that time. But under Rule 23(e)(3), a court may refuse to approve a settlement unless a new opportunity to opt out is afforded to the class. By adopting this provision in Rule 23, the initiative proposed by CJAC would increase the number of second opt-out opportunities given to class members in California class actions.

Attorney fees contingent on pre-litigation settlement attempt

In California, a plaintiff attorney who brings a lawsuit which has some merit but which does not end in a judicial resolution can still recover attorneys' fees as a private attorney general under Civil Procedure Code section 1021.5 if the lawsuit was the "catalyst" for changing the defendant's behavior. In *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 561, the California Supreme Court held that, under such a catalyst theory, the plaintiff "must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." This requirement of a pre-litigation attempt to settle has never been held to be a prerequisite to a prevailing plaintiff recovering attorneys under Section 1021.5 in any non-catalyst case. However, CJAC has inserted a provision in the proposed CALFA initiative, once again nowhere to be found in Rule 23, that would permit a court to consider and perhaps deny or reduce the attorneys' fees and costs to a prevailing plaintiff if the plaintiff did not attempt to settle the matter before the litigation was commenced. Similarly, the initiative would absolutely preclude the plaintiff from recovering attorneys' fees and costs incurred in "litigating entitlement to attorney fees and costs." The result is that the defendant would have every incentive to fight tooth and nail the plaintiff 's motion for attorneys' fees.

Eliminating "issue" class actions

Both California and federal class-action law recognize that, in some instances, it is not appropriate to certify an entire case as a class action because the case as a whole does not lend itself to class-action treatment. However, it is still possible to certify a single issue or small group of issues, such as, for example, the enforceability of a contractual arbitration clause in a consumer contract, for determination on a class-wide basis even if the other issues in the case are not suitable for class-action treatment. Rule 23(c)(4)(A) expressly authorizes such so-called "issue" class actions. But, perhaps not surprisingly, the proposed initiative would completely do away with such class actions by requiring the entire case to satisfy all class-action requirements before such an issue class action could be certified.

No monetary relief in Rule 23[b][2] class actions

The proposed initiative also significantly departs from Rule 23 by prohibiting monetary relief as part of class actions certified under Rule 23(b)(2). Class actions under Rule 23(b)(2) are primarily for injunctive or declaratory relief. However, some courts have recognized that monetary relief that is incidental to injunctive relief for the class may constitute part of the relief in a class action certified under Rule 23(b)(2). (*Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937, 949.) The CALFA initiative specifically abolishes the right to obtain such incidental monetary relief as part of a Rule 23(b)(2) class action for injunctive or declaratory relief.

Much more can probably be said about the proposed CALFA initiative, but that will have to await further developments. As of the preparation of this commentary, it is not certain whether the proposed CALFA initiative will qualify for the June 2008 ballot. If it does qualify and is passed by the voters, CALFA will by its own terms apply to all class actions pending in California State Courts on its effective date. It goes without saying that this would be the most significant change in California class-action law in many decades.


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