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PERSPECTIVE

2017 IN REVIEW

Procedural rules drive class action case law

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Procedural rules relating to class actions continue to drive the case law, and this past year both plaintiffs and defendants had something to celebrate.

Arbitration Clauses

California courts continued to demonstrate skepticism (or even hostility) to arbitration despite the U.S. Supreme Court's instruction in *AT&T v. Concepcion*, 563 U.S. 333 (2011), and its progeny, which invalidated California law barring class action waivers in arbitration clauses.

In *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), the California Supreme Court invalidated an arbitration clause that waived representative actions for injunctive relief. The plaintiff's putative class complaint alleged that Citibank violated, among other statutes, California's unfair competition law by falsely advertising a credit protection plan. Citibank moved to compel arbitration. The trial court granted the motion except for claims for public injunctive relief because California's *Broughton-Cruz* rule prohibits forcing such claims into arbitration. The Court of Appeal reversed, holding the Federal Arbitration Act preempted *Broughton-Cruz*.

The California Supreme Court did not decide the validity of *Broughton-Cruz* post-*Concepcion*. It held that because the arbitration clause precluded McGill from pursuing a claim for public injunctive relief in any forum (arbitration or otherwise), the provision was contrary to state law forbidding the use of "private agreements" to contravene a "law established for a public reason." The court held that because this state law was not directed specifically at arbitration agreements, it remained valid as a law of general applicability under *Concepcion* and its progeny.

Broughton-Cruz's validity remains uncertain, and thus it remains unclear whether claims for public injunctive relief can still be forced into arbitration. Notably, in 2014 the California Supreme Court held contracts, including arbitration clauses, cannot require an employee to waive the right to file a representative action under the Private Attorneys General Act. *Iskanian v. CLS Transportation Los Angeles LLC,* 59 Cal. 4th 348 (2014). A court of appeal then held Iskanian not only prevented waiver of a PAGA representative claim, but also prevented arbitration of the claim. *See Tanguilig v. Bloomingdale's Inc.*, 5 Cal. App. 5th 665 (2016). And the U.S. Supreme Court did not grant certiorari in either *Iskanian* or *Tanguilig*. Thus, the ban on complete waiver of these representative claims stands for the time being, and as to public injunctive relief, parties will face the conundrum of whether they can force arbitration of such claims.

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Federal Appellate Review of Certification Orders

Orders granting or denying class certification are interlocutory and not subject to immediate appeal absent court permission under Federal Rule of Civil Procedure 23(f).

In the absence of permission under Rule 23(f), some plaintiffs facing a denial of certification

have attempted to manufacture a "final order" by voluntarily dismissing their claims, and then immediately appealing. In *Microsoft v. Baker*, 137 S. Ct. 1702 (2017), the district court granted defendant's motion to strike the class allegations, and the 9th U.S. Circuit Court of Appeals denied review under Rule 23(f). The plaintiff then voluntarily dismissed his claims with prejudice and filed an appeal. The 9th Circuit held it had jurisdiction because the dismissal constituted a final order.

The U.S. Supreme Court reversed, holding the voluntary dismissal was not a "final decision" under Section 1291. In particular, the tactic allowed plaintiffs to appeal immediately an adverse certification ruling, while defendants could only request discretionary review. That would undermine the finality requirement of Section 1291 and abrogate the discretion to hear appeals under Rule 23(f).

Just months later, the 9th Circuit recognized an exception to *Microsoft*. In *Brown v. Cinemark USA, Inc.*, 2017 DJDAR 11636 (9th Cir. Dec. 7, 2017), the district court denied class certification, and the plaintiff continued to litigate individual claims until reaching a settlement, which reserved the right to appeal the class certification decision. When the defendant moved to dismiss the appeal, the 9th Circuit denied the motion, holding it had jurisdiction under Section 1291. The court held the "mutual settlement for consideration" in *Brown* was different from the "sham tactics" employed in *Microsoft*, and thus the settlement and dismissal in *Brown* was a final appealable order.

Class Ascertainability

The extent to which putative class plaintiffs must establish at the certification stage the class is ascertainable is subject to significant dispute in federal courts. Relying on an ascertainability requirement, the 1st, 3rd, 4th and 11th Circuits have held a class representative must establish an "administratively feasible" means to identify class members, and it is insufficient to rely on absent class members' "say so" that they belong in the class.

Siding with the 2nd, 6th, 7th and 8th circuits, the 9th Circuit declined to require a showing of administrative feasibility as a condition of class certification. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). The court held Rule 23 does not contain any "administrative feasibility" requirement and further held the 9th Circuit had not even adopted an ascertainability requirement.

The issue of ascertainability also arose in California's state court system in 2017. In *Noel v. Thrifty Payless*, 2017 DJDAR 11508 (Cal. Ct. App. Dec. 4, 2017), the plaintiff failed to present any evidence establishing how he would identify the class. Instead, he proposed to rely on class member self-identification. In affirming denial of class certification, the court noted "the theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action." The court of appeal then held that a plaintiff must provide a "means of identifying" the absent class members prior to providing notice. The court did not delineate how plaintiffs must satisfy ascertainability, but the decision strongly suggests it is insufficient to rely on absent class members' self-identification following notice.

Tolling of Limitations Period

Finally, one case to watch in 2018 is *China Agritech, Inc. v. Resh*. The Supreme Court previously held putative class actions toll the limitations period for absent class members' individual claims. In *China Agritech*, the 9th Circuit held the tolling applied to an absent class member filing a successive class action. 2017 DJDAR 4741 (May 24, 2017). The court granted review on Dec. 8 to settle a circuit split on the issue.

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