

## Raising the Class-Certification Hurdle

By Mark A. Chavez

Just a short time ago, the notion that a trial court could properly resolve a motion for class certification through a mini-trial encompassing merits issues would have been considered laughable by most class-action practitioners. The courts typically treated class certification as a preliminary, procedural matter that could be determined based upon the allegations of the complaint, the declarations of counsel, and little, if any, additional evidence. The focus of the inquiry was on whether the plaintiff's claims were susceptible to proof on a class-wide basis, not the quantity of proof. Plaintiffs were required to make only "some showing" to establish the requirements of Rule 23, and it was generally

understood that the U.S. Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), precluded consideration of the merits of a plaintiff's claims at the class-certification stage.

Unfortunately, what once may have been laughable may now be inevitable. In recent years, a sea change has occurred in the standards for assessing and determining motions for class certification. The evolution in the standards of proof for class certification is perhaps best illustrated by the appellate decisions in *In Re: Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2nd Cir. 2006) (IPO), and *In Re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir.

2008). These decisions reflect a fundamental shift in the class-certification process that has significantly increased the hurdle for plaintiffs. According to the IPO and *Hydrogen Peroxide* courts, class

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## Preemptive Collateral Estoppel Blocks Consumer Class Actions in *Thorogood*

By Dawn M. Goulet and Amy E. Keller

In *Thorogood v. Sears, Roebuck and Co.* (*Thorogood III*), No. 10-2407, 2010 U.S. App. LEXIS 22807 (7th Cir. Nov. 2, 2010), the Seventh Circuit recently applied the All Writs Act to enjoin not only the plaintiff and his counsel but all other members of a decertified class from filing so-called copycat class actions in other state or federal courts against the defendant, Sears, Roebuck and Co.

The opinion, the third in this case authored by Judge Richard A. Posner, has attracted a fair amount of attention, mostly for its anti-class action rhetoric and the open hostility it exhibits toward

counsel for the plaintiff. It describes the case as "a near-frivolous class action," the "quixotic quest" of a plaintiff's lawyer who has refused to accept defeat, a "nuisance," and an "effort to escalate [a] dubious claim" that was a "flop." The opinion goes on to describe the plaintiff's allegations regarding how he was deceived by the defendants' advertising as a "confabulation" (in psychology, a fantasy that has unconsciously emerged as a factual account in memory). Indeed, in denying the plaintiff's petition for rehearing and rehearing en banc, the Seventh Circuit

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Jocelyn D. Larkin



Greg Cook

This issue of the *CADS Report* highlights recent developments in consumer class-action law and focuses, in particular, on pesky procedural questions. First, Mark A. Chavez surveys the recent trend toward examining merits issues during class certification, such as the *Hydrogen Peroxide* and *IPO* decisions from the Third and Second Circuits. He reviews the background of this trend, contrasts it with past case law, and discusses the implications, including, for example, the need for broader discovery.

Dawn M. Goulet and Amy E. Keller examine the ability of a federal court to enjoin later class actions, exploring the Seventh Circuit’s much-talked about decision in *Thorogood v. Sears, Roebuck and Co.* and touching on the Supreme Court’s grant of certiorari in *Smith v. Bayer*.

J. Russell Jackson considers the requirement that a class definition be precise, be ascertainable, and not include those who are not entitled to recover under the theory of the case. He covers recent case law on these requirements and emphasizes the constitutional basis for them, as well as the requirement that the definition not depend on the resolution of a merits issue to determine class membership (sometimes known as a “failsafe” class).

Sara E. Kropf tackles the impact of the Supreme Court’s decision in *Bridge v. Phoenix Bond & Indemnity Co.* on Racketeer Influenced and Corrupt Organizations Act (RICO) class actions. Although *Bridge* was not a class action, its elimination of the requirement for the plaintiff to have personally relied upon the fraud has the potential to expand the number of RICO class actions. Kropf considers whether it is possible to overestimate the impact of *Bridge* on class actions, particularly because RICO continues to have a strict causation requirement and would likely require reliance by someone. She also argues that “aggregate reliance” would be inappropriate.

We also present two articles focusing upon California and Ninth Circuit law. Derek E. Diaz takes on the Ninth Circuit’s ruling in *Bateman v. American Multi-Cinema, Inc.* that enormous statutory damages would not prevent the certification of a class action. There, the Ninth Circuit reversed a trial court order in a Fair and Accurate Credit Transactions Act (FACTA) case that denied class certification. The plaintiffs alleged a receipt-printing problem for 290,000 receipts (potentially \$29 million to \$290 million in damages). Philip A. Leider examines the unsettled status of UCL class certifications after the California Supreme Court decision in *In re Tobacco II*. Leider itemizes a number of the unsettled issues, reviews the decisions of several California courts of appeals on these issues, and speculates on their likely outcome.

Finally, this issue features an interview with Professor William Rubenstein of Harvard Law School, who recently took over as editor of the Newberg treatise on class actions. The interview, conducted by Robert J. Herrington, covers Professor Rubenstein’s background, his plans for the treatise, and his thoughts on current hot areas within class-action law.

We are very proud of the content in this issue and hope that it provides value to you and your practice. We are also very proud of our annual Class Action Institute, which was held in October at the Hard Rock Hotel in Chicago, Illinois, and was chaired by Dan Karon. Karon is already planning the Institute for next year, and we suggest that you contact him if you have suggestions for a location, facilities, or programs. He may be reached at karon@gsk-law.com.

We would also like to urge everyone to attend the ABA Section of Litigation Annual Conference, set for April 13–15 in Miami, Florida. The CADS Committee will be presenting a program on recent developments in class-action law. With key

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# The Touchstone of Class Certification: The Class Definition

By J. Russell Jackson



J. Russell Jackson

One of the benefits of blogging about class-action issues is that trends begin to emerge as you read decision after decision in the never-ending search to find something to post about.

One of the trends of 2010 involves a class-action requirement that is largely unused and did not make it into Rule 23. Civil Procedure test-takers likely would not even list it among the class-action requirements. And yet, courts are increasingly focusing on it as a reason to deny class certification. I refer, of course, to the class definition.

The class definition is fundamental to the class action. It defines at the outset precisely who—other than the named plaintiffs—are parties to the litigation and will be bound by any resulting judgment, favorable or unfavorable. Indeed, although many people are tempted to treat the class definition as a mere detail that can be tweaked or fixed in a post-judgment claims process, the simple fact is that the defendant is entitled to know at the outset precisely who is in the class (and the scope of class membership), as well as ensure that those people are bound by the judgment if the defendant wins the class trial.

The class definition is also a key to constitutionally adequate class notice. Absent class members must be able to easily determine whether their interests are going to be affected by the judgment if they do not opt out, and thus they must be able to ascertain at the time they

receive class notice precisely whether they are members of the class or not.

The requirements for the class definition have come from decades of decisions that keep these purposes in mind. The class definition must be precise. It must define a class that is objectively ascertainable at the outset of the case. It must not involve mini-trials to determine whether individuals are class members. It cannot require the resolution of a merits issue to determine class membership—what many courts have dubbed a “failsafe” class. See *Intratex v. Beeson*, 22 S.W.3d 398 (Tex. 2000). And it must not be so overbroad that it includes large numbers of people who have no class claim.

These requirements sound like common sense, but it is surprising how often class certification decisions turn on definitions that fail to meet them.

## Ascertainability

Sometimes the problem with ascertainability appears to come from a failure on the plaintiff’s part to adequately set forth precisely what the case is all about. For example, in *Heisler v. Maxtor Corp.*, 2010 WL 4788207 (N.D. Cal. Nov. 17, 2010), the plaintiffs brought two class actions alleging consumer fraud regarding hard drives that they claimed had malfunctioned. One was a California-only class, and the other involved the rest of the United States.

The class was defined as “[a]ll end user persons or entities who purchased in the United States . . . a [Maxtor Hard Drive] sold by Maxtor or an authorized Maxtor retailer or distributor that have experienced a failure and (a) reported the failure to Maxtor and/or Seagate (the ‘Reporting Class’) and (b) who did not report the failure . . . (the ‘Non-Reporting Class’).” *Id.* at \*1.

The court examined the complaint and observed that the plaintiffs never identified one particular defect or mode of failure. This, the court concluded, presented a problem with ascertainability where the definition depended, in part, on “failure”:

Here, the ascertainability of the proposed classes is questionable. Plaintiffs’ definition fails to explain clearly what causes a “failure” of the subject hard drives; and no relevant date range is provided to exclude individuals who may have experienced a failure after expiration of the [one-year] warranty. . . . Moreover, there is a real concern that the term [“failure”] could be interpreted too broadly, encompassing even hard drive problems resulting from operator error. . . . Neither the list [of customer complaints] nor the Plaintiffs’ proposed class definition includes objective limitations that would exclude temporary failures or failures occurring as a result of factors other than manufacturing defects.

*Id.* at \*2–3.

Because of these problems, and others, the court denied class certification without prejudice to the plaintiffs later renewing the motion.

Another problem with providing an objectively ascertainable class definition sometimes stems not from any failure of the parties, but rather from the unavailability of evidence. One recent decision that illustrates this type of ascertainability problem is *Sevidal v. Target Corp.* (2010) 189 Cal. App. 4th 905, 117 Cal. Rptr. 3d 66. In *Sevidal*, the plaintiff sued Target for consumer fraud for advertising products as “Made in the USA” when, instead, they were made elsewhere.

The plaintiff sought certification of a statewide class of:

Any California consumer who purchased any product from Target.com on or after November 21, 2003 which was identified on Target.com as “Made in the USA,” when such product was actually not manufactured or assembled in the United States.

117 Cal. Rptr. 3d at 71.

The trial court denied class certification, and the court of appeal affirmed on two grounds. First, it held that the class was unascertainable. Second, it held that the class was impermissibly overbroad.

The ascertainability determination turned, in part, on the facts involving

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Target's website. The "Made in the USA" designation was not seen by all users of the website who viewed the affected items. Rather, it was in a subroutine of a subroutine of the program. Put differently, once one clicked on the product, he or she had to click on "View Details" and then "Additional Info" before the "Made in the USA" designation would appear. Based on Target's five-month test, 80 percent of customers did not click on the "Additional Info" tab at all and thus never could have seen the "Made in the USA" designation. *Id.* at 74.

Moreover, the mis-designation "Made in the USA" was the result of a computer bug that would only sometimes cause the mis-designation to appear. In other words, sometimes the information displayed in "Additional Info" was correct, and sometimes it wasn't, and Target had no record of who saw what. The plaintiffs argued that this was Target's fault (rather than the plaintiffs') and thus should not preclude class certification, but the court observed that "Target had no contractual or statutory duty to maintain records pertaining to a consumer's selection of the 'Additional Info' icon." *Id.* at 80. Target's lack of records, and the randomness of the false representations, simply made it impossible to precisely define a class with objective criteria that was not horribly overbroad. *Cf. Solo v. Bausch & Lomb, Inc.*, (D.S.C. Sept. 25, 2009) (noting problems of proof in rejecting the class definition as unascertainable).

The plaintiff relied heavily on *In re Tobacco II Cases* (2009) 46 Cal.4th 298, which held that absent class members subjected to a pervasive advertising campaign do not have to demonstrate reliance to obtain relief in a UCL class action. Part of the importance of *Sevidal* lies in its holding that *Tobacco II* does not excuse a UCL class action from meeting the other class-action requirements, including ascertainability. The court explained:

A class representative has the burden to define an ascertainable class. Although the representative is not required to identify individual members, he or she must describe the proposed class by specific and objective criteria. Ascertainability is achieved "by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible." . . . "Ascertainability . . . goes

to the heart of the question of class certification," and "requires a class definition that is precise, objective, and presently ascertainable. . . ." The purpose of the ascertainability requirement is to ensure it is possible "to give adequate notice to class members" and "to determine after the litigation has concluded who is barred from relitigating." The ascertainability requirement is satisfied if "the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who will be bound by the results of the litigation."

**The mis-designation "Made in the USA" was the result of a computer bug that would only sometimes cause the mis-designation to appear. Sometimes the information displayed in "Additional Info" was correct, and sometimes it wasn't, and Target had no record of who saw what.**

*Sevidal*, 117 Cal. Rptr. 3d at 77–78 (citations omitted).

Because the computer glitch did not consistently misidentify the goods as "Made in the USA," because there was no record of who received the misidentifications, and because a substantial majority of those who used the website never visited the portions of the website where misidentifications could occur, the court of appeal held that the trial court was correct in finding that the class was unascertainable and thus could not be certified. The court of appeal observed that "[t]hese conclusions are fully consistent with *Tobacco II*'s holding that UCL claims brought as class actions remain subject to the statutory class certification rules, including the requirement that the plaintiff show an

ascertainable class." *Id.* at 80.

Another common class definition problem that implicates ascertainability lies in the need to conduct some sort of mini-trial to determine whether a person is a class member. For example, in *Benefield v. International Paper Co.*, 2010 WL 4180757 (M.D. Ala. Oct. 20, 2010), the court was faced with a public nuisance class action. The court observed that the class definition—which included all people who owned real property parcels within two miles of an alleged contaminated site that were contaminated by the site, resulting in a diminution of property value of \$100 or more—required too many individual mini-trials at the outset to establish class membership.

The plaintiffs submitted expert testimony to establish that the merits elements could be proven with class-wide, statistical proof. The court focused on the weaknesses in the plaintiffs' experts' blanket conclusions and ill-conceived methodologies in rejecting the class definition:

In short, while the Plaintiffs have argued, correctly, that this court should not engage in any merits determination in determining whether the class should be certified, the Plaintiffs have asked the court to find facts, based on disputed evidence, to determine who is in the class. The court concludes, therefore, that it is not administratively feasible for the court to determine whether a particular individual meets the class definition.

*Id.* at \*4 (citation omitted).

The court also noted that the exclusions carved out of the class definition also presented their own problems: "That [personal injury] exclusion will require a determination of which people within the geographic area who own residential property also have personal injuries caused by releases from the Facility, which itself poses causation issues, and therefore makes the class definition improper." *Id.*

## Overbreadth

Courts frequently explain that a class definition cannot include within the class large swaths of consumers who are happy with their products and have suffered no injury. Such people have no standing and should not be swept into a class. And because purchasers of consumer

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# Civil RICO Class Actions: A New *Bridge* to the Courthouse?

By Sara E. Kropf



Sara E. Kropf

Civil Racketeer Influenced and Corrupt Organizations Act (RICO) class actions are one of the most significant litigation liabilities a modern corporation can face. When the statute's treble damages are multiplied by thousands or even millions of claims and attorney fees are added, a corporation's survival can be at stake. Unless the defendant can win on a motion to dismiss or defeat a motion for class certification, there will be tremendous pressure to settle.

Before the Supreme Court's 2008 decision in *Bridge v. Phoenix Bond & Indemnity Co.* on civil RICO class actions in consumer fraud cases, some circuits required class plaintiffs to prove their individual reliance on the supposed misrepresentations. This individualized proof was one of the most significant barriers to class certification in such cases. However, in *Bridge*, the Supreme Court held that civil RICO plaintiffs need not show that they actually relied on the misrepresentations. Although the Court's ruling was relatively narrow and made clear that reliance still plays an important role in showing causation, some lower courts have misinterpreted *Bridge* to mean that plaintiffs are *never* required to show reliance, and at least one has allowed statistical proof of causation through a theory of "aggregate reliance." Although *Bridge* should not ultimately increase the number of RICO class actions filed, it does nothing to discourage them,

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and it weakens one of the key defenses available to corporate defendants.

## Background of RICO

Congress drafted RICO to target organized crime's infiltration into legitimate businesses through extortion and other criminal means. Unfortunately, RICO has given rise to a different type of extortion: using the threat of the statute's treble damages and fee shifting to compel settlement. In a classic example of unintended consequences, the statute designed to give prosecutors and innocent businesses a weapon against the Mafia has instead been wielded as a bludgeon in routine business disputes.

RICO was enacted in 1970 as Title IX of the Organized Crime Control Act. See *United States v. Turkette*, 452 U.S. 576, 591 n.13 (1981). Congress, however, made two fateful decisions for the business community when drafting the statute. First, with little discussion or debate, Congress inserted a provision creating a civil cause of action. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of" a pattern of racketeering "may sue therefor" and "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C.A. § 1964(c). One court searched the legislative history behind the provision and, finding only "clanging silence," explained that "[t]he most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c)." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984).

The commission of two or more "predicate acts" in a "pattern of racketeering activity" is a violation of the act. Congress's second fateful decision was to include violations of the federal mail and wire fraud statutes as "predicate acts" not only for criminal charges, but also civil causes of action. Fraud is a notoriously ambiguous and malleable charge, requiring only a "scheme to defraud" using the mail or wires. Given that almost every

act of modern business involves the use of mail, faxes, or the Internet, businesses may be exposed to RICO liability for even minor misdeeds. Justice Thurgood Marshall noted that "[t]he effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because [of the] 'extraordinary expansion of mail and wire fraud statutes.'" *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., dissenting). Because of RICO's coercive power, the Department of Justice has implemented guidelines to constrain its abuse, discouraging "'imaginative' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute." U.S. Department of Justice, U.S. Attorneys' Manual § 9-110.200. Unfortunately, no such guidelines constrain plaintiffs in the civil class-action context.

## Civil RICO Class Actions Before *Bridge*

Civil RICO cases vastly outnumber criminal ones. One recent study found that 78 percent of all RICO cases were civil cases. Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 22 (2002). Fully 16 percent of RICO cases in the study were class actions. *Id.* Defendants have two procedural opportunities to end RICO class actions before the stakes dramatically increase: winning on a motion to dismiss and defeating a motion for class certification. If a corporate defendant loses at both stages, it will almost certainly be compelled to settle the case. For example, one recent RICO class action involving insurance underpayments resulted in a \$255 million settlement, which included nearly \$70 million in attorney fees. *McCoy v. Health Net, Inc.*, No. 03-cv-1801 (FSH) (PS), 2008 WL 3473130 (D.N.J. July 24, 2008). Public companies face extraordinary pressure to avoid trial in these cases, given that the worst-case outcome could financially cripple the company.

The Class Action Fairness Act of 2005 (CAFA) allows for easier removal of cases

from state to federal court, meaning that more class actions are likely to rely on federal statutes and will be governed by federal rules. Federal Rule of Civil Procedure 23(b)(3) requires a predominance of common questions of both law and fact. Beginning in the 1990s, a number of circuits decertified nationwide mass tort claims on the basis of unmanageable variations in state fraud laws, concluding that there was no legal predominance in such cases. For example, in *Castano v. American Tobacco Co.*, the Fifth Circuit decertified a multi-state mass fraud claim because of the differing standards for reliance and for mandatory disclosure of facts in the various state fraud laws applicable to the class. 84 F.3d 734 (5th Cir. 1996). RICO allows plaintiffs to overcome Rule 23's legal predominance requirement because in theory it will apply uniformly nationwide. The question that remains is whether pleading a RICO claim helps a plaintiff show predominance of factual issues in the class as well.

The Supreme Court has held that plaintiffs must prove both proximate and but-for causation in a RICO case. *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992). Causation in a fraud case is most commonly shown by proof of reliance. Unless a plaintiff shows that he or she relied on a misrepresentation, he or she cannot rule out that factors other than the misrepresentation may have caused the injury. If there are different reasons for each class member's injury, there cannot be predominance of common factual issues as required by Rule 23(b)(3). Before the *Bridge* decision, this served as a strong bulwark against certification of civil RICO class actions. Courts frequently held that the individual findings of reliance required to establish causation precluded certification because each class member had different circumstances, beliefs, knowledge, and motivations. See Joseph McLaughlin, 1 McLaughlin on Class Actions § 5:50 (6th ed.). The Fifth Circuit highlighted the issue, stating that "pervasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification." *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003).

For example, in *Freedman v. Arista Records, Inc.*, a court rejected the certification of a putative class consisting of the seven million purchasers of Milli Vanilli's album "Girl You Know Its [sic] True." 137 F.R.D. 225 (E.D. Pa. 1991). The plaintiffs

contended that Arista fraudulently marketed the record by insinuating that Morvan and Pilatus, the front men of the group, actually sang on the record when they did not. Rejecting class certification, the court noted that fraud requires the defendant to induce the plaintiff to act in reliance on the defendant's conduct. The issue of reliance effectively destroyed the Rule 23(b)(3) factual predominance requirement because the plaintiffs could only establish through individualized proof whether each plaintiff bought the album because of Morvan and Pilatus's singing and such individualized proof is impossible in a class action of this size. As the court explained, "[w]hat causes a person to respond positively to a performance is a complex matter." *Id.* at 229. If an individual plaintiff bought the album because he or she heard a song on the radio or liked the music video, then the alleged misrepresentation was irrelevant.

### **Bridge and First-Person Reliance**

The Supreme Court in *Bridge* weakened the factual predominance barrier by holding that first-person reliance is not an element of RICO. 553 U.S. 639 (2008). *Bridge* arose from a dispute between competing bidders in the Cook County, Illinois, tax lien auction process. In a tax lien auction, the "winner" was the party that bid the lowest tax penalty to be imposed on the property owner. However, it was not uncommon for several parties to bid down the potential tax penalty to zero. In these circumstances, the county could not pick the auction's winner based on bid price alone and would choose the winner by rotating among the zero-penalty bidders. If a party used an agent or two to bid on the same property, however, that party would have an unfair advantage because it would have more than one place in the rotation. Cook County therefore implemented a "Single, Simultaneous Bidder Rule," requiring each bidder to sign an affidavit agreeing that the bidder would not use any agents or additional parties to bid at auction.

The plaintiffs in *Bridge* accused a competitor of arranging for related firms to bid in the auctions, increasing the competitor's chances to win them. The plaintiffs' RICO claim was based on the multiple false affidavits the competitor filed with the county.

The district court dismissed the RICO claim because the plaintiffs had

not directly relied on (or even received) the misrepresentation—the county had. The lower court held that although the plaintiffs were injured by the misrepresentations to the county, the plaintiffs were not within the scope of the RICO statute because they had not personally relied on the misrepresentations. "[A]t best," according to the court, the plaintiffs "were indirect victims of the alleged fraud." *Id.* at 645. On appeal, however, the Seventh Circuit reversed, concluding that the alleged injury was sufficiently direct and proximately caused by the fraud to establish a RICO violation.

The Supreme Court granted certiorari on the narrow question of whether first-party reliance was an element of a civil RICO claim predicated on mail fraud. The Court held that it was not. While common-law fraud requires proof of reliance, the mail fraud statute has no such requirement. The only requirement under RICO was to prove injury to the plaintiff's business or property "by reason of" mail fraud.

However, the Court explained that while first-person reliance was not required in every case, the reliance element was not necessarily eliminated. To show that the injury was caused "by reason of" the fraud, the plaintiff would likely have to show that *someone* relied on the misrepresentation. "In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation." *Id.* at 658. For example, if Cook County had not accepted the fraudulent affidavits, there would be no reliance and the injury would never have occurred. The *Bridge* Court emphasized a plaintiff's obligation to prove causation, which, in most cases, would necessarily be established through reliance.

### **The Effect of Bridge**

*Bridge* poses several threats for corporate defendants. One, of course, is the holding itself, which eliminates from RICO what some courts had considered a key pleading requirement—first-person reliance. This holding makes it somewhat easier for plaintiffs to file RICO-based class actions by allowing for lengthier causative chains. Another threat for defendants is that courts may misread *Bridge* to eliminate causation altogether. This concern is not entirely unfounded, as a few courts have done so to the detriment of corporate defendants.

One such example is the recent ruling in *Martrano v. Quizno's Franchise Co.* No. 08-0932, 2009 WL 1704469 (W.D. Pa. June 15, 2009). The case was one of multiple civil RICO cases brought against Quizno's by unhappy franchisees. The Quizno's form franchise contract contained explicit disclaimers and non-reliance clauses in which the franchisees were informed that sales representatives were not authorized to make separate oral representations. It also made clear that Quizno's was providing no information as to "actual or potential sales, earnings, or profits," and the plaintiffs were furnished with a list of past and present Quizno's franchisees to contact about any questions.

The *Martrano* plaintiffs alleged that Quizno's and its representatives made material misrepresentations or omissions regarding the financial prospects of owning Quizno's franchises to induce the plaintiffs to purchase them. Based on its contractual disclaimers, Quizno's moved to dismiss the complaint on the grounds that the plaintiffs did not properly allege proximate cause. The company contended that the plaintiffs did not allege how any use of the wires or mail damaged them or how the plaintiffs relied on any misrepresentations to their detriment.

The district court denied the motion to dismiss, rejecting the company's reliance argument out of hand. It addressed reliance in a footnote, simply stating that in *Bridge*, "the Supreme Court held that a reliance element is not incorporated into RICO." *Id.* at \*11 n.34. The court held that the plaintiffs' conclusory allegation that they suffered losses that they would not have incurred had they not been induced to become franchisees was sufficient to state a claim.

Unlike in *Bridge* where the plaintiffs' theory was not based on first-party reliance, the misrepresentations were made directly to the *Martrano* plaintiffs. But by citing *Bridge* for the proposition that reliance is not necessary, the *Martrano* court failed to recognize the key role that individualized questions about reliance should play in establishing proximate cause given the facts of that case. For example, perhaps the plaintiff decided to become a Quizno's franchisee because he or she had a friend who had opened a successful franchise. The *Martrano* court ignored these other possible reasons for the decision to buy a franchise.

In another case, *Spencer v. Hartford Financial Services Group*, the district court likewise applied *Bridge* to effectively eliminate causation entirely from the RICO statute. 256 F.R.D. 284 (D. Conn. 2009). In *Spencer*, the plaintiffs sought to certify a class of individuals who had entered into structured settlements with the defendants. The plaintiffs claimed they were defrauded because the defendants did not disclose that the price of the annuity that was the basis of the structured settlement included the defendants' internal costs of providing the financial product. At the class certification stage, the defendants asserted that Rule 23's factual predominance requirement was not satisfied because the class plaintiffs received many different oral representations and because plaintiffs had not shown that they relied on the statements in entering the structural settlements. The theory of the case depended on showing first-party reliance by the plaintiffs on the defendants' supposed misrepresentations.

The *Spencer* court relied on *Bridge* to sidestep two Second Circuit decisions that required the plaintiffs to show that there was a uniform misrepresentation and that the reliance element could not be shown by generalized (rather than individualized) proof. *Id.* at 296–97 (discussing *Moore v. PaineWebber*, 306 F.3d 1247, 1253 (2d Cir. 2002); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)). Ultimately, the court in *Spencer* determined that "after *Bridge*, the *Moore* and *McLaughlin* decisions are no longer good law on the question of whether a plaintiff must show that he or she was personally a recipient of a material misrepresentation." *Spencer*, 256 F.R.D. at 297. The court went on to hold that after *Bridge*, plaintiffs no longer needed to prove that each class member received and relied on the misrepresentation, they need only demonstrate that the defendant made uniform misrepresentations. The *Spencer* court did not require the plaintiffs to show that the misrepresentations (or anything else) actually caused any injury. Like the *Martrano* court, the *Spencer* court used *Bridge* to avoid the issues of individualized reliance necessary to prove causation that could have denied class certification. In the end, the reasoning of the *Martrano* and *Spencer* decisions effectively deprives defendants of the ability to challenge whether each class member has proven causation.

## Bridge and Aggregate Reliance

A third potential threat from *Bridge* is that courts will allow proof of causation through a theory of "aggregate reliance." Under this theory, if enough people rely on a misrepresentation—whether or not they are in the class—the demand for a consumer good will rise and so will its price. The increased price paid by class members is the alleged injury; there is no need to show that each individual class plaintiff relied on the misrepresentation, only that they all paid the artificially inflated price. Following *Bridge*, a New York district court allowed proof of causation through a theory of "aggregate reliance" rather than requiring individualized proof in a consumer fraud case. The Second Circuit, however, recently rejected that theory, providing some comfort to corporate defendants.

The specter of aggregate reliance emerged in a 2006 decision, *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006). *Schwab* involved a putative RICO class action against cigarette manufacturers for fraudulently marketing "light" cigarettes as a healthier alternative to the regular variety. (The plaintiffs claimed to have paid a higher price for the light cigarettes.) To prove causation, plaintiffs offered expert testimony based on a survey showing that 90.1 percent of light smokers chose light cigarettes based on the desire to reduce health risks. *Id.* at 1048. Based on this testimony, Judge Jack Weinstein certified the class action, holding that the misrepresentations proximately caused the damages and that factual predominance was met through the statistical evidence.

The *Schwab* class certification, however, was reversed by the Second Circuit in *McLaughlin*. *McLaughlin* held that the district court had abused its discretion because reliance "cannot be the subject of general proof." 522 F.3d at 223. The court also pointed to a troubling problem with the *Schwab*'s expert's survey attempting to establish reliance and causation: The price of light cigarettes did not drop after it was revealed that they were not, in fact, healthier.

Following the *Bridge* decision, Judge Weinstein once again applied the theory of aggregate reliance in a class action based on marketing practices by pharmaceutical companies. In *In re Zyprexa Products Liability Litigation*,

Judge Weinstein certified a RICO class action against the manufacturer of the drug Zyprexa, Eli Lilly. 253 F.R.D. 69 (E.D.N.Y. 2008). The plaintiffs claimed that the company systematically drove up demand for the drug by pushing doctors through fraudulent marketing practices to prescribe it for off-label use. The class consisted of insurance providers or other third-party payors who claimed to have suffered injury by paying an inflated reimbursement price for Zyprexa because they did not know about some problems with the drug's efficiency and potential side effects. The key contention was that the doctors had relied on the company's marketing materials when they decided to prescribe the drug, as opposed to independent factors, such as their own experience in prescribing Zyprexa. This reliance led to increased demand and, therefore, an increased price paid by the plaintiffs.

The district court explained that *Bridge* had "placed in doubt" *McLaughlin's* holding that reliance was not subject to general proof. *Id.* at 193. It certified the class on the basis of an "excess price" theory, finding that the plaintiffs had paid more for the prescriptions than they would have had the doctors known about the undisclosed side effects and the drug's true efficacy. Unlike in *Schwab*, though, in *Zyprexa*, there was evidence that the market negatively responded when the company disclosed new information about the drug's dangers.

Just as in *Schwab*, the Second Circuit reversed. *UFCW Local 1776 v. Eli Lilly and Co.*, 620 F.3d 121 (2d Cir. 2010). The court rejected the plaintiffs' argument that there is no need to show reliance under RICO. It explained that after *Bridge*, "while reliance may not be an element of the cause of action, there is no question that in this case the plaintiffs allege, and must prove, third-party reliance as part of their chain of causation. . . . Because reliance is a necessary part of the causation theory advanced by the plaintiffs, we must ask whether reliance can be shown by generalized proof." *Id.* at 133. The court concluded that it could not do so "in this context." The court explained that any reliance by the doctors on the disclosed efficacy and side effects of the drug was not the but-for cause of the plaintiffs' injury because the evidence showed that doctors do not rely on price when they prescribe a drug.

So, even if the misrepresentations of the drug's efficacy and side effects affected the price, those misstatements did not cause the doctors to prescribe it more often and therefore harm the plaintiffs. Moreover, the alleged chain of causation was much too attenuated to satisfy proximate cause because any of several intermediate steps may have affected the price.

Although the *Zyprexa* decision shed considerable doubt on the theory of aggregate reliance advocated by plaintiffs' lawyers in consumer class actions and on lengthy causative chains, it did not close the door completely. Rather, it concluded that the facts of this particular case did not lend themselves to generalized proof.

**The *Bridge* decision eliminated the first-party reliance requirement for RICO class-action claims, but it did not eliminate the causation requirement altogether.**

### **A Positive Outcome from *Bridge*?**

Corporate defendants may be able to use part of the *Bridge* decision to their advantage, based on a 2010 Supreme Court decision. In *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), the Supreme Court addressed proximate cause in a civil RICO case and provided some guidance as to *Bridge's* application. In *Hemi Group*, the City of New York sued an out-of-state cigarette retailer for its failure to provide reports detailing which residents had bought cigarettes. These reports, required by the federal Jenkins Act, were intended in part to allow local jurisdictions to collect cigarette taxes from residents. The City claimed that the retailer's failure to provide these reports had caused the city injury through lost tax revenue. The retailer itself had no legal obligation to collect or pay these taxes.

In a plurality opinion written by

Justice Roberts and joined by Justices Scalia, Thomas, and Alito, the Court concluded that the city did not have a viable RICO claim because it could not satisfy "RICO's direct relationship requirement." *Id.* at 989. According to the plurality, RICO requires a "direct relationship" between the defendant's conduct and the injury, and a link that is too remote or attenuated cannot satisfy this requirement. Here, the causal link between the retailer's conduct (failure to provide reports) and the injury (the city's loss in tax revenue) was insufficiently direct because it was the customers who had "directly caused" the injury by not paying city cigarette taxes, not the retailer. *Id.* at 990. The plurality specifically rejected the city's reliance on *Bridge*, noting that the theory of causation there was "straightforward" and that there were no intervening causes of the injury to the plaintiff.

The *Hemi Group* decision did not question *Bridge's* holding with respect to reliance. Nonetheless, this decision does suggest that corporate defendants may be able to use the *Bridge* decision to their advantage. In cases where the plaintiffs' theory of causation is not direct, the *Bridge* decision lends support to *Hemi Group's* plurality holding that RICO requires a "direct relationship." Corporate defendants may be able to defeat RICO claims on this basis. The fact that *Hemi Group* is a plurality opinion, however, does undercut its strength as a defense. Three justices filed a vigorous dissent, and courts of appeal are not bound to follow a plurality decision. The *Hemi Group* decision may result only in confusion among the courts of appeal as they struggle with how to define the limits of causation under RICO.

### **Conclusion**

The *Bridge* decision eliminated the first-party reliance requirement for RICO class-action claims, but it did not (and could not) eliminate the causation requirement altogether. This holding certainly will not decrease the number of consumer class actions filed against corporations under RICO and may, in fact, increase them as plaintiffs experiment with lengthier causative chains.

*Bridge* is still a fairly new decision, and lower courts continue to refine its reach. Despite the fact that some lower courts

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# Courts Must Ignore Excessive Statutory Damages

By Derek E. Diaz



Derek E. Diaz

In a string of decisions that began 14 years ago, the U.S. Supreme Court waged war on punitive damages. Due process, the court held, bars awards of punitive damages that are “grossly excessive.”

*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). In a recent ruling, however, the Ninth Circuit Court of Appeals may have thrown open the door for grossly excessive awards of statutory damages. We may not know anytime soon whether due process curbs those awards, and many law-abiding companies may settle simply to avoid the specter of catastrophic liability.

In *Bateman v. American Multi-Cinema, Inc.*, a movie-goer sued a large cinema conglomerate for printing too many of his credit-card digits on his ticket receipt. See *Bateman v. Am. Multi-Cinema, Inc.*, No. 09-55108, 2010 U.S. App. LEXIS 19934, at \*1–2 (9th Cir. Sept. 27, 2010). He sought to certify a class of movie-goers whose receipts showed more than five credit-card digits, which is the limit imposed by the Fair and Accurate Credit Transactions Act (FACTA). 15 U.S.C. § 1681c(g)(1). Within weeks of the lawsuit, the cinema conglomerate, American Multi-Cinema (AMC), fixed its receipt-printing problem.

By that time, 290,000 noncompliant receipts had been issued. The receipts did not, however, appear to have caused any class member any actual damages or led to a single instance of identity theft. Nonetheless, because FACTA imposes statutory damages of \$100 to \$1,000 per violation, AMC faced between \$29 million and \$290 million in liability.

The district court sympathized with AMC's plight and denied class certification. Part of its ruling hinged on the gaping disparity between the statutory

damages and the actual harm suffered. *Bateman v. Am. Multi-Cinema, Inc.*, 252 F.R.D. 647, 651 (C.D. Cal. 2008). The sheer enormity of the statutory damages troubled the court. Also factoring into the court's decision was AMC's good-faith effort to comply with FACTA promptly after learning of the problem. Given these factors, a class action was simply not the superior means of resolving the class members' dispute, the district court ruled.

On appeal, the Ninth Circuit disagreed—strongly. None of the district court's rationales should have weighed against class certification, the Ninth Circuit held. Since Civil Rule 23 does not mention those rationales, the district court could consider them only if Congress had intended them as part of FACTA. Nothing in the original statute or its one amendment speaks to class actions.

To some observers, that sort of legislative silence would do nothing to clarify Congress's intent about FACTA class actions, but the Ninth Circuit saw the matter differently. Without a “direct expression” negating class relief, courts “must presume that Congress intended class relief to be available,” the court held. *Bateman*, 2010 U.S. App. LEXIS 19934, at \*23. That means that denying class certification due to enormous statutory damages would “subvert congressional intent,” the court said. *Id.* at 39. So the court took a legislative silence and crafted it into an affirmative mandate for class certification.

Plaintiffs' attorneys will likely push for a broad interpretation of *Bateman*. Indeed, the reasoning of the opinion would seem to apply to any law with statutory damages that said nothing about the propriety of class actions. A few laws, such as the Truth in Lending Act and the Fair Debt Collection Practices Act, do cap class-action awards. Most do not. *Bateman* implies that courts can no longer consider whether, under non-capped laws, class liability would explode in shocking or unconstitutional ways.

On the other hand, *Bateman* does give defense counsel some tools for blunting those sorts of broad arguments. In a

footnote, the court limited its discussion to FACTA and declined to establish a per se rule barring consideration of enormous damages. Also, older laws may warrant different analyses. Before the U.S. Supreme Court's seminal decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), Congress might not have expected courts to apply class relief to every statute, the *Bateman* court noted.

A different result might also occur, the *Bateman* court said, if a company faced “ruinous” statutory damages. 2010 U.S. App. LEXIS 19934, at \*39. Few large, solvent companies would likely clear that hurdle, though. For example, AMC faced \$290 million in potential liability, but that amount was not sufficiently ruinous in light of AMC's \$20 million in annual profits or its \$4 billion in assets. *Bateman* implies that potential liability could be considered only if it would put a company “out of business” or “result in bankruptcy.” *Id.*

The Ninth Circuit drew much of its inspiration from *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). In *Murray*, the court of appeals reversed a district court's denial of class certification, which had rested in part on the enormity of potential statutory damages under the Fair Credit Reporting Act.

The opinion in *Murray*, which Chief Judge Frank Easterbrook wrote, held that “it is not appropriate to use procedural devices” like denying class certification “to undermine laws of which a judge disapproves.” *Id.* at 954. Not all circuit courts appear to see the situation in that light. For instance, the Eleventh Circuit Court of Appeals has suggested, in dictum, that courts may properly consider the enormity of potential statutory damages when deciding whether to certify a class. See *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003).

Both *Murray* and *Bateman* skirted the issue of unconstitutional damages. The excessiveness of any statutory award, those cases held, should be examined after trial, not when deciding class certification. *Murray* justified that procedure on the grounds that, after trial, the court can

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# UCL Class Certification Prospects Still Hazy after *Tobacco II*

By Philip A. Leider



Philip A. Leider

In *In re Tobacco II*, 46 Cal. 4th 298 (2009), the California Supreme Court clarified some aspects of class certification under the state's recently amended Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, but other issues remained shrouded. While the Supreme Court has provided some guidance on the operation of the UCL in state law antitrust cases, the intermediate appellate courts have split on fundamental procedural issues in UCL class actions, and the Supreme Court has denied review. In addition, Chief Justice Ronald George has announced that he will retire from the bench, and his successor, Justice Tani Cantil-Sakauye of the Third District Court of Appeal, does not have an extensive record of UCL decisions. Until it becomes clearer which way the judicial winds will blow, proponents and opponents of class certification both will have to advocate creatively in this area.

## Developments after *Tobacco II*

*Tobacco II* held that only the named plaintiff must establish standing to pursue a class action under the UCL's "fraud" prong, and to have standing, claimants must demonstrate that they actually relied on the allegedly fraudulent conduct and lost money or property as a result. The court divided 4-3 in *Tobacco II*, and Chief Justice George recused himself from the case, making it difficult to predict the outcome of future cases. In the intervening months, the Supreme Court has decided one case of note in the antitrust arena; however, what has been most striking is the court's refusal to grant review

in additional class actions to clarify issues left lingering after *Tobacco II*.

## Proposition 64 Cases

### The "Pass-On" Defense

In *Clayworth v. Pfizer*, 49 Cal. 4th 758 (2010), the Supreme Court held that plaintiffs suing for price fixing under state antitrust law may suffer injury in fact and lose money within the meaning of Proposition 64 and therefore have standing to sue under the UCL, even if they "pass on" the entire alleged overcharge to their downstream customers. The court of appeal had affirmed a summary judgment granted in favor of the defendant based on the so-called pass-on defense. See *Clayworth v. Pfizer, Inc.*, 83 Cal. Rptr. 45, 63 (2008), *depublished upon grant of rev.* ("In sum, the language of the Cartwright Act, all relevant case law, and all relevant statutes lead us to conclude that 'three times the damages sustained' as used in section 16750 refers to actual monetary loss suffered by plaintiffs. Plaintiffs suffered no such loss, as the claimed overcharges were passed on, a pass-on that defeats plaintiffs here. In the language of the issue as framed by the parties, the pass-on defense is available in California.").

The Supreme Court reversed. In an opinion authored by Justice Werdegar, the Court concluded that a rule rejecting the pass-on defense is the one "most closely in accord with the Legislature's overarching goals of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds." *Clayworth*, 49 Cal. 4th at 763-64.

The court recognized that Californians had passed Proposition 64 to curtail abuses of the UCL by limiting standing to sue under the statute. That limitation, however, according to the court, did not deprive purchasers who overpaid for products from suing under the UCL, even if they later recovered the overpayment from others downstream. The court rejected the defendants' argument that the

plaintiffs lacked standing because they had suffered no "compensable loss" under the UCL, emphasizing that the threshold question of standing was distinct from the question of available remedies. *Id.* at 789 ("While Manufacturers argue that ultimately Pharmacies suffered no compensable loss because they were able to mitigate fully any injury by passing on the overcharges, this argument conflates the issue of standing with the issue of the remedies to which a party may be entitled. That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them.").

The court also rejected the defendants' argument that summary judgment was nevertheless correctly entered because the plaintiff was not entitled to monetary relief under the UCL. The court held that an injunction may issue as long as the plaintiff proves the defendant engaged in "an unfair business practice" and noted that "[n]othing in the statute's language conditions a court's authority to order injunctive relief on the need in a given case to also order restitution." *Id.* at 790.

*Clayworth* has been cited by plaintiffs' lawyers for the proposition that it is not necessary for a UCL claimant to allege and demonstrate loss of money or property to pursue a UCL claim because an injunction can issue absent the loss of money or property. The better view is that *Clayworth* reaffirms Proposition 64's requirement of lost money or property for standing purposes, but a claimant need not be entitled to restitution to pursue a UCL claim. In other words, even if the claimant has already had the lost money or property restored to him or her, the initial loss suffices to confer standing to pursue injunctive relief. *Clayworth* cannot be stretched to mean that loss of money or property is not required at all because that would eliminate the standing requirement for claimants seeking only an injunction, a result that is clearly not supported by either the text or legislative history of Proposition 64. It is difficult to gauge the long-term

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impact of *Clayworth* because Justices Chin, Kennard, and Corrigan recused themselves, although the fact that Chief Justice George and Justice Baxter joined the majority opinion suggests that the result and rationale are noncontroversial.

### **Reliance on a False Representation**

The Supreme Court will have an opportunity to clarify Proposition 64's standing requirements in *Kwikset Corp. v. Superior Court*, 171 Cal. App. 4th 645 (2010), *depublished upon grant of rev.*, which was argued and taken under submission on November 3, 2010. In that case, the court of appeal held that a plaintiff alleging that he paid for a lockset misrepresented as "Made in USA" does not have standing to sue under the UCL if "he or she receives a product or service of equivalent value in exchange for the payment." *Id.* at 655.

Unlike in *Clayworth*, the plaintiff did not allege that he paid a premium for the lockset based on its country of origin—instead, he contended that his payment of the purchase price itself, which was allegedly based on false or deceptive information, constitutes the "loss" of money. The court of appeal disagreed, holding that the deception and resulting payment did qualify as an "injury in fact" for purposes of the UCL but that it did not satisfy the further requirement that the claimant "lost money or property" resulting from the deceptive practice. *Id.* at 655 ("As noted, real parties clearly intended to buy locksets. The mere fact they were induced to buy petitioners' locksets because of a 'Made in U.S.A.' or similar label does not mean real parties 'lost money or property' as a result.").

While it is always dangerous to predict how the Supreme Court will rule based on questions and comments at oral argument, it seems likely that the court will agree with the court of appeal that the *Kwikset* plaintiffs sufficiently alleged injury in fact but not lost money or property. Justice Werdegar appeared to be the only one persuaded that the purchase of a lockset under false pretenses sufficed to satisfy both requirements. The remaining justices appeared to support interpreting the two requirements as requiring two separate showings. Justices Corrigan, Chin, and Baxter seemed prepared to reject the notion that a payment for a perfectly functional lockset constitutes "lost money" under the statute.

### **Statutory Penalties Require "Vested Interest"**

Finally, in *Pineda v. Bank of Am., N.A.*, \_\_\_ Cal. 4th \_\_\_, 2010 WL 4643834 (Nov. 18, 2010), the Supreme Court held that statutory penalties for failure to pay timely wages are not recoverable as "restitution" under the UCL. First, the court reaffirmed previous cases holding that the UCL's remedies are generally limited to injunctive relief and restitution. *Id.* It then noted that the statutory penalties at issue were not intended to restore aggrieved employees to the *status quo ante* but were instead designed "to encourage employers to pay final wages on time, and to punish employers who fail to do so." *Id.* at \*7. The decision confirms previous decisions holding that UCL claimants can recover money that they never possessed only if they have a "vested interest" in the funds.

The Supreme Court's recent Proposition 64 decisions help to clarify the UCL's standing requirements in individual cases, but the Court has studiously avoided taking on the thornier issues of class-action practice that deeply divided the court in *Tobacco II*. These fractures have led to widely divergent results in the intermediate appellate courts.

### **The Appellate Courts after Tobacco II**

#### **"Unlawful" Prong Cases Premised on Misrepresentations**

The Fourth Appellate District, Division One, clarified that for claims where the predicate conduct is misrepresentation and deception under the "unlawful" prong of the UCL, as distinguished from the "fraud" prong at issue in *Tobacco II*, the plaintiff must allege and demonstrate actual reliance on the alleged misrepresentation to have standing. In *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350 (2010), the putative class representative alleged that Sharp engaged in deceptive and unfair practices by billing uninsured patients its standard rates for services where it substantially discounted those rates for patients covered by Medicare or private insurance. The plaintiff alleged that Sharp's practices were "unlawful" under the UCL because they violated provisions of the Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 *et seq.*, proscribing certain

misrepresentations in the marketing and supply of goods or services to consumers. Durell further charged that Sharp misrepresented on its website that it offered health care in "a caring, convenient, cost-effective and accessible manner" and breached its agreement for services, which specified that Durell would be obligated to pay Sharp's "usual and customary charges" even though he was actually charged the higher rates applicable only to uninsured patients. *Durell*, 183 Cal. App. 4th at 1361–62.

The trial court sustained Sharp's demurrer to the UCL claim, and the court of appeal affirmed. After reviewing the legislative history of Proposition 64 and analyzing *Tobacco II*, the court concluded that the same causation requirement applies in misrepresentation cases whether they are pled under the "fraud" prong or the "unlawful" prong of the UCL.

The court noted that Durell had not alleged that he actually relied on Sharp's website or the agreement for services in going to Sharp or in seeking or accepting services once he was transported there. Instead, the operative complaint merely alleged that as a "proximate result of Sharp's unlawful business practices," Durell and the proposed class "have suffered economic damages in that they are obligated to pay an unreasonable, unfair and unconscionable debt." *Id.* at 1363. In affirming dismissal of the "unlawful" prong claim, the court concluded that this was precisely the type of "factual nexus" causation the California Supreme Court had rejected in *Tobacco II* in favor of a more stringent, actual reliance requirement.

Citing its own earlier cases construing the "unfair" prong, the court also affirmed dismissal of Durell's claim on the ground that he had not alleged that Sharp's conduct "is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law." *Id.* at 1366. The court further affirmed dismissal of Durell's claims for violation of the CLRA, breach of contract, and breach of the covenant of good faith and fair dealing, as well as the denial of leave to amend.

In *Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373 (2010), the court demonstrated just how low the bar established in *Durell* was actually set. The plaintiff

alleged that “contrary to Sharp’s promise in its Admission Agreement to charge uninsured patients its ‘regular rates,’ it engaged in an unfair and unreasonable pricing practice by charging them ‘exponentially more’ for the same services than it accepted from patients covered by Medicare or private insurance.” *Id.* at 1378. Hale pled violations of the same CLRA subsections as Durell as a predicate for her claims under the “unlawful” prong of the UCL. After finding that Hale had adequately alleged injury-in-fact based on the \$500 down payment for her \$14,447.65 medical bill, the court turned to the causation requirement, which the trial court had found was not met. The appellate court disagreed, crediting Hale’s allegation that “at the time of signing the contract, she was expecting to be charged ‘regular rates,’ and certainly not the grossly excessive rates that she was subsequently billed.” *Id.* at 1385. The court saw “no utility” in requiring Hale to amend her complaint to exchange the term “expecting” for the term “relying.” The court also rejected Sharp’s argument that Hale could not have relied on the admission agreement until after she arrived at the hospital because “[i]t is possible . . . for a person who has arrived at the hospital to rely on the Admission Agreement in deciding whether to proceed with treatment.” *Id.* at 1386. Reversing dismissal of the UCL and CLRA claims on that ground, the court nevertheless affirmed dismissal of Hale’s contract-based claims due to her nonperformance in paying only \$500 of the amount she had been charged and affirmed the denial of leave to amend.

Taken together, *Durell* and *Hale* stand for the straightforward proposition that a plaintiff claiming deception under the UCL must plead facts showing that he or she actually relied on the allegedly deceptive conduct to his or her detriment. In contrast to *Durell*, who did not allege that he relied on either Sharp’s Agreement for Services or its website in seeking or continuing care, Hale alleged that she relied on the admission agreement in paying her \$500 and incurring charges more extensive than she expected.

The lesson for plaintiffs’ counsel is clear: Find a representative plaintiff who can truthfully allege he or she was actually misled by the defendant’s conduct. Alternatively, plaintiffs should consider bringing their claims under the “unfair” prong, without allegations of deception or

misrepresentation, in a jurisdiction where the standard is not as stringent as in the Fourth Appellate District. *See Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 594–98 (2009) (discussing split in authority on the “unfair” prong), *rev. denied* Mar. 10, 2010; *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1273–74 (2006) (urging the California Supreme Court to resolve the split of authority). Defense counsel should challenge inadequate pleading of actual reliance with the caveat that it is often simple for a plaintiff to overcome such defects.

**The lesson for plaintiffs’ counsel is clear: Find a representative plaintiff who can truthfully allege he or she was actually misled by the defendant’s conduct.**

### Intermediate Appellate Courts Split

Aside from the limited guidance provided by the Sharp Healthcare cases, the intermediate appellate courts have split in cases involving more fundamental questions of class certification procedure. For example, notwithstanding the Supreme Court’s admonition in *Tobacco II* that only the named plaintiff, and not the putative class members, need to demonstrate actual reliance on allegedly misleading advertising to pursue a representative UCL claim, in *Cohen v. DirectTV, Inc.*, 178 Cal. App. 4th 966, 979 (2009), *rev. denied* Feb. 10, 2010, the Second District, Division 8, affirmed a trial court’s denial of class certification on the grounds that individualized questions predominated over common questions where the defendant proffered evidence showing that many members of the putative class never saw or relied upon the accused advertising. The *Cohen* court distinguished *Tobacco II* as a standing case, whereas in analyzing “commonality,” a trial court properly focuses on the similarities and dissimilarities in the experiences of putative class members. *Id.* at 981 (“We see no language in *Tobacco II* which suggests

to us that the Supreme Court intended our state’s trial courts to dispatch with an examination of commonality.”). Although the result in *Cohen* seems intuitively correct from a defense perspective, it is somewhat difficult to reconcile with the majority’s rejection of Justice Baxter’s dissent in *Tobacco II*, which expressed the view that “the definition of a class cannot be so broad as to include persons who would lack standing to bring suit in their own names.” *In re Tobacco II*, 46 Cal. 4th at 331 (Baxter, J., concurring and dissenting).

The Supreme Court’s denial of review in *Cohen* and several other post-*Tobacco II* cases has left the field in considerable flux. For example, in two cases where the Supreme Court granted review and then remanded in light of *Tobacco II*, the courts of appeal reached sharply diverging conclusions regarding class certification. Compare *Pfizer, Inc. v. Superior Court*, 182 Cal. App. 4th 622 (2010) (affirming denial of class certification on the ground that the plaintiff failed to show that the majority of putative class members saw or relied upon an advertisement touting Listerine as being as “effective as floss”) with *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174 (2010) (holding that individual questions of reliance and monetary loss did not require denial of class certification in a fading roofing tiles case because individualized proof of reliance and injury was not required for absent class members; remanding only for examination of the named plaintiff’s standing).

Since *Tobacco II*, the cases have largely divided into two rough fields: one set where courts find that individualized issues of reliance and causation defeat class certification, and another where courts find that such issues are irrelevant or germane only to the standing of the putative class representative. *See, e.g., Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (2009) (the variation in marketing pitches heard by purchasers of “vanishing premium” life insurance policies defeats commonality); *In re Vioxx Cases*, 180 Cal. App. 4th 116 (2009), *rev. denied* Mar. 30, 2010 (denial of class certification affirmed due to the predominance of individualized issues in a case alleging that the plaintiffs and class were misled into believing that a prescription drug was safer than a generic pain reliever when it was actually less safe and no more

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# Interview with Harvard Law School's Professor William Rubenstein

By Robert J. Herrington



Robert J. Herrington

edition of the *Newberg on Class Actions* treatise.

## Background

Like many of us, Rubenstein developed his class actions expertise almost by accident. After graduating from Harvard Law School in 1986, Rubenstein clerked for the Honorable Stanley Sporkin and then worked as Project Director and Staff Counsel for the American Civil Liberties Union (ACLU) litigating various discrimination and civil rights cases.

After eight years at the ACLU, Rubenstein took his expertise to Stanford Law School, where he taught civil procedure and federal litigation. While researching issues surrounding how to address disputes between plaintiff groups in civil rights litigation, Rubenstein found himself focusing on case law from the class actions realm, and things took off from there.

"I came to the area almost by accident, but I am glad I did," Rubenstein says. "It is really an exciting area of practice, with the breadth of issues and all the change."

From Stanford, Rubenstein's career took him to UCLA School of Law and then Harvard Law School, where he teaches civil procedure and an advanced course on class actions.

"It is a challenging area to teach," he says. "There is a major difference between

I recently had the opportunity to sit down with Professor William Rubenstein of Harvard Law School to discuss the state of class-action law and his current project, writing a new

the legal doctrine on the one hand and the real dynamics of class-action litigation on the other. There is so much at play that is not evident from the case law—so much in terms of tactics and strategy."

To bring the strategy to life, Rubenstein often uses a "case method" for teaching his course in class actions, following three major cases from beginning to end.

"It gives students the opportunity to see how legal doctrine and the practical dynamics of class-action litigation relate to one another."

In addition to his teaching duties, Rubenstein serves as an expert witness, addressing attorney fees and class-action settlement issues. For those interested, he also offers a seminar on how to become a law professor. More information is available at [www.billrubenstein.com/seminar.html](http://www.billrubenstein.com/seminar.html).

## Updating the *Newberg* Treatise

Perhaps the best news for class-action practitioners is that Rubenstein has taken on the enormous task of revising and updating the *Newberg* treatise on class actions.

"I had used *Newberg* quite a bit over the years," Rubenstein says. "I reached out to Alba Conte and was thrilled when she was receptive to my interest in working on the treatise."

When asked about the amount of time and effort required to be the sole author updating the 13-volume treatise, Rubenstein says he's involving Harvard Law students in the process.

"It is a great opportunity," he says. "We have a group of incredibly bright and motivated students who are eager to work on the project."

Rubenstein says he is "completely redoing" the treatise. "The plan is to replace one volume at a time. The basic structure will be similar, but the goal is to have a current, concise, and user-friendly resource that will be especially useful for practitioners and judges."

The first volume of the updated treatise is slated for publication in the summer of 2011, with volume two set for the end of the year.

"The idea is to have one volume come out every six months, so there will be two new volumes each year—and within about five years, you will have a whole new set."

## Hot Areas in Class-Action Law

When asked to identify "hot areas" in class-action law, Rubenstein points to international/global class-action litigation and third-party financing of class-action lawsuits.

"On the international front, there are really three issues: one, suits by foreign plaintiffs in U.S. courts; two, class actions in foreign countries; and three, the possibility of some type of international class-action tribunal," Rubenstein says. "Lawyers from the plaintiffs' bar are thinking hard about all of these issues. The F-Cubed decision is not going to be the end of it."

Rubenstein refers to the U.S. Supreme Court's decision in *Morrison v. National Australia Bank*, which held that U.S. securities law does not permit claims against foreign domiciled companies brought by foreign claimants who purchased their shares on foreign exchanges.

"The other interesting area is litigation financing," Rubenstein says. "There is no question it's here. The question is how it is going to affect the field."

When asked for his views, he says, "It feels like this is a loosening of the financial challenges that often face the plaintiffs' bar. The structure of plaintiffs' firms may change as more money flows in to fund class actions. This is an area to watch."

Rubenstein also speaks about the trifecta of class-action cases currently pending before the U.S. Supreme Court—*Smith v. Bayer*, which involves the preclusive effects of a denial of class certification; *Dukes v. Walmart*, which

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involves whether courts can certify massive class actions involving disparate groups of hourly and management employees; and *AT&T v. Concepcion*, which involves the enforceability of arbitration and class-action waiver provisions in consumer contracts. Rubenstein authored an amicus brief in the *Concepcion* case on behalf of civil procedure and complex litigation professors underscoring the importance of class-action lawsuits.

"It's really interesting," he says. "Every few years, something happens and people start saying it is the end of class actions. You had the PSLRA and SLUSA, later CAFA, and now these cases. But each time, class actions survive."

Rubenstein has several ideas why class suits are unlikely to disappear. "First, you have an incredibly resourceful and dynamic plaintiffs' bar. The other issue is that business interests, although they often criticize class actions, have a vested interest in seeing the device survive. If defendants know they face liability, they like aggregate claim processing because it is often the only way to bring full closure to an issue and to move on. Therefore, there really are no significant institutional players with a vested interest in completely doing away with class-action lawsuits."

For more information on Rubenstein and his work on the Newberg treatise, visit [www.billrubenstein.com/index.html](http://www.billrubenstein.com/index.html). ■

## Chairs

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class-action matters pending before the Supreme Court (for example, *Concepcion*, *Dukes*, and *Bayer*), we expect a lively and informative program. We are also planning a lunch and dinner. More details will follow.

Please visit our webpage, [www.abanet.org/litigation/committees/classactions](http://www.abanet.org/litigation/committees/classactions), for recent updates and new information. We would also like to thank our terrific team of editors who have assembled and edited the *CADS Report*: Ben Seessel, Robert Herrington, Kathryn Honecker, and Julia Campins. ■

CADS Chairs  
Jocelyn D. Larkin and Greg Cook

## The Class Definition

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products make their buying decisions for a number of reasons, including personal preferences, brand loyalties, price, and other factors, it can be difficult to define a consumer fraud class involving consumer products. A number of decisions this year have applied the overbreadth rule.

In *Judy v. Pfizer, Inc.*, Case No. 042-01946-02 (Mo. Cir. Ct., St. Louis County Jul. 27, 2010), the court refused to certify a class of "all persons and entities who/ which . . . expended any sum of money in order to purchase Neurontin in the State of Missouri for any off-label use" during a 10-year class period. The plaintiffs' theory was that the defendant had committed consumer fraud by marketing the medicine for off-label uses for which it had no scientifically proven efficacy.

The court concluded that the class definition was overbroad because it included many people who suffered no injury at all:

The record before the Court shows that the efficacy of Neurontin varies from patient to patient and from use to use. In addition, the evidence in the record shows that Neurontin is effective for the treatment of many conditions, including neuropathic pain. As such, the Court cannot certify a potential class premised on Neurontin being ineffective for the treatment of off-label conditions because more than a small number of uninjured individuals would be included in the class definition.

Slip op. at 12 (available at [www.consumerclassactionsmasstorts.com/uploads/file/Document\[1\]\(2\).pdf](http://www.consumerclassactionsmasstorts.com/uploads/file/Document[1](2).pdf)).

As the court had explained earlier in the opinion, the class definition cannot include large numbers of people who have suffered no injury. Slip op. at 4 (citing, *inter alia*, *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. 2008)). Here, as in *Nixon*, it was impossible to adjust the class definition to include only those people who derived no benefit from the product, as that would require individualized merits determinations that would make this a failsafe class. See Slip op. at 4, 12.

Similarly, the court in *Cleary v. Philip Morris U.S.A., Inc.*, 265 F.R.D. 289 (N.D. Ill. 2010), refused to certify a class of all smokers in Illinois who smoked light cigarettes during the class period. The plaintiffs' theory was that the defendant failed to disclose that smokers would compensate and ultimately receive the same tar and nicotine from light cigarettes as from regular cigarettes.

The court held that the class definition was overbroad:

Class C is defined so broadly that it is likely to include persons who suffered no detriment at all due to Philip Morris's conduct. Some class members may have purchased Marlboro Lights for reasons wholly unrelated to its purportedly less-unhealthy qualities—for example, because they preferred the flavor over other brands. And other class members may have purchased Marlboro Lights despite being completely unaware of claimed differences between the adverse effects of "light" cigarettes and other, non-"light" brands. It is not entirely clear where Cleary fits in along this spectrum. Though it is true, as Cleary points out, that factual differences among the claims of class members do not necessarily defeat typicality, the likelihood that some significant proportion of class members experienced no injury at all does, at least in a case like this one in which proof of detriment is a necessary element of the claim.

*Id.* at 293 (citation omitted); see also *Hovsepian v. Apple, Inc.*, 2009 WL 5069144 (N.D. Cal. Dec. 17, 2009) (class for defective display screens could not be certified because it included people who have no claim against Apple).

## Conclusion

Class action attorneys—both plaintiffs' and defendants' counsel—would do well to consider the class definition at the outset of the litigation. How membership in the class is determined—including what objective evidence of membership may be required—can make a real difference in whether the class is certified or not. ■

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## Certification Hurdle

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certification may be granted only if the trial court finds, after weighing all of the evidence and resolving any conflicts in expert testimony, that the plaintiff has established by a preponderance of the evidence that each of the requirements of Rule 23 is satisfied. Notwithstanding *Eisen*, the district court must make a finding on a merits issue if it overlaps with a class-certification requirement.

*IPO* and *Hydrogen Peroxide* disavow well-established precedent from their respective circuits in reconfiguring the class-action landscape. They justify this radical move by invoking the Supreme Court's statement in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), that certification may be granted only "after a rigorous analysis" demonstrates that the requirements have been satisfied by reexamining and distinguishing away *Eisen*'s bright-line prohibition on assessing the merits at class certification and by construing the 2003 amendments to Rule 23 to require a more elaborate and "definitive assessment" of the class-certification criteria.

The rationale for these decisions may be debatable or even suspect. However, the implications of *IPO* and *Hydrogen Peroxide* are troubling. In district courts following *IPO* and *Hydrogen Peroxide*, the class-certification process will necessarily become increasingly attenuated, expensive, and risky for plaintiffs. The ultimate lesson of *IPO* and *Hydrogen Peroxide* may be that merits not only matter but are critical in the class-certification calculus.



Mark A. Chavez

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## IPO

The *IPO* decision arose out of the thousands of individual and class actions filed against the underwriters and issuers of initial public offerings (IPO) for alleged securities law violations. After the cases were consolidated into 310 actions in the Southern District of New York, the trial court selected six "focus cases" to resolve class certification. The district court recognized that its consideration of the issue was governed by the Supreme Court's pronouncements in *Eisen* and *Falcon*, the two Supreme Court cases that have defined class-action jurisprudence over the past three decades.

*Eisen* instructed the lower courts not to engage in any assessment of the merits at the class-certification stage. It held that the district court had erred in engaging in an inquiry into the merits to decide how to allocate class notice costs. As the court explained, there is "nothing in either the language or history of Rule 23 that gives a court authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177.

In reaching this conclusion, the Supreme Court explicitly agreed with and adopted Judge Wisdom's ruling in *Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971), explaining that:

In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

*Eisen*, 417 U.S. at 178 (quoting *Mackey Int'l*, 452 F.2d at 427).

Allowing a preliminary assessment of the merits would put the cart before the horse. The Court cautioned that such an inquiry could produce a tentative ruling in favor of plaintiffs that might prove prejudicial to the defendant in later proceedings. *Eisen*, 417 U.S. at 178.

As its endorsement of the *Miller* passage makes evident, *Eisen* created a distinct class/merits dichotomy. The decision directed the lower courts to avoid weighing the merits of plaintiff's claims in resolving class-certification motions. The Court promulgated a bright-line rule that was understood and followed by the lower courts for nearly 30 years.

*General Telephone Co. v. Falcon*, 457

U.S. 147 (1982), provided further guidance to the lower courts without altering *Eisen*'s mandate. The Court considered a certification order resulting from application of the Fifth Circuit's "across the board" rule, which allowed a member of a racial group who was the victim of discrimination in promotion practices to represent a class including other members of the same racial group who had been victims of discrimination in hiring practices. According to the Court, this rule was inconsistent with the requirement that a class representative must "possess the same interest and suffer the same injury" as the class. *Falcon*, 457 U.S. at 155.

The defect in the Fifth Circuit's "across the board" rule allowing class certification in the case was that it failed "to carefully evaluate the legitimacy of the named plaintiff's plea that he is a proper class representative." *Falcon*, 457 U.S. at 160. Although the Court recognized that this issue could sometimes be resolved from the pleadings, it also cautioned that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* Under either approach, the Supreme Court observed that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161. *Falcon* did not explain how this "rigorous analysis" should be conducted or suggest any intention to weaken *Eisen*'s bright-line rule.

In *IPO*, the district court sought to reconcile and apply both *Eisen* and *Falcon*. In accordance with established Second Circuit precedent, it ruled that the plaintiffs were required to make "some showing" and could not merely rely upon their pleadings to support class certification. The pivotal issue on certification was whether the plaintiffs were entitled to rely upon a presumption of reliance to establish their securities law violations and thereby satisfy the predominance requirement of Rule 23(b)(3). Such a presumption exists if the market in which the relevant securities are traded is "efficient." Whether the market for initial public offerings is "efficient" was hotly disputed by the parties. Unless plaintiffs were able to rely upon the presumption of reliance, individual issues would predominate and plaintiffs would be unable to prevail on class certification. Thus,

the “efficient market” issue went both to class certification (predominance) and the merits (reliance).

The plaintiffs presented evidence and argument to establish that the initial public offering market was efficient. The district court found this evidence sufficient to satisfy the plaintiffs’ burden of making “some showing” on this issue. It declined to resolve whether the market was actually efficient, finding the issue was a question of fact to be resolved at trial, and granted class certification.

In a sweeping decision, the Second Circuit reversed the class-certification order. In essence, the court of appeal concluded that the district court had erred in giving too much weight to *Eisen’s* admonition not to inquire into the merits and too little to *Falcon’s* rigorous analysis mandate.

According to *IPO*, the threshold question was “whether a definitive ruling must be made that each Rule 23 requirement has been met or whether only some showing of a requirement suffices.” *IPO*, 471 F.3d at 26. It held that the “some showing” standard adopted in earlier Second Circuit decisions and applied by the district court was based on a “misreading” of *Eisen*. The Second Circuit disavowed its own precedents on this issue and found that *Eisen’s* pronouncement should be limited to the class notice context within which it was made. It then concluded that a district court may not certify a class without determining whether each Rule 23 requirement is satisfied even where the requirement overlaps with a merits issue. *Id.* at 27–34.

Next, *IPO* considered whether a district court may rely upon a plaintiff’s expert report to establish an issue, such as whether the market is efficient, as long as the report is “not fatally flawed” or, instead, must consider “all of the evidence” at the class-certification stage. Here, the Second Circuit departed from and repudiated its previous decisions, which had rejected any weighing of competing expert reports at the class-certification stage. It held that a district court has to evaluate dueling expert reports and make a determination of whether a plaintiff’s expert can establish that the elements of Rule 23 are satisfied. *IPO*, 471 F.3d at 40–41.

Finally, the Second Circuit rule that the standard for determining a Rule 23 motion remains the same when a Rule 23 requirement overlaps with the merits. The district court must find that the proposed

class meets each Rule 23 requirement even if they overlap or are “identical” to a merits issue. Apparently, seeking to avoid any concerns relating to resolving a merits issue at the class-certification stage, the court observed that such determinations would not be binding on the trier of fact. *IPO*, 471 F.3d at 41.

***Hydrogen Peroxide* directly suggests that “rigorous analysis” may be used as a mechanism for eliminating “non-meritorious claims.” This view is supported by the Third Circuit’s approach to defining the “rigorous analysis” requirement of *Falcon*. It did so by articulating a set of principles intended to guide a district court’s class-certification analysis.**

### ***Hydrogen Peroxide***

In *Hydrogen Peroxide*, the plaintiffs sued the defendants for price fixing on behalf of a class of direct purchasers under the antitrust laws. To establish the predominance requirement, the plaintiffs offered the testimony of their expert that antitrust impact was capable of proof through evidence common to the class. Defendants submitted the opinion of their own expert attacking the analysis and opinions of the plaintiffs’ expert. The district court denied the defendant’s *Daubert* motion to exclude the testimony of the plaintiffs’ expert and granted the plaintiffs’ motion for class certification.

On a Rule 23(f) appeal, the Third Circuit embraced the “rigorous analysis” mandate of *Falcon* and cast aside *Eisen’s* prohibition on merits inquiries in even more emphatic terms than the Second Circuit did in *IPO*. The court began its

review of the class certification ruling by underscoring the need to undertake a “rigorous analysis” of the requirements of Rule 23. It found the “[c]areful application of Rule 23” justified because of the “pivotal status” of class certification in large-scale litigation. According to the court, class certification can “create unwarranted pressure to settle non-meritorious claims on the part of defendants.” The court of appeal explicitly acknowledged that this pressure “is a factor we weigh in our certification calculus.” *Hydrogen Peroxide*, 552 F.3d at 309-10.

Thus, *Hydrogen Peroxide* directly suggests that “rigorous analysis” may be used as a mechanism for eliminating “non-meritorious claims.” This view is supported by the Third Circuit’s approach to defining the “rigorous analysis” requirement of *Falcon*. It did so by articulating a set of principles intended to guide a district court’s class-certification analysis.

First, *Hydrogen Peroxide* pointed out that the requirements of Rule 23 “are not mere pleading rules.” Instead, the district court may “delve beyond the pleadings” to assess whether these requirements are satisfied in a particular case. This may include an examination of the factual record underlying the plaintiff’s claims. *Hydrogen Peroxide*, 552 F.3d at 316–17.

Second, a district court cannot “decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met” simply because there is an overlap between a class-certification requirement and the merits of a claim. According to the *Hydrogen Peroxide* court, “*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement.” Conversely, an inquiry into the merits is appropriate where necessary to resolve a disputed class-certification requirement. “A contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact.” *Hydrogen Peroxide*, 552 F.3d at 317–18.

Third, “[a] party’s assurance to the court that it intends or plans to meet the requirements [of Rule 23] is insufficient.” All of the plaintiff’s evidence and arguments are subject to rigorous analysis. If the record demonstrates that serious problems exist, the court should not certify the class based upon assurances that a solution will be found. *Hydrogen Peroxide*, 552 F.3d at 318.

The Third Circuit found support for this principle in the 2003 amendments to Rule 23, while acknowledging that the amendments did not alter the substantive standards for class certification. The amendment to Rule 23(c)(1)(A) changed the timing of the class-certification motion from “as soon as practicable after commencement of an action” to “an early practicable time.” According to *Hydrogen Peroxide*, this “subtle” change reflected the need for a “thorough evaluation of the Rule 23 factors.” The court found a similar import in the introduction of a trial plan concept in the Advisory Committee’s 2003 notes. Similarly, the revision of Rule 23(c)(1) eliminating the language stating that class certification “may be conditional” clarified that certification may be granted only after a searching inquiry demonstrates satisfaction of all of the requirements of Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318–19.

Finally, *Hydrogen Peroxide* concluded that a district court must make “findings” that the proposed class meets each of the requirements of Rule 23. The factual determinations necessary to make Rule 23 findings must be established by a preponderance of the evidence. This means that to certify a class, “the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.” In the proper exercise of its discretion, the court must “resolve factual disputes” and make findings on the Rule 23 requirements “having considered all relevant evidence and arguments presented by the parties.” *Hydrogen Peroxide*, 552 F.3d at 319–20.

After articulating these general principles, the Third Circuit applied them to the defendants’ specific challenges to the class-certification ruling. It found the district court’s acceptance of the plaintiffs’ assurance that they intended to prove their case through common proof and prior decisions, holding that a plaintiff was only required to make a “threshold showing” of antitrust impact, inconsistent with the standards adopted in the opinion. In perhaps the most significant portion of its decision, the *Hydrogen Peroxide* court then turned to the defendants’ contention that the district court had failed to consider the testimony of the defendants’ expert in deciding if common issues predominated. The district court found the plaintiffs’ showing of commonality adequate and declined to weigh the conflicting opinions

of the experts in deciding whether the requirements of Rule 23 had been met. *Hydrogen Peroxide* found this approach to be erroneous. Instead, the court reasoned that all evidence relevant to class certification, including expert opinion, is subject to the rigorous analysis standard. “Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.” The district court cannot uncritically accept plaintiffs’ expert testimony to establish that common issues predominate. It must resolve any dispute between the experts even if the dispute implicates the credibility of one or more experts. Ultimately, the district court must be persuaded by the plaintiffs’ expert.

### Conclusion

*IPO* and *Hydrogen Peroxide* rest on the premise that the “rigorous analysis” language of *Falcon* justifies imposing an exacting standard on plaintiffs to achieve class certification. At least in part to protect class-action defendants from the pressure to settle “non-meritorious claims,” plaintiffs should be forced to prove each of the requirements for class certification by a preponderance of the evidence. The district courts should not hesitate to weigh conflicting expert testimony and resolve conflicts. They should also make findings on issues that overlap with the merits notwithstanding *Eisen*’s admonition to the contrary.

Although not every circuit has adopted the new standard, an increasing number of district courts have embraced the “rigorous analysis” mandate to raise the class-certification hurdle. This trend has a number of implications for the class-certification process, including:

- Timing. The motion for class certification should await the development of an adequate record in the litigation.
- Discovery. The need to establish each requirement for class certification by a preponderance of the evidence militates in favor of expanding the scope and extent of discovery.
- Limitations on merits discovery. The rationale for bifurcating discovery and limiting plaintiffs to class discovery prior to certification falls away, at least wherever there is any overlap between class and merits issues.

- The requisite showing. The enhanced certification hurdle and burden of proof will lead to more detailed and extensive evidentiary presentations at class certification.
- Battles of the experts. In many cases, class-certification decisions will turn on battles of the experts over issues previously left for resolution at summary judgment or trial.
- Evidentiary hearings. Where a district court must weigh conflicting expert testimony, assess the credibility of experts, and resolve the conflicts, an evidentiary hearing may be necessary to allow an informed decision.

It may be, however, that the most important long-term implication of *IPO* and *Hydrogen Peroxide* is that merits matter at the class-certification stage more than many previously realized. These two decisions empower district courts to invoke the “rigorous analysis” language of *Falcon* to eliminate cases through class-certification rulings that they believe lack merit. In courts applying *IPO* and *Hydrogen Peroxide*, the notion that the certification question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious” (*Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000)) may be relegated, along with *Eisen*, to obscurity. Indeed, *IPO* and *Hydrogen Peroxide* may open the door to mini-trials in which plaintiffs will be forced to prove the merits of their claims just to achieve class certification. ■

## Civil RICO Class Actions

*continued from page 9*

have arguably misread *Bridge* or improperly concluded that it permits proof of causation by aggregate reliance, corporate defendants in these class actions are far from defenseless. They will need to shift their efforts from attacks on the lack of first-party reliance to proof that the alleged misrepresentations were not uniform across the class or that any reliance by the plaintiffs (or third parties) on them was not reasonable. These remain potent defenses even in a post-*Bridge* world. ■

## Consumer Class Actions in *Thorogood*

continued from page 1

issued yet another outspoken opinion in which it reiterates its view that “[c]lass action attorneys have an inherent motivation to enrich themselves at the expense of the class.” *Thorogood v. Sears, Roebuck & Co.* (*Thorogood IV*), No. 10-2407, 2010 U.S. App. LEXIS 24641, at \*14 (7th Cir. Dec. 2, 2010).

Whether you are entertained or enraged by such talk, the *Thorogood III* decision presents more than hyperbole. In it, the Seventh Circuit takes a strong stand on the propriety of “preemptive collateral estoppel”—where a defendant, instead of waiting for a case to be filed and asserting the defense of res judicata or collateral estoppel, preemptively pursues an injunction to close the courthouse doors to subsequent litigation.

### The *Thorogood* Case

In *Thorogood*, the plaintiff filed a class-action suit against Sears in Illinois state court, alleging the company’s advertisements concerning its stainless steel Kenmore clothes dryers were deceptive because parts of the dryers were not made of stainless steel and were known to stain clothing. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 743-44 (7th Cir. 2008) (*Thorogood I*). The district court judge certified the class, but the Seventh Circuit soon decertified it, calling it “a notably weak candidate for class treatment” and expressing disbelief that the individual members of the class could possibly have shared the same understanding of the relevant advertisements that the named plaintiff did. *Id.* at 746.

After decertification, Sears made a Rule 68 offer of judgment, which the plaintiff refused. Because the offer exceeded the amount in controversy, the district court dismissed the case as moot and, in its second decision in the case, the Seventh Circuit affirmed. *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 753-54 (7th Cir. 2010) (*Thorogood II*).

### The *Murray* Case

The same attorney who represented the *Thorogood* plaintiff then filed a similar class action against Sears on behalf of another

plaintiff in California state court. Sears removed the case to federal court, *Murray v. Sears, Roebuck and Co.*, No. 4:09-cv-5744-CW (N.D. Cal.), where the Northern District of California held that the plaintiff was collaterally estopped by the Seventh Circuit’s decertification decision in *Thorogood I* from bringing his suit as a class action. 2010 U.S. Dist. LEXIS 83284, at \*15–16 (N.D. Cal. July 21, 2010). The plaintiff then amended his complaint to allege new and different facts, prompting the district court to reverse its earlier ruling and permit discovery to proceed. *Murray v. Sears, Roebuck & Co.*, No. 09-05744 CW, 2010 U.S. Dist. LEXIS 97811, at \*9–10 (N.D. Cal. Sept. 3, 2010).

### The All Writs Act and Collateral Estoppel

As we all learned in the first year of law school, collateral estoppel forbids the re-examination in a subsequent suit of a finding essential to a previous decision. Traditionally, collateral estoppel bars re-litigation of an issue decided in a previous proceeding if the issue necessarily decided in the previous proceeding is identical to the one to be litigated, the previous proceeding resulted in a final judgment on the merits, and the party against whom the collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.

Not as well known as collateral estoppel, the All Writs Act permits federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). This seemingly broad endorsement of judicial interference is balanced against the Anti-Injunction Act, which states that a court “may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283. Given the strong prohibitions laid out in the Anti-Injunction Act, the Supreme Court has cautioned that courts should use the All Writs Act “sparingly and only in the most critical and exigent circumstances.” *Wis. Right to Life, Inc. v. Fed. Election Comm’n*, 542 U.S. 1305, 1306 (2004). The two statutes are often read in conjunction with each other to enable a federal court to enforce its judgments while at the same time limiting its ability to interfere with a state court’s proceedings.

The Seventh Circuit combined these two principles in *Thorogood III*, finding that the All Writs Act enabled it to enter an injunction against attorneys and plaintiffs barring the filing of any further class action suits against Sears related to the rusting dryers.

### Is *Thorogood* a Novel Application of the All Writs Act?

While the All Writs Act may be used to effectuate and prevent the frustration of orders a court has previously issued in exercise of its jurisdiction, it confers no independent basis for subject matter jurisdiction. That is, the federal court’s power under the act is confined to its existing statutory jurisdiction; the act does not enlarge a court’s jurisdiction.

In the class-action context, the All Writs Act has frequently been used to enjoin class members from bringing related concurrent litigation in other courts. This could happen in several situations, such as where a court has been charged with the enforcement of a settlement or while the case is currently proceeding. For example, in *Lucas v. Kmart Corp.*, the court issued an injunction pursuant to the All Writs Act because the court would continue to retain jurisdiction over the case pursuant to a settlement, which had “a term of approximately seven and a half years.” No. 99-cv-01923-JLK, 2006 U.S. Dist. LEXIS 51439, at \*39–40 (D. Colo. March 22, 2006). While proceedings are pending, “a court may enjoin almost any conduct which, left unchecked, would have . . . the practical effect of diminishing the court’s power to bring the litigation to a natural conclusion.” *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004). The Supreme Court has also recognized that an injunction under the All Writs Act is appropriate in order to “preserve the status quo while administrative proceedings are in progress.” *Heckler v. Redbud Hosp. Dist.*, 437 U.S. 1308, 1313 (1985).

Interestingly, the *Thorogood* opinion does not fall into either of these categories. After the class was decertified by the Seventh Circuit, the plaintiff’s individual claim was extinguished by Sears’s offer of judgment, which the district court held eliminated any case or controversy and divested the district court of subject matter jurisdiction. The Seventh Circuit affirmed this decision without argument. Thus, the case was over.

Even though neither the district court nor the Seventh Circuit retained jurisdiction over the case, the Seventh Circuit maintains that the application of the All Writs Act was proper. While this does not comport with the application of the act in most jurisdictions, it is somewhat consistent with Seventh Circuit Precedent.

In *In re Bridgestone/Firestone*, the Seventh Circuit held that the application of the act could be proper to enjoin litigants from proceeding with an identical case. 333 F.3d 763 (7th Cir. 2003). After the Seventh Circuit decertified a national class because of differences in state law, new suits were filed in multiple jurisdictions, with some claiming a national class and others claiming single-state classes. In issuing the injunction, the Seventh Circuit emphasized that it was not meant to enjoin single-state class actions:

The district court had not certified, and our opinion thus did not address, any statewide class. Although we suggested that even a single-state class covering multiple models of tire or SUV would be unmanageable . . . advice designed to ward off what a federal court deems an unproductive investment of judicial time does not create a “judgment” that *forbids* any state tribunal to make the effort.

*Id.* at 766.

While the Seventh Circuit went beyond the “typical” application of the All Writs Act in issuing an injunction pursuant to its earlier decision to decertify a nationwide class, it is important to note the distinctions between *Bridgestone/Firestone* and *Thorogood*.

First, in *Bridgestone/Firestone*, the district court still had jurisdiction over the case. Unlike the situation in *Thorogood*, the action had not been dismissed in the district court for lack of subject matter jurisdiction. While this procedural issue may seem minor, it makes the difference between whether a court is issuing an injunction as an ancillary aid to jurisdiction it already has versus whether it has jurisdiction at all. Indeed, given the lack of any case or controversy in *Thorogood*, the Seventh Circuit’s decision to use the All Writs Act to decide an issue now properly before the California district court could amount to little more than an impermissible advisory opinion. Here, the California district court is properly presented with the facts of the amended complaint in *Murray*, while

the *Thorogood* court, on the other hand, after decertifying a class and dismissing the plaintiff’s individual claim based on a Rule 68 offer of judgment, is no longer presented with any case or controversy.

Second, the *Bridgestone/Firestone* panel enjoined identical classes from proceeding pursuant to its order decertifying the class, whereas *Thorogood III* goes one step further to enjoin any class (national or state-wide) from proceeding in any court, even though the earlier *Thorogood I* decertification decision only covered a “nation-wide” class (in reality, the *Thorogood* class covered 29 jurisdictions).

### Binding a Class That Isn’t Certified

As discussed in *Thorogood III*, the Supreme Court’s grant of certiorari in *Smith v. Bayer*, 131 S. Ct. 61 (2010), may change the injunction that the Seventh Circuit seeks to impose. Can class-certification orders serve as collateral estoppel in other jurisdictions? Although the Seventh Circuit and Eighth Circuit have justified injunctions against classes that were not certified, *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1019-20 (8th Cir. 2002), doing so raises important due process issues. When a class is either not certified or decertified, it would stand, then, that no class exists on which to impose any kind of judgment or order. How can an injunction be issued against a class that, for all legal purposes, does not exist? The Eleventh Circuit has found such injunctions to be improper:

[W]hen placed in its proper perspective, the district court’s denial of the Dealers’ motion for class certification informed the putative class members that they would have to try their case somewhere else; it *invited* them to repair to another forum. Hence, in refusing to entertain their claims, the court implicitly indicated that it was not binding them to its judgment—specifically, its decision, and the bases thereof, denying the Dealers’ motion for class certification. What we have before us, then, is not a judgment, but the *explicit refusal to issue one*. Permitting an injunction to lie under such circumstances would stand the Anti-Injunction Act on its head.

*In re Ford Motor Co.*, 471 F.3d 1233, 1257 (11th Cir. 2006) (emphasis added).

Given the opposing viewpoints on this issue, it remains to be seen whether the use

of preemptive collateral estoppel to bar subsequent class actions will be a practice that is accepted by most courts in the future.

### Is Collateral Estoppel an Inadequate Remedy?

The All Writs Act is an extraordinary remedy that “invests a court with a power that is essentially equitable and, as such, not generally available to provide alternatives to other adequate remedies at law. *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). In *Thorogood III*, the Seventh Circuit gives two reasons why the defense of res judicata or collateral estoppel is an inadequate remedy for class action defendants.

First, the court notes that the defense does not provide a defendant with adequate protection because its rejection by a district court is “an unappealable interlocutory order” that could subject a class-action defendant to a “bog” of discovery and “settlement extortion.”

Second, the court points out that, without an injunction barring the filing of similar class actions, a defendant would have to plead the defense of collateral estoppel “in a myriad of jurisdictions in order to ward off judgment, and would be helpless against settlement extortion if a valid such defense were mistakenly rejected by a trial court.”

But do these fears make the defense of collateral estoppel an inadequate remedy? Although the court uses the phrase, there is really no such thing as an “unappealable interlocutory order.” As an exception to the general rule that only final orders are appealable, in 28 USC 1292(b), Congress provides a procedure under which any interlocutory order may be appealed. Where the district court feels that the order involves a controlling question of law as to which there is substantial ground for a



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difference of opinion, and for which an immediate appeal will materially advance the litigation, it may so state in its order. The court of appeals may then, at its discretion, permit an appeal to be taken.

This procedure is, of course, very different from an immediate appeal as of right, but does that make the defense of collateral estoppel an inadequate remedy? The Supreme Court does not appear to believe so. It has explained that “the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress.” *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985).

It seems clear that that any perceived inadequacy has less to do with the remedy itself and more with the Seventh Circuit’s disapproval of how it was applied.

## Separation of Powers Implications

The unavailability of interlocutory review as of right on a collateral estoppel order is not a procedural error that must be “remedied” by the courts. Instead, it is an intentional limitation on the jurisdiction of the federal courts of appeals and the result of a careful balancing of powers. While, as a general rule, “[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States,” 28 U.S.C. § 1291, there are several exceptions to this rule, narrow categories of immediately appealable interlocutory decisions, in section 1292(a). In 1958, Congress augmented this list by adding § 1292(b), which, as noted above, gives district courts the power to certify for immediate appeal interlocutory orders that are deemed to be pivotal and debatable. “Implicit in § 1291 is Congress’ judgment that the district judge has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.” *Richardson-Merrell*, 472 U.S. at 436. It follows that the California district court in *Murray* is the court to decide the preclusive effect, if any, of the Seventh Circuit’s orders in *Thorogood*.

Sections 2071, 2072(c), and 1292(e) also permit the Supreme Court to

prescribe rules relating to appeals and lower courts. Although the Supreme Court has thus been empowered to clarify when a decision should be considered “final” for appellate review, and to expand the list of appealable interlocutory orders, it cannot do so by court decision, but only through the proper exercise of its rulemaking authority under Sections 2072, 2073, and 2074. Those provisions require, among other things, the establishing of bench-bar committees open to the public and the presentation of any proposed rule to Congress by these committees.

The Supreme Court has instructed that “Congress’ designation of the rule-making process as the way to define or refine when a district court ruling is ‘final’ and when an interlocutory order is appealable warrants the Judiciary’s full respect.” Here, the Seventh Circuit’s concerns about the harsh results of the final judgment rule are well taken. It is, of course, possible that a district court somewhere will make a mistake and reject a class-action defendant’s valid defense of res judicata or collateral estoppel. It is also possible that the absence of an immediate right to appeal that decision could subject the defendant to a “bog” of discovery advanced to extort the settlement of a nuisance claim.

Use of the All Writs Act, however, is not the obvious answer to these concerns. Congress could, if it wished, amend Section 1292 to provide an immediate right to appeal where a district court passes on a res judicata defense in a class action. The Supreme Court could furthermore create such a rule, if it felt one were needed, through the proper rulemaking procedures outlined in Sections 2072, 2073, and 2074. Indeed, it is from this rulemaking authority that the 1998 adoption of Federal Rule of Civil Procedure 23(f), which gives the appellate courts discretion to hear immediate appeals from orders granting or denying motions for class certification, stems.

Here, where Congress and the Supreme Court have not acted to provide a right to interlocutory appeal of a decision on collateral estoppel, the Seventh Circuit’s use of the All Writs Act to circumvent the sometimes harsh results of the final judgment rule appears to be misplaced:

Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever

compliance with statutory procedures appears inconvenient or less appropriate.

*Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 43 (1985).

## When Is an Injunction Against Further Litigation Warranted?

It is important to note that the *Thorogood* decision does not stand for the proposition that the All Writs Act should routinely be used to enjoin subsequent class actions where a federal court has refused to certify a nationwide class. Indeed, in noting that the *Thorogood* case itself was “unusual,” the Seventh Circuit admitted that “[o]rordinarily the ability to plead res judicata or collateral estoppel gives a litigant adequate protection against being harassed by repetitive litigation . . . [a]nd when the remedy at law (as by pleading a defense to a damages action) is adequate, there is no basis for an injunction.” *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985). Using the All Writs Act to enjoin subsequent litigation is not a step that is never justified, but one that should rarely be taken. As the Ninth Circuit explained in *Wood v. Santa Barbara Chamber of Commerce*, “[i]f used too frequently or couched in overly broad terms, injunctions against future litigation may block free access to the courts. 705 F.2d 1515, 1524-25 (9th Cir. 1983). The type of “vexatious litigation” the *Wood* case felt merited this sort of judicial intervention is notable. In that case, a pro se employment dispute had spawned litigation involving over 250 defendants, and the plaintiff had repeatedly attempted to renew the same conflict in, at one point, over 30 district courts.

## What Now?

As of this writing, the Northern District of Illinois has not yet issued its injunction pursuant to the Seventh Circuit’s instructions in *Thorogood III*. The day after the Seventh Circuit released its decision, Sears filed a notice alerting the Northern District of California in the *Murray* case of the Seventh Circuit’s decision. An additional variable mentioned by the panel in *Thorogood III* is the Supreme Court’s recent grant of certiorari in *Smith v. Bayer Corp.*, which may affect the scope of the injunction as it relates to the preclusion of state court cases under the Anti-Injunction Act. ■

## UCL Class Certification

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effective); *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905 (2010) (affirming the denial of class certification in a case accusing a retailer of falsely labeling clothing as “Made in USA” on the ground that many putative class members never saw or relied upon the alleged misrepresentation); *Morgan v. AT&T Wireless Svcs., Inc.*, 177 Cal. App. 4th 1235 (2009) (reversing an order sustaining demurrer in a case asserting that a company sold cellular phones with the knowledge that changes to the company’s wireless network would soon render the phones essentially useless and holding that individualized proof of deception, reliance, and injury are not required under UCL’s fraud prong); *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th 145 (2010), *rev. denied* Apr. 14, 2010 (reversing the denial of class certification because the presence of a controlled substance in over-the-counter products was unlawful and therefore

material to class purchasers as a matter of law); *Weinstat v. Dentsply Intern., Inc.*, 180 Cal. App. 4th 1213 (2010), *review denied* Apr. 14, 2010 (reversing the decertification of a class of dentists who purchased ultrasonic scalers allegedly unfit for oral surgery due to sterilization issues on the ground that the trial court incorrectly assumed that standing requirements of Proposition 64 applied to absent class members). Further, although federal cases are beyond the scope of this article, they too display a wide variation in views regarding the impact, if any, of Proposition 64 and *Tobacco II* in UCL class-certification determinations.

### Conclusion

Whereas cases such as *Clayworth*, *Durell*, and *Hale* matters have helped to clarify the standing requirements of Proposition 64 in individual UCL actions, the California Supreme Court has yet to grant review in a post-*Tobacco II* case squarely presenting the class certification issues dividing the majority so sharply from the minority in *Tobacco II*. It therefore remains unsettled whether issues of deception, reliance, and causation are properly considered at class

certification, with some cases holding that such issues are relevant only to the standing of the named plaintiff and other cases regarding the issues as properly considered in conjunction with the community of interest requirement for class certification. UCL advocates will have to lawyer creatively using the existing intermediate appellate authority, as divergent as it may appear, until the Supreme Court decides to clear the air. Meanwhile, with a new chief justice and a deeply divided court, developments will surely take place incrementally. Chief Justice Cantil-Sakauye joined in the majority opinion in *McAdams v. Monier*, but her own views, whatever they may be, could control the development of the law in UCL class actions for years to come. ■

*(Editor’s note: As this article was going to press, Justice Carlos Moreno announced he would also be leaving the bench. His replacement has not yet been announced. In addition, the California Supreme Court issued an opinion in Kwikset authored by Justice Werdegar holding that “plaintiffs who can truthfully allege they were deceived by a product’s label into spending money to purchase the product, and would not have purchased it otherwise, have ‘lost money or property’ within the meaning of Proposition 64 and*

## Excessive Statutory Damages

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better “evaluate the defendant’s overall conduct and control its total exposure.” 434 F.3d 954. *Bateman* viewed any prejudice consideration of damages as “unduly speculative.” 2010 U.S. App. LEXIS 19934, at \*40. Similarly, the Second Circuit Court of Appeals has suggested that courts should engage in due-process analyses only after trial. See *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003).

At least one commentator has vigorously denounced that approach. In a recent law review article, Professor Sheila B. Scheuerman of the Charleston School of Law argues that “[n]othing relevant to the due process inquiry is gained by delaying consideration of the defendant’s due process rights until after judgment.” Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class*

*Actions*, 74 Mo. L. Rev. 103, 147 (2009).

Professor Scheuerman attacks the delayed-consideration approach on several fronts. Judges need not speculate about the level of statutory damages in a case, Scheuerman points out. Most laws, like FACTA, set a minimum level of damages per occurrence. So, in a class action, figuring out the minimum amount of statutory damages “is a mere mathematical exercise. . . .” *Id.*

Also, the delayed-consideration approach, Scheuerman claims, assumes that courts can throw out statutory minimums in the name of due process. But the very need to reduce statutory minimums defeats the superiority of a class action, she argues. “Simply put, how can a class action, which if certified would necessarily result in mandatory statutory damages in excess of those permitted by the Constitution, be ‘superior’ to individual suits that will not pose such a problem?” *Id.*

Finally, Scheuerman notes that the “reality of class certification” is that a defendant will settle a high-stakes class action rather than bet the company on

an adverse verdict. *Id.* at 148. In *Bateman*, for instance, the parties settled a few weeks after the Ninth Circuit ruled. *Bateman* will thus go unchallenged—at least directly. Lower courts in the Ninth Circuit must now arguably leave undefined the constitutional boundaries of statutory damages.

This seemingly unsolvable riddle stems from courts combining two forms of litigation incentives—class actions and statutory awards. That combination may well have been unintended. Class actions “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action. . . .” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Statutory awards, especially those with fee-shifting provisions, serve the same purpose.

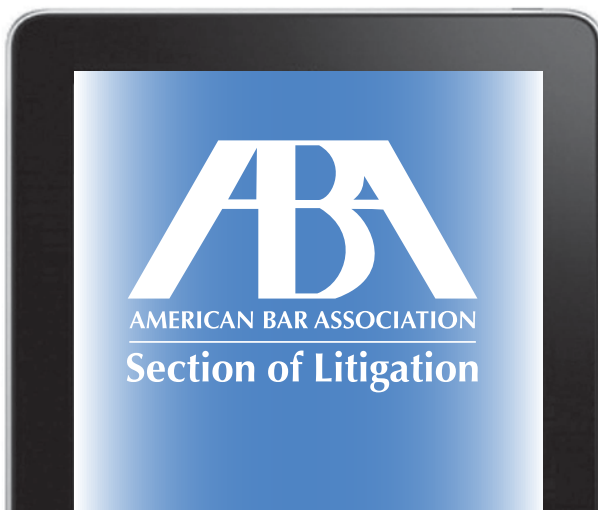
So “the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions.” *Parker*, 331 F.3d at 22. Some federal circuits seem to be inclined to allow that distortion to continue unabated. ■

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