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Class actions: year in review

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The more significant developments affecting class actions filed in California over the past year relate to challenges over who may pursue class action relief, either because of waiver provisions found in arbitration clauses or because of limitations on standing. Many of these developments arose in federal cases.

Article III Standing of Absent Class Members

Much has been written about the U.S. Supreme Court's decision in Spokeo, *Inc. v. Robins*, 136 S. Ct. 1540 (2016). The court held standing is not satisfied merely by pleading a statutory violation; rather a plaintiff must also demonstrate a concrete and particularized injury. The defense and plaintiff bars both tried to claim the result as a victory. Meanwhile, lower courts have struggled to flesh out the details of what constitutes a sufficiently concrete injury.

In the class context, litigants have sparred over whether *Spokeo*'s requirements are limited to the class representative or apply to all absent class members. Although cases have gone both ways, there appears to be an emerging consensus that all class members must show a concrete injury.

For instance, in *Sandoval v. Wal-Mart Stores, Inc.*, the plaintiffs alleged violations of the Unfair Competition Law (UCL) and Consumer Legal Remedies Act (CLRA) because a drug known as IntenseX did not result in the purportedly promised enhanced "sexual power and performance." 15-cv-0738-H-JLB and 15-cv-0120-H-JLB (S.D. Cal. June 10, 2016). The defendant argued the class could not be certified because it included consumers who had not been harmed. The court noted "[t] he Ninth Circuit has been inconsistent about whether [all] absent class members, as opposed to only the named plaintiff, must have standing." Citing *Spokeo*, the district court held the class could not be certified because, among other problems, it included uninjured consumers.

Arbitration Clauses and Class Actions

Wavier of class claims. California courts have been openly hostile to arbitration clauses that ban representative arbitrations and expressed concern about the policy implications of restricting litigants' access to the courts. But in *AT&T v. Concepcion*, 563 U.S. 333 (2011), the U.S. Supreme Court indicated that the Federal Arbitration Act reflected Congress' intent to resolve those policy concerns in favor of arbitration. The *Concepcion* court overruled California case law that used the doctrine of unconscionability to ignore or invalidate arbitration clauses prohibiting class-wide treatment.

The plaintiff bar has nonetheless continued to look for ways to limit the impact of *Concepcion* and its progeny in actions filed in California state court.

Following *Concepcion*¸ a California state trial court held that an arbitration clause was unenforceable because it stated it was not enforceable if prohibited by law, and at the time the parties executed the contract, California banned prohibitions on class-wide arbitration. The California Court of Appeal affirmed, and the California Supreme Court denied review. The U.S. Supreme Court granted certiorari and reversed. It held that, since the California law that prohibited a waiver of class arbitration was invalid under *Concepcion*, it could not serve as the basis to prohibit enforcement of the arbitration provision. *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015).

The plaintiff bar has nonetheless continued to look for ways to limit the impact of *Concepcion* and its progeny in actions filed in California state court. In *McGill v. Citibank*, N.A., 232 Cal. App. 4th 753 (Cal. App. 4th Dist. 2014), the plaintiff brought a putative class action alleging unlawful and deceptive business practices by Citibank. The plaintiff argued the FAA does not preempt the California rule prohibiting the arbitration of UCL and CLRA injunctive relief claims. The trial court denied the defendant's motion to compel arbitration as to the injunctive relief claims, but the Court of Appeal reversed. It reasoned that Concepcion instructs that "the FAA preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban ... interferes with the FAA's objective."

The California Supreme Court granted review, and held oral argument Dec. 7. A decision is expected in early 2017.

Click-wrap arbitration clauses. In the e-commerce world, courts have addressed when class representatives (and class members) can be found to have assented to arbitration provisions. Assuming the consumer claims not to have actual knowledge of the arbitration terms, the question is whether he should have known of the terms, such that his assent to the transaction included assent to the terms and conditions.

Federal courts have generally found that a consumer is bound when the e-commerce retailer uses a click-wrap agreement, which requires the consumer to expressly assent to the terms. But, in the absence of other indications of assent, courts have been hesitant to enforce terms and conditions when the retailer uses a browsewrap agreement, which does not require the user to manifest assent to its terms or conditions explicitly; rather, the terms and conditions are presented via hyperlinks on the website, and the user allegedly gives his assent by using the website. *See, e.g., Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014).

This year, a California Court of Appeal followed the precedent in *Nguyen*. *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855 (Cal. App. 2d Dist. 2016). The court held that, when a website makes its terms available via a conspicuous hyperlink but otherwise provides no notice nor prompts users to affirmatively assent, even close proximity of the hyperlink to buttons consumers must click, without more, "is insufficient to give rise to constructive notice" of the terms. Thus, e-commerce companies that want to maximize the chance that their terms and conditions will be enforced should avoid solely relying on a browsewrap agreement.

Mooting Plaintiff's Claims

Defendants in some cases have made offers of judgment under Federal Rules of Civil Procedure, Rule 68 to representative plaintiffs and then sought dismissal on mootness grounds. In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the U.S. Supreme Court joined the majority of federal courts of appeal that have rejected this defense. Justice Ruth Bader Ginsberg wrote that, when a plaintiff rejects an offer of settlement, his interest in the suit remains the same as it was before the offer. The offer thus has no "operative effect."

After *Campbell-Ewald*, the 9th U.S. Circuit Court of Appeals heard *Chen v. Allstate Ins. Co.,* 819 F.3d 1136 (9th Cir. 2016), in which the plaintiff filed a putative class action alleging violations of the Telephone Consumer Protection Act. The defendant went beyond a mere Rule 68 offer of judgment and deposited $20,000 in full settlement of the claims into an escrow account. The 9th Circuit nonetheless rejected the defendant's attempt to moot the class action. The panel reiterated *Campbell-Ewald*'s holding that a claim only becomes moot once a plaintiff actually receives all of the relief to which he is entitled.

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