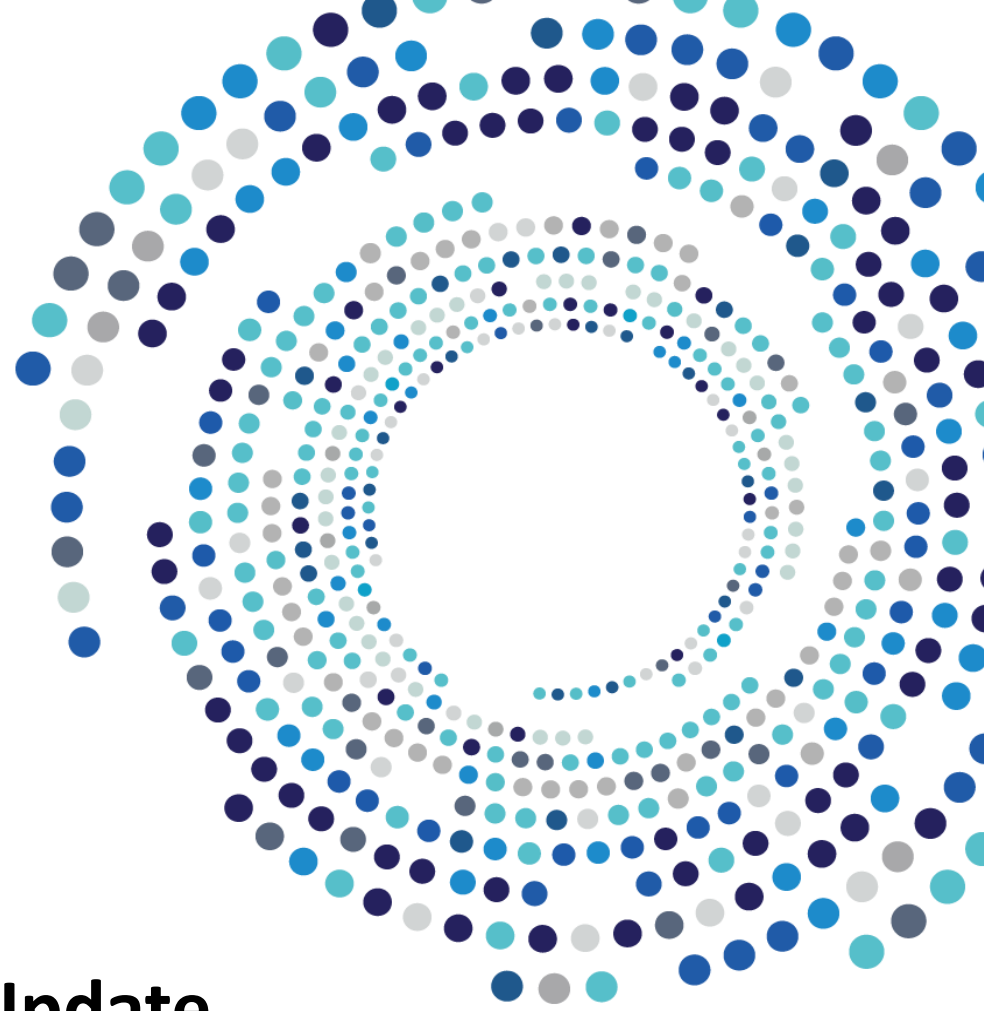

24th Annual Consumer

Financial Services Institute

Class Actions & Litigation Update

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Overview

- Rule 23(e) Amendments
- Supreme Court Developments
- Issues Arising Under California's Unfair Competition Law
- Litigating Ascertainability

Rule 23(e) Amendments

Rule 23(e) Amendments

- Rule 23(e) Changes and Implications
- Northern District of California's Guidance Regarding Class Settlements
- Courts' Focus in Recent Cases Rejecting Proposed Class Settlements

Pre-December 2018 Rule 23(e)

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

The Rule 23(e) Changes

The claims, issues, or defenses of a certified class–or a class proposed to be certified for purposes of settlement–may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

Advisory Committee Notes:

> The introductory paragraph of Rule 23(e) is amended to make explicit that its **procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court**. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. **Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement**. (emphasis added)

The Rule 23(e) Changes – Rule 23(e)(1)

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

The Rule 23(e) Changes – Rule 23(e)(1) (Cont'd)

Advisory Committee Notes:

- "At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members."
- "Regarding the proposed settlement, many types of information might appropriately be provided to the court . . .
    - *benefits that the settlement will confer on the members of the class . . .*
    - *details of the contemplated claims process and the anticipated rate of claims . . .*
    - *distribution of unclaimed funds . . ."*
    - *"likely range of litigated outcomes" and "risks that might attend full litigation . . ."*
- "The court should not direct notice to the class until parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing."

The Rule 23(e) Changes – Rule 23(e)(2)

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

The Rule 23(e) Changes – Rule 23(e)(2) (Cont'd)

Advisory Committee Notes:

> The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

> A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process . . . This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns.

The Rule 23(e) Changes – Rule 23(e)(2) (Cont'd)

Additional Advisory Committee Notes:

- "Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important."
- "If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved."
- "Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding."
- "Paragraph (D) calls attention to a concern that may apply to some class action settlements – inequitable treatment of some class members vis-à-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."

The Rule 23(e) Changes – Rule 23(e)(3) & Rule 23(e)(4)

(3) **Identifying Agreements.** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) **New Opportunity to be Excluded.** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

Advisory Committee Notes:

> Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

The Rule 23(e) Changes – Rule 23(e)(5)

(5) **Class-Member Objections**

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment In Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration maybe provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

The Rule 23(e) Changes – Rule 23(e)(5) (Cont'd)

Advisory Committee Notes:

> Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).
>
> But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors – or their counsel – have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes . . .

The Rule 23(e) Changes – Rule 23(e)(5) (Cont'd)

Advisory Committee Notes (Cont'd):

> The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies with consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. **The term 'consideration' should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel**. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees. (emphasis added).

Northern District of California's Guidance Regarding Class Settlements

- Published on November 1, 2018
- Applies to preliminary approval, final approval, and post-distribution accounting
- Generally consistent with Rule 23(e) amendments, but enumerates many specific requirements for each stage of class settlement approval process
- Guidance not binding, but warns that "[f]ailure to address the issues discussed . . . may result in unnecessary delay or denial of approval"
- **Likely to be used as a "checklist" by courts in other districts**
- Available at:

https://www.cand.uscourts.gov/ClassActionSettlementGuidance

Exemplar N.D. Cal. Guidance

- The motion for preliminary approval should state, where applicable:
    - *If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.*
    - *In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.*
- The parties should ensure that the class notice is easily understandable, taking into account any special concerns abut the education level or language needs of the class members.

Exemplar N.D. Cal. Guidance (Cont'd)

- **Class counsel should consider the following ways to increase notice to class members:**
    - *Identification of potential class members through third-party data sources*
    - *Use of social media to provide notice to class members*
    - *Hiring a marketing specialist*
    - *Providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members*
    - *Distributions to class members via direct deposit*

Exemplar N.D. Cal. Guidance (Cont'd)

- Lead class counsel should provide the following information about at least one of their comparable past class settlements and should summarize the information in an "**easy-to-read chart that allows for quick comparisons with other cases**":
  - Total settlement fund
  - Number of class members
  - Number of class members to whom notice was sent
  - Attorneys' fees and costs
  - Number and percentage of claim forms submitted
  - Average recovery per claimant
  - Methods of notice
  - Amounts distributed to each *cy pres* recipient
  - Administrative costs
  - Where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests.
  - Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Exemplar N.D. Cal. Guidance (Cont'd)

- Within 21 days after settlement fund distribution and payment of attorneys' fees, parties should file a post-distribution accounting and summarize certain information in an "**easy-to-read chart that allows for quick comparisons with other cases**":

  - Total settlement fund
  - Number and percentage of claim forms submitted
  - Number and value of checks not cashed
  - Attorneys' fees and costs
  - Attorneys' fees in terms of percentage of the settlement fund
  - Amounts distributed to each *cy pres* recipient
  - Number of class members
  - Average and median recovery per claimant
  - Number and percentage of opt-outs
  - Largest and smallest amounts paid to class members
  - Administrative costs
  - Number of class members to whom notice was sent and not returned as undeliverable
  - Number and percentage of objections
  - Method(s) of notice and the method(s) of payment to class members

Exemplar N.D. Cal. Guidance (Cont'd)

- Within 21 days after distribution, the parties should also summarize:
  - *Where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests*
  - *Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class*
- Within 21 days after distribution, the parties should also post the Post-Distribution Accounting including the summary chart on the settlement website.

Questions:

- How will these post-distribution accounting data disclosure requirements impact class settlement strategy, if at all?
- How will they impact court evaluations of proposed class settlements?

Recent Cases Rejecting Class Settlements

In re Yahoo! Inc. Customer Data Sec. Breach Litig., No. 16-md-02752, 2019 WL 387322 (N.D. Cal. Jan. 30, 2019)

- Plaintiffs alleged data breaches in 2013, 2014, 2015, and 2016 resulting in billions of compromised accounts and disclosure of significant non-public personally identifiable information
- Settlement entered before decision rendered on class certification
- Court rejected proposed settlement that provided $50 million to the proposed class (as well as certain credit monitoring and identity theft protection services)

Recent Cases Rejecting Class Settlements (Cont'd)

In re Yahoo! Inc. Customer Data Sec. Breach Litig. (Cont'd)

- **Court concluded that settlement:**
  - *Inadequately disclosed settlement fund size*
    - E.g., *parties failed to disclose how much would be spent on credit monitoring services or class notice and settlement administration*
  - *Inadequately disclosed release of claims in connection with 2012 data breach (complaint did not allege claims in connection with 2012 data breach)*
    - *This could be remedied with proper notice and amended complaint*
  - *Provided that attorneys' fees award would be paid separate from settlement fund, which might cause unearned attorneys' fees to revert to defendants*
  - *Failed to adequately disclose the scope of defendant's commitment to enhance data security*
  - *Inaccurately estimated class size—estimate was lower than defendant's previous public estimates and seemed unsupported relative to U.S. population—preventing court from assessing strength of plaintiffs' case.*
- Parties required to file new motion for preliminary approval by April 8, 2019

Recent Cases Rejecting Class Settlements (Cont'd)

Parsons v. Kimpton Hotel & Rest. Grp. LLC, No. 16-cv-05387, 2018 WL 4441268 (N.D. Cal. Sept. 13, 2018)

- Claims arise from data breach resulting in theft of non-public personally identifiable information and credit card information
- Settlement entered before decision rendered on class certification
- **In rejecting proposed settlement that provided for up to $600,000 to the proposed class, court concluded that:**
    - *$15 hourly rate to compensate for time spent protecting against identity theft was "far too low to fully compensate injured class member[s], and the three-hour cap will likely shortchange at least some subset of injured class members"*
    - *Class notice suggested documentation would be required to support class members' expenses and could be reworded to more clearly indicate that expenses may be simply be described*
    - *$800,000 anticipated attorneys' fees award was unjustified given the low expected participation rate and the $600,000 cap*
- Plaintiffs filed a new motion for preliminary approval on December 10, 2018, which court granted on January 9, 2019 (final approval hearing scheduled for June 20, 2019)

Supreme Court Developments

Supreme Court Developments

- *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018)
- *Nutraceutical Corp. v. Lambert*, No. 17-1094 (Feb. 26, 2019)
- *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017)
- *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471 (pending)

China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018)

- Securities putative class action filed on **June 30, 2014** in the Central District of California alleging China Agritech had violated the Securities and Exchange Act through fraud and misleading practices
    - *Plaintiff purchasers of China Agritech's common stock alleged China Agritech fraudulently overstated revenue on the NASDAQ stock exchange*
    - *Once the misconduct was discovered, stock price plummeted*
- Two other sets of China Agritech shareholders had previously brought putative class actions premised on the same alleged conduct:
    - *Dean v. China Agritech, Inc.*, No. 2:11-cv-11331, Originally Filed **Feb. 11, 2011** (C.D. Cal.)
        - Order Denying Motion for Class Certification Issued **May 3, 2012**
    - *Smyth v. Chang*, No. 2:13-cv-03008, Originally Filed **October 4, 2012** (D. Del./C.D. Cal.)
        - Order Denying Motion for Class Certification Issued **September 26, 2013**
- Note: if *American Pipe* tolling applied, another putative class action would have been timely until **April 17, 2015**

China Agritech (Cont'd)

- **The District Court dismissed the action as untimely:**
  - Action was barred by the two-year statute of limitations applicable to securities fraud claims. *Resh v. China Agritech, Inc.,* No. 14-5083, 2014 WL 12599849 at *3 (C.D. Cal. Dec. 1, 2014).
- **Ninth Circuit reversed and remanded:**
  - *American Pipe & Construction Co. v. Utah* required the tolling of the statute of limitations during the pendency of previous putative class action
- **In a unanimous decision, the Supreme Court reversed, holding that**:

> [A] putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, [may not] commence a class action anew beyond the time allowed by the applicable statue limitations.

China Agritech (Cont'd)

- Supreme Court explained that prior holdings in *American Pipe* and *Crown, Cork & Seal Co. v. Parker* turned on efficiency
    - *Holdings removed incentive for individual putative class members to attempt to intervene in pending lawsuits or to file additional lawsuits*
- In *China Agritech*, efficiency and economy concerns warranted opposite result:
    - *With class claims "efficiency favors early assertion of competing representative claims" (Op. 1807)*
    - *Early assertion of class claims may:*
        - *(a) help the district court select the best class representative*
        - *(b) limit the number of class certification rulings*
        - *(c) ensure sufficient time remains under the statute of limitations for additional class actions to be filed if certification is denied*

Class claims are different than individual claims

China Agritech (Cont'd)

- Other considerations:
  - *Rule 23(c)(1)(A) expressly states that class certification should be resolved early*
  - *2003 amendments to Rule 23(c) lengthen time for class discovery, allowing district court to consider multiple class-representative filings at once*
  - *The Private Securities Litigation Reform Act of 1995 (federal statute enacted to stem filing of frivolous securities lawsuits) ("PSLRA"), by requiring notice of commencement of a class action, was intended to allow a district court to consider multiple lead plaintiffs at once*
- Supreme Court did not overrule *American Pipe* or *Crown, Cork, Seal & Co. v. Parker:*
  - *Clarified holdings apply tolling to potential plaintiffs bringing subsequent individual lawsuits*
  - *Ninth Circuit erred by extending tolling rules established in those decisions to cases involving successive class actions*

China Agritech (Cont'd)

- **Concurrence (Sotomayor, J.):**
  - Would limit holding to PSLRA because, unlike Rule 23, the PSLRA has specific notice provisions that merit a unique treatment of PSLRA claims
  - Existing safeguard already prevent indefinite tolling:
    - *statutes of repose*
    - *powers of comity among courts to limit litigation costs*
    - *equitable limitations*
  - Concerned that Court's holding could ***increase*** unnecessary filings

Exemplar Post-*China Agritech* Decisions

Asberry v. The Money Store, No. 2:18-cv-01291, 2018 WL 3807806 (C.D. Cal. Aug. 8, 2018).

- Three plaintiff borrowers initiated class action against mortgage lenders, alleging, among other things, that lenders impermissibly charged them post-acceleration late fees and split fees with non-attorneys
- Similarly situated plaintiffs had earlier filed a class action against defendants (*Mazzei v. Money Store*) and prevailed at trial on late fee claims but lost on fee-splitting claims
  - After trial, plaintiff sought new trial on fee-splitting claims—defendant allegedly failed to preserve database that would have provided evidence of division of fees—but court denied motion
  - **After trial, court also decertified late fee class:**
    - *Plaintiff failed to present class-wide evidence that class members were in privity with defendants*
    - *Plaintiff was not typical of the putative class because his loan originated with and was serviced by defendant, unlike putative class members whose loans were originated by a different lender*
    - *Decertification furthered interest of absent class members to the extent plaintiff failed to produce enough evidence to protect their interests at trial*

Exemplar Post-*China Agritech* Decisions (Cont'd)

Asberry (Cont'd)

- Second Circuit affirmed *Mazzei* trial court's decision to decertify late fee class and deny plaintiff's request for new trial on fee-splitting claim
- One of Plaintiffs in new *Asberry* case claimed he should have been identified as a class member in both classes in *Mazzei*, but claimed he did not receive notice and did not know of alleged improper late fee charges and fee splitting until 2017
- Plaintiffs in *Asberry* sought to certify a class of similarly situated plaintiffs with respect to fee-splitting claims and late fee claims. Court concluded that:
  - *Fee-splitting claims dismissed as barred by res judicata*
  - *Late fee claims barred by statute of limitations (unless tolled):*
    - *Alleged improper late fees incurred between 2003 and 2006*
    - *Statute of limitations expired as early as 2008 or as late as 2010*
    - *Action filed on February 16, 2018*

Exemplar Post-*China Agritech* Decisions (Cont'd)

Asberry (Cont'd)

- Tolling of Late Fee Claims:
  - Plaintiffs asserted that during pendency of *Mazzei*, statute of limitations was tolled based on *American Pipe*
  - Supreme Court then issued its *China Agritech* decision
  - **In granting defendants' motion to dismiss, the court explained that:**

> [W]hile the members of the Late Fee Class II may pursue their claims individually, to the extent they are not barred by the statute of limitations, [*China Agritech*] forecloses the possibility that statutes of limitations were tolled on a class-wide basis.

  - **With respect to plaintiffs' equitable tolling argument, court explained that:**

> The only allegation supporting Plaintiffs' new action is their disdain for the Southern District of New York decertifying the Late Fee Class, which is insufficient to support a claim for equitable tolling.

Exemplar Post-*China Agritech* Decisions (Cont'd)

Practice Management Support Services, Inc. v. Cirque du Soleil, Inc., No. 14 C 2032, 2018 WL 3659349, at *5 (N.D. Ill. Aug. 2, 2018) (granting motion to decertify class):

> The *China Agritech* Court explained that "[a] would-be class representative who commences suit after expiration of the limitation period . . . can hardly qualify as diligent in asserting claims and pursuing relief. Her interest in representing the class as lead plaintiff, therefore, would not be preserved by the prior plaintiff's timely filed class suit." 138 S. Ct. at 1808.
>
> As this reasoning shows, Practice Management is not a diligent class representative. It asserts claims based on faxes sent in 2009, and it waited until 2014 to file this case. It had "every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation." *Id.*

Exemplar Post-*China Agritech* Decisions (Cont'd)

Lindblom v. Santander Consumer USA, Inc., No. 1:15-cv-00990, 2018 WL 3219381, at *6 (E.D. Cal. June 29, 2018) (denying motion to intervene):

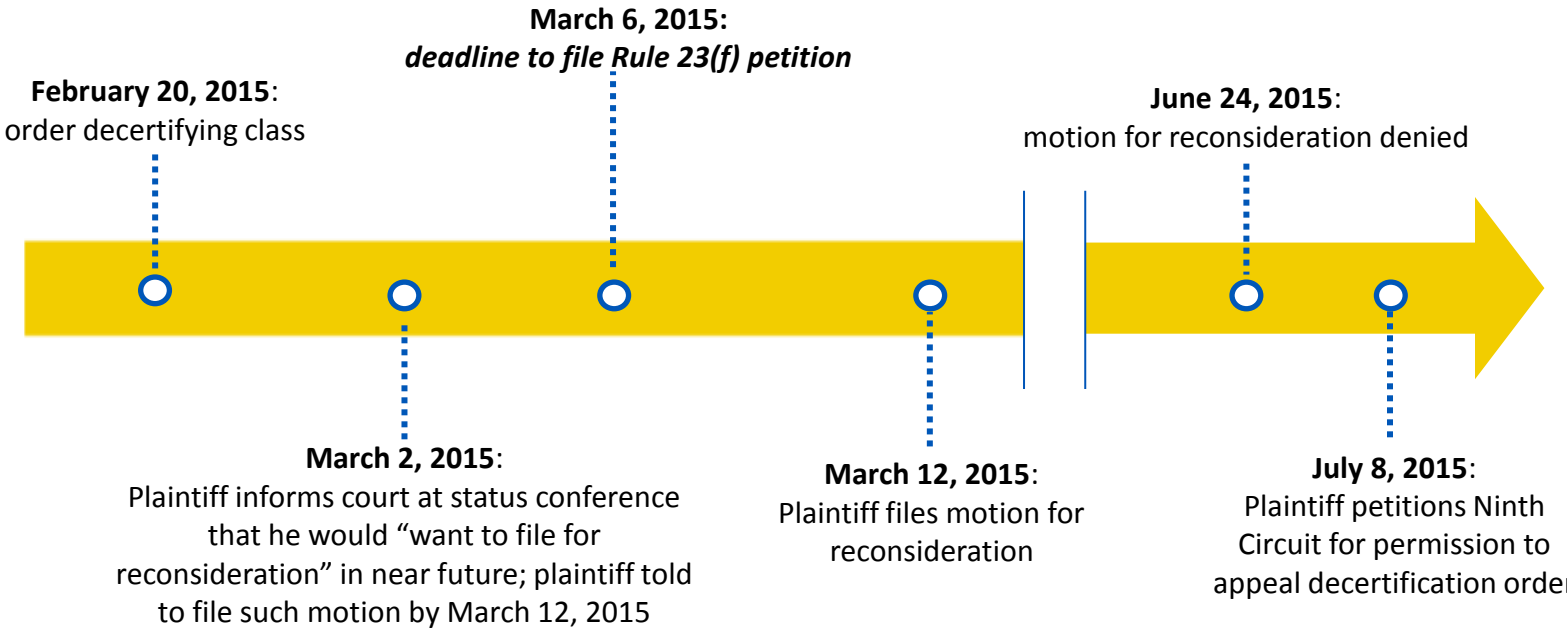
> Further, to the extent that the proposed intervenors class claims are no longer viable in a successive action, *China Agritech* leaves undisturbed the proposition that movants may still benefit from *American Pipe* tolling in pursuit of their individual claims. Therefore, movants need not intervene here to pursue their individual claims. While the ability to bring a claim in separate litigation is not in itself a sufficient reason to deny intervention . . . that the proposed intervenors will suffer no harm if intervention is denied is relevant to the Court's assessment of the timeliness of its motion.

Christianson v. Ocwen Loan Servicing, LLC, 338 F. Supp. 3d 989, 993 n.2 (D. Minn. 2018) (denying motion to dismiss):

> *China Agritech* "is limited to addressing putative classes that spring from class actions already on file . . . Because Plaintiff brought an individual action, the [*China Agritech*] decision is inapplicable."

Nutraceutical Corp. v. Lambert, No. 17-1094 (Feb. 26, 2019)

- Nutraceutical Corporation's marketing of dietary supplement allegedly violated California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act
- Originally allowed to proceed as a class

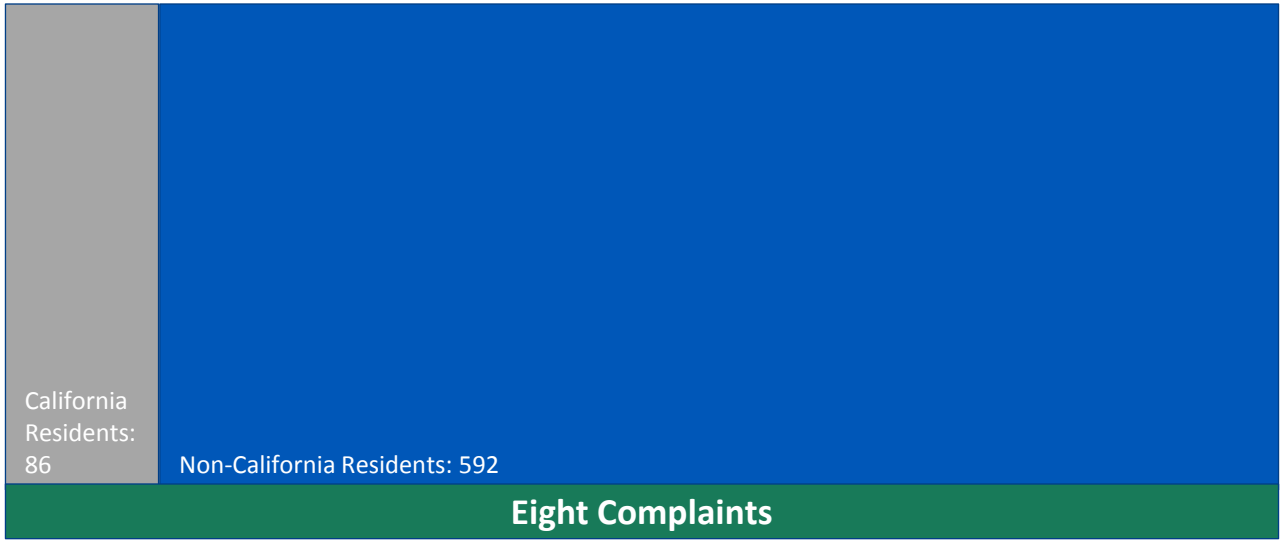


Nutraceutical Corp. (Cont'd)

- Rule 23(f): "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered"
  - *Ninth Circuit deemed petition timely because, in its view, Rule 23(f) deadline should be tolled under the circumstances*
  - *Ninth Circuit reversed decertification order*
- **Supreme Court reversed:**
  - *Rule 23(f) is non-jurisdictional claim-processing rule that can be waived or forfeited by an opposing party, but not necessarily subject to equitable tolling*
  - *Rule states that petition must be filed "within 14 days" of "an order granting or denying class-certification"*
  - *Federal Rules of Appellate Procedure single out Rule 23(f) for inflexible treatment*
  - *Advisory Committee Notes serve as reminder that interlocutory appeal is **exception** to general rule that appellate review must await final judgment*
  - *Timely seeking reconsideration may or may not be enough, but that did not happen here*

Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017)

- 600+ plaintiffs, mostly non-California residents, filed civil action in California state court against Bristol-Myers Squibb asserting claims based on injuries purportedly caused by Plavix



- Nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not take Plavix in California, and were not injured by Plavix in California

Bristol-Myers Squibb Co. (Cont'd)

- California Supreme Court held that California courts have specific jurisdiction to hear non-resident claims:
  - *Applied a "[s]liding scale approach to specific jurisdiction" under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." 137 S. Ct. 1773, 1778-9.*
  - *BMS's extensive contacts with California permitted exercise of jurisdiction based on less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required*
  - *Nonresident and resident claims were based on the same allegedly defective product and allegedly misleading marketing and promotion of the product*

Bristol-Myers Squibb Co. (Cont'd)

- **United States Supreme Court reversed:**
  - *For a state court to exercise specific jurisdiction, the "suit" must "arise out of or relate to the defendant's conduct with the forum"*
  - *Issue is not just about "immunity from inconvenient or distant litigation" – a "federalism interest may be decisive"*
- California Supreme Court did not identify an adequate link between state and nonresidents' claims
- As potentially relevant to class certification issues, the Supreme Court stated that:

> The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."

Bristol-Myers Squibb Co. (Cont'd)

- **Exemplar Post-*Bristol-Myers Squibb Co.* development in class action context:**
  - *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) (Rule 23 "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the federal court rules of procedure shall not abridge, enlarge, or modify any substantive right.") (dismissing claims of non-resident class members) *rev'd on other grounds by Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, No. 14-23032, 2018 WL 3659349 (N.D. Ill. Aug. 2, 2018).
  - *Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc.*, No. 16-cv-9281, 2018 WL 3474444, at *4 (N.D. Ill. July 19, 2018) ("In this class action, the *Bristol-Myers* opinion is applicable and its import clear: The Court lacks jurisdiction over the Defendants as to the claims of the nonresident, proposed class members.") (granting in part and denying in part the Motion to Strike the class allegations).
  - *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 5 (D.D.C. 2018) ("There is no controlling or persuasive precedent in this jurisdiction, and no circuit authority elsewhere, that addresses Bristol-Myers Squibb's application to nationwide class actions in federal courts. There are only district court cases, and among them there is near even split on the question.") (granting motion to certify order for interlocutory appeal).
  - *Thompson v. Transamerica Life Ins. Co.*, No. 2:18-cv-05422, 2018 WL 6790561, at *6 (C.D. Cal. Dec. 26, 2018) (declining to dismiss class allegations relating to nonresident putative class members, reasoning that putative class members are not parties to the pending action and therefore not relevant to the jurisdictional analysis).

An Update on *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471

- In June 2016, Citibank brought debt collection suit in North Carolina state court against George Jackson
    - *In his answer, Jackson asserted a class action counterclaim against Citibank and a class action third party claim against Home Depot and Carolina Water Systems*
    - *Citibank subsequently dismissed its claims against Jackson (without prejudice) and Jackson subsequently amended his class action complaint to remove Citibank*
- Home Depot filed notice of removal under the Class Action Fairness Act and motion to realign the parties to denominate Jackson as plaintiff and the other parties as defendants
- District court denied Home Depot's motion to realign the parties and granted Jackson's motion to remand, holding that since Home Depot was not an original defendant, Home Depot lacked removal power
- **The Fourth Circuit affirmed**

Update on *Home Depot U.S.A., Inc.* (Cont'd)

- 28 U.S.C. § 1441 provides that if a civil lawsuit is brought in state court and a federal district court has original jurisdiction, then "the defendant" may remove the case to federal court
- In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104-09 (1941), the Supreme Court held (under the predecessor to Section 1441, which similarly referred to "the defendant") that a plaintiff may not remove counterclaims brought by the defendant:
  - The Court determined that Congress, by limiting removal to defendants, intended that plaintiffs not be able to remove cases
- CAFA (2005) amended the diversity statute (29 U.S.C. § 1332) to give federal courts original jurisdiction over most class actions where at least $5 million is at issue and any class member is a citizen of a State different from any defendant
  - *CAFA enacted 28 U.S.C. § 1453, establishing rules for the removal of class actions*
  - *Unlike Section 1441, Section 1453 authorizes removal by "any" defendant*
  - *The Supreme Court has held that "no anti-removal presumption attends cases invoking CAFA"*

Update on *Home Depot U.S.A., Inc.* (Cont'd)

- The Supreme Court has not previously addressed the removal rights of a third-party counterclaim defendant (i.e., a party who joined the case as a defendant to a counterclaim but was not an original plaintiff or defendant)
- Before *Home Depot*, appellate courts have unanimously denied such removal rights, including under CAFA, but construing *Shamrock Oil* as requiring that only an "original defendant" may remove a case. *E.g.,:*
  - *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir. 2017)
  - *In re Mortg. Elec. Registration Sys., Inc.,* 680 F.3d 849, 853–54 (6th Cir. 2012)
  - *Westwood Apex v. Contreras*, 644 F.3d 799, 804–05 (9th Cir. 2011)
  - *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334–35 & n.4 (4th Cir. 2008)

Update on *Home Depot U.S.A., Inc.* (Cont'd)

- **Home Depot's arguments:**
  - *Home Depot was never a plaintiff, but was brought into the action as a defendant*
  - *Even if Home Depot cannot remove the case under Section 1441, Home Depot can remove the case under CAFA, which uses the phrase "any defendant" rather than "the defendant" – which Congress passed with the intention to expand removal power*
  - *CAFA evinces a strong preference for removing class action proceedings*
- **At the Supreme Court hearing on January 15, 2019:**
  - *Justice Alito was skeptical that Congress intended CAFA to allow a class action to stay in state court just because "it comes into state court in this strange back-door way"*
  - *Justice Roberts stated that "if you have a statute that says 'any defendant,' it would seem that includes [third-party defendants] as well"*
  - *Justice Gorsuch asked, "Now how can it be that the word 'defendant' expands and contracts like that?...[W]hat I can't abide or understand at least, is how the word 'defendant' could be so Procrustean as to just happy to fit you"*

Update on *Home Depot U.S.A., Inc.* (Cont'd)

- **Parties and amici suggested much was at stake in the decision (not surprisingly):**

  > Shortly after CAFA was enacted, a . . . law review article encourag[ed] class-action lawyers to exploit this [CAFA removal] loophole by filing their claims as counterclaims . . . The author noted that, although that tactic had already been employed a number of times in the first two years after CAFA's enactment, those cases represented "just the tip of an approaching iceberg."
  >
  > Brief for Petitioner Home Depot at 44 (discussing Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 199 & n.45 (2007) (discussing and collecting cases)).

- **Supporting Home Depot:**
  - *The Retail Litigation Center, Inc.*
  - *DRI – The Voice of the Defense Bar*
  - *Washington Legal Foundation/Allied Educational Foundation*
- **Supporting Jackson:**
  - *National Consumer Law Center*
  - *American Association For Justice*
- The Supreme Court's decision is expected by June 2019

Issues Arising Under California's Unfair Competition Law

Issues Arising Under California's Unfair Competition Law

- What Constitutes "Public Injunctive Relief"?
- Article III Standing
- Unconscionability and Judicial Abstention
- Duty to Disclose
- Jury Trial and Limits on State-Wide Injunctive Relief

What Constitutes "Public Injunctive Relief"?

McGill v. Citibank, 2 Cal. 5th 945 (Cal. 2017)

- Plaintiff claimed that defendant marketed a "credit protection" plan in a deceptive manner, allegedly in violation of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL") and Consumers Legal Remedies Act ("CLRA"). The trial court granted defendant's motion to compel arbitration of all claims except the UCL, FAL and CLRA claims to the extent they sought "public injunctive relief."
- The California Supreme Court originally granted review to address the continued "vitality" of the *Broughton/Cruz* rule; however, the Court deferred deciding the issue and instead addressed whether an arbitration agreement was "valid and enforceable insofar as it purports to waive [plaintiff's] right to seek public injunctive relief *in any forum*."
- The Court held that a provision in an arbitration agreement precluding an arbitrator from awarding public injunctive relief is unenforceable as a matter of California public policy.
- "Public injunctive relief" is relief having the "'primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public." *McGill*, 2 Cal. 5th at 955 (quoting *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1077 (1999)).

What Constitutes "Public Injunctive Relief"? (Cont'd)

- A few early federal court decisions applied the *McGill* rule and rejected attempts to enforce arbitration agreements that barred claims for public injunctive relief.
  - *Blair v. Rent-A-Ctr., Inc.*, No. C 17-02335 WHA, 2017 WL 4805577 (N.D. Cal. Oct. 25, 2017), *appeal filed*, No. 17-17221 (9th Cir. Oct. 30, 2017)
  - *McArdle v. AT&T Mobility LLC*, No. 09-CV-01117-CW, 2017 WL 4354998 (N.D. Cal. Oct. 2, 2017), *appeal filed*, No. 17-17246 (9th Cir. Nov. 2, 2017)
  - *Tillage v. Comcast Corp.*, No. 17-cv-06477-VC, 2018 WL 4846548, at *1 (N.D. Cal. Feb. 15, 2018), *appeal filed*, No. 18-15288 (Feb. 21, 2018)
- Oral argument in *Blair*, *McArdle* and *Tillage* took place on February 12, 2019.

What Constitutes "Public Injunctive Relief"? (Cont'd)

- More recently, other federal courts have concluded that *McGill* does not preclude enforcement of an arbitration agreement where "private" relief is at issue, even when sought on behalf of a putative class.
  - *Johnson v. JP Morgan Chase Bank, N.A.*, No. 17-cv-2477-JGB-SP, 2018 WL 4726042 (C.D. Cal. Sept. 18, 2018) (holding that prayer for injunctive relief in putative class action based on breach of contract did not constitute "public injunctive relief" under *McGill*)
  - *McGovern v. U.S. Bank N.A.*, No. 18-CV-1794-CAB-LL, 2019 WL 329537, at *9 (S.D. Cal. Jan. 25, 2019) (finding that any benefit to the general public would be only incidental because the general public was not subject to any of the fees at issue)
  - *Croucier v. Credit One Bank, N.A.*, No. 18-cv-20-MMA-JMA, 2018 WL 2836889 (S.D. Cal. June 11, 2018) (finding *McGill* inapplicable where injunctive relief would primarily benefit a small class of similarly situated individuals)
  - *Kim v. Tinder, Inc.*, 2018 WL 6694923, No. 18-cv-03093-JFW-AS (C.D. Cal. July 12, 2018) (finding *McGill* inapplicable: "An injunction that purports to control only the price charged to users of Tinder's dating app who wish to subscribe to Tinder Plus and are age 30 or over is clearly one that would not affect the public at large and, therefore, would only qualify as a private injunction.")

Article III Standing

Davidson v. Kimberly-Clark Corp., 889 F.3d 956, *as amended* (9th Cir. May 9, 2018)

- Plaintiff alleged that she paid a premium for wipes manufactured and advertised by defendant as "flushable" even though they allegedly were not flushable.
- A number of district courts had previously dismissed claims for injunctive relief under the UCL and CLRA on the grounds that plaintiffs lacked Article III standing even if plaintiffs had statutory standing under state law.
- Held: "[A] previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm."
- The original opinion, *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1115–16 (9th Cir. 2017), justified a finding of standing, in part, based on fear of a "perpetual loop" of defendants removing false-advertising cases to federal court and obtaining dismissals of claims for injunctive relief. This rationale was eliminated from the amended opinion.

Article III Standing (Cont'd)

- The amended opinion applies an arguably more straightforward analysis under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), and other United States Supreme Court cases, finding:
  - **A concrete and particularized injury.** Plaintiff's allegation that she would purchase truly flushable wipes by defendant if possible was sufficient to state a claim.
  - **Sufficient likelihood of repeated injury.** Plaintiff faced the similar injury of being unable to rely on defendant's representations in deciding whether to purchase the product in the future.
  - **A redressable injury.** An injunction would prevent defendant from using the term "flushable" on its wipes until truly flushable, thus requiring truthful advertisements upon which plaintiff could rely.

Unconscionability and Judicial Abstention

De La Torre v. CashCall, Inc., 5 Cal. 5th 966 (2018)

- Low-income borrowers brought a putative class action in federal court, alleging that a California lender's interest rates violated the "unlawful" prong of the UCL by being unconscionably high in violation of section 22302 of the Financial Code (generally prohibiting "unconscionable" consumer loans).
- The district court granted defendant's motion for summary judgment, finding the court could not provide a remedy for plaintiffs without intruding into economic policy because it would have to make a determination as to "the point at which CashCall's interest rates crossed the line into unconscionability."
- On a certified question from the Ninth Circuit, the California Supreme Court concluded that plaintiffs stated a cause of action under the UCL.
- The Court rejected the argument, under the doctrine of judicial abstention, that any limitations on interest rates should be set by the Legislature rather than on an *ad hoc* basis by courts: "Although courts must proceed with caution in this area, the possibility that an interest rate is unconscionable in a particular context is not so different relative to any other kind of potential contractual defect that it justifies concluding that courts lack power or responsibility to address unconscionable interest rates."

Duty to Disclose

Hodson v. Mars, Inc., 891 F. 3d 857 (9th Cir. 2018)

- Plaintiff claimed that defendant's failure to disclose, on its products' labels, the involvement of child or slave labor in the products' supply chain was fraudulent, unfair and unlawful in violation of the UCL, CLRA and FAL.
- The Ninth Circuit affirmed dismissal of plaintiff's claims, given that there was no physical or safety defect involved and plaintiff failed to sufficiently plead how the omitted information related to the products' "central functionality."

Brady v. Bayer Corp., 26 Cal. App. 5th 1156 (2018)

- Plaintiff alleged that the sale of "One A Day" vitamin supplements with directions to take two per day was likely to deceive members of the general public.
- The California Court of Appeal held that plaintiff stated a claim for deceptive business practices because directions on the back label of the multivitamin "gummies" instructed consumers to chew two per day rather than one, as the brand name indicated.

Jury Trial and Limits on State-Wide Injunctive Relief

Nationwide Biweekly Administration, Inc. v. Superior Court, 24 Cal. App. 5th 438 (2018), *review granted* 426 P.3d 302 (Cal. Sept. 19, 2018)

- The California Court of Appeal granted Nationwide's request for writ relief and directed that the trial court grant a jury trial on the issue of liability, reasoning that unlike a private claim under the UCL (for which there is no right to a jury trial), the "gist" of a UCL action brought by the government is legal rather than equitable.
- Notably, the Court of Appeal initially denied the writ petition and granted it only after the California Supreme Court directed the appellate court to enter an order to show cause why petitioners were not entitled to relief, which suggests that the Supreme Court may affirm on review.

Abbott Laboratories v. Superior Court, 24 Cal. App. 5th 1, *as modified on denial of reh'g* (Cal. Ct. App. June 27, 2018), *review granted* 424 P.3d 268 (Cal. Aug. 22, 2018)

- The California Court of Appeal held that a county district attorney may not recover statewide monetary relief (i.e., either civil penalties or restitution) under the UCL, but is instead limited to seeking such relief within the district attorney's own territorial jurisdiction.
- Resolution of this issue is particularly important because it may have implications not only for state-wide injunctive relief claims, but also settlements in cases where plaintiffs purport to sue on behalf of all California residents.

Litigating Ascertainability

Litigating Ascertainability

- Ascertainability & Administrative Feasibility Circuit Split
- Exemplar Federal District Court and State Court Cases
- Strategies for Raising or Overcoming Ascertainability Issues

Administrative Feasibility Requirement

- **Administrative Feasibility**:

> A plaintiff must show that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d. 349, 355 (3d Cir. 2013)

- Circuits are split as to whether plaintiffs must demonstrate that the class can be ascertained via a method that is administratively feasible:
  - ***Administrative Feasibility Required:*** *First, Third, and Fourth Circuits*
  - ***No Separate Administrative Feasibility Requirement:*** *Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits*
- Even where administrative feasibility is not required, courts must still ascertain putative class members using objective criteria at some stage in litigation

In re Asacol Antitrust Litig., 907 F.3d. 42 (1st Cir. 2018)

- Plaintiffs filed consumer protection and antitrust claims against drug manufacturer in connection with coordinated withdrawal of drug months before its patent protection expired and before manufacturer's introduction of similar substitute drug that ran for many years longer
  - *Plaintiffs proposed a class consisting of indirect purchasers of defendant's medications, including individual consumers who purchased the products from drug retailers in twenty-six jurisdictions*
  - *Defendants argued that it was not possible to ascertain the putative class members because injury-in-fact, an element of the claim, would be an individualized issue.*
    - Defendants argued that they had reasonable bases to challenge class members' claim affidavits
  - *Plaintiffs argued that the individualized injury issue could be resolved by allowing class members to submit a claim for with "data and documentation," and that a claims administrator would evaluate each claim pursuant to a court-approved formula*

In re Asacol Antitrust Litig. (Cont'd)

- **District court granted class certification, but First Circuit reversed on interlocutory appeal**:
  - *Plaintiff need not demonstrate that every class member was injured before class certification, but where injury-in-fact is an element of a claim, a class cannot be certified based on an exception that defendant will have no opportunity at trial to challenge injury allegations*
  - *District court must offer a reasonable and workable plan for how the defendant will have the opportunity to challenge individual class members' injury allegations in a manner consistent with due process*
  - *In this case, it was not administratively feasible to determine whether persons were members of the putative class:*
    - *Plaintiffs did not demonstrate a "reasonable and workable plan" for how the defendants would be provided the opportunity to argue that individual class members did not suffer injury-in-fact, which was an element of the claim, in a way that would protect the defendants' constitutional rights to defend themselves*

True Health Chiropractic, Inc. v. McKesson Corp., 896 F.3d. 923, 929 (9th Cir. 2018)

- Plaintiffs alleged that defendant medical device manufacturer sent unsolicited fax advertisements without prior consent and without opt-out notices
- Plaintiffs proposed various subclasses consisting of "[a]ll persons or entities who received faxes from McKesson from September 2, 2009 to May 11, 2010, offering [certain McKesson services], where the faxes do not inform the recipient of the right to 'opt out' of future faxes":

Subclass A	Subclass B	Subclass C
Putative class members that "(1) provided their fax numbers when registering a product purchased from [defendant], and/or (2) entered into software-licensing agreements . . ."	Subset of subclass A, including putative class members who "(1) 'check[ed] a box during their software registration that indicated their express permission to be sent faxes as a preferred method of communication to receive promotional information,' (2) 'complete[d] a written consent form whereby they further provided their express permission to receive faxes,' and/or (3) 'confirm[ed],' via phone, 'that they would like to continue to receive faxes and/or would like to change their communication method preferences' during an 'outreach program to update contact information of certain preexisting customers'"	Subset of subclass A, including putative class members who gave consent in oral or email communications with defendant's representatives

True Health Chiropractic, Inc. (Cont'd)

- District court denied class certification on the grounds that individual issues in defendant's various consent defenses defeated predominance
- Ninth Circuit Arguments
  - **Defendant:**
    - *Not possible to identify putative class members because defendant had consent defenses against putative class members that could not be resolved without individualized inquiries*
  - **Plaintiff:**
    - *FCC rule required both solicited and unsolicited faxes to contain opt-out notice, such that variations in consent would be irrelevant*
    - *In the alternative, district court should have certified subclasses in which individualized consent issues were not present*

True Health Chiropractic, Inc. (Cont'd)

- **Ninth Circuit analyzed two proposed subclasses separately:**
  - *Order denying class certification with respect to Subclass C (subject to individual consent defenses based on individual communications) affirmed given variation in communications and business relationships as evidenced through a corporate declaration and deposition testimony*
  - *Order denying class certification of Subclass B (where consent defenses not based on individual defenses) reversed on the reasoning that there was little or no variation in the manner in which the putative subclass members provided consent, and consent could be determined by examining the product registrations or user licenses*
- Ninth Circuit held that district court did not run afoul of the Ninth Circuit's decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d. 1121 (9th Cir. 2017) (holding that administrative feasibility is not a prerequisite to class certification), because district court did not impose an "administrative feasibility" requirement
  - *Instead, according to the Ninth Circuit, with respect to the subclass subject to individual consent defenses, the district court properly denied certification on predominance grounds*

Other Recent Appellate-Level Decisions Addressing Ascertainability and Administrative Feasibility

- *Seeligson v. Devon Energy Prod. Co., L.P.*, No. 17-1032, 2018 WL 5045671 (5th Cir. Oct. 16, 2018)
- *Lacy v. Cook Cty., Illinois*, 897 F.3d 847 (7th Cir. 2018)
- *Langan v. Johnson & Johnson Consumer Cos., Inc.*, 897 F.3d 88 (2d Cir. 2018)
- *Ocwen Loan Servicing, LLC v. Belcher*, No. 18-90011, 2018 WL 3198552 (11th Cir. June 29, 2018)

Exemplar Federal District and State Court Ascertainability Cases

Reyes v. BCA Fin. Servs., Inc., No. 16-cv-24077, 2018 WL 3145807 (S.D. Fla. June 26, 2018)

- **Contrast *In re Asacol* (First Circuit) with *Reyes* (from Eleventh Circuit):**
  - *TCPA claims against debt collector in connection with alleged practice of using a "predictive dialer" that called numbers provided by a collections software, which had been loaded with phone numbers supplied by defendant's clients, which had received the numbers from consumers.*
  - *The predictive dialer used artificial or prerecorded voice prompts to determine whether it had called the right person. If the person indicated that the wrong number had been dialed, the defendant did not call the number again.*
  - *Plaintiffs proposed a class consisting of "[a]ll persons and entities throughout the United States (1) to whom [defendant] placed more than one call, (2) directed to a number assigned to a cellular telephone service, but not assigned to the intended recipient of [defendant's] calls, (3) by using computer assisted dialing technology . . . (4) from September 23, 2012 through September 23, 2016."*

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Reyes (Cont'd)

- **Contrast *In re Asacol* (First Circuit) with *Reyes* (from Eleventh Circuit) (cont'd):**
  - *Defendant argued class was not ascertainable on grounds that its records could not be used to determine class members, and third-party databases plaintiffs proposed were subject to large error rates*
  - *Plaintiffs argued that the defendant's records could be used as a starting point that could be supplemented with class member affidavits*
  - ***District court granted certification:***

According to the court, there was no indication that in this particular case, self-identification through affidavits would not be administratively feasible or "otherwise problematic"

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Royal Park Investments SA/NV v. Bank of New York Mellon, No. 14-cv-06502, 2017 WL 3835339 (S.D.N.Y. Aug. 30, 2017)

- Plaintiff mortgage securities investor alleged numerous claims based on purported violations of representations and warranties relating to underlying mortgage loans' credit quality
- Proposed class included "[a]ll persons and entities who held Certificates in the Covered Trusts and were damaged thereby"
- **District court held that proposed class was not sufficiently definite:**
    - *No time constraints, which meant that due to the "ever-changing composition of the [class] membership," it would be impossible to determine the identity of class members without temporal or contextual limitations*
    - *Without time constraints, class membership would depend on date used to determine whether entity held certificate, and class would include entities that likely did not suffer losses tethered to any defendant conduct*
- Frequently cited in similar cases where lack of explicit temporal limitations in the class definition would mean the class composition would constantly shift

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Royal Park Investments SA/NV: Subsequent History

- Ascertainability issues were addressed by redefining the class to include a temporal limitation: "All persons and entities who held Certificates in the Covered Trusts ***at any time between the date of issuance to no later than 60 days after notice of class certification and opportunity to opt out is issued*** and were damaged as a result of The Bank of New York Mellon's conduct alleged in the Complaint"
- Renewed motion for class certification nevertheless denied for failure to satisfy predominance requirement:
    - *Breach of contact claims: it would be necessary to prove both specific loan breaches and defendant's knowledge of those breaches, both of which would require individualized inquiry offsetting any efficiencies from proceeding as a class*
    - *Standing: individualized determination of entities that maintained the right to sue would be required, because the right to sue depended on whether the putative class members acquired or retained the litigation rights associated with the certificates in connection with the certificate transfers*

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Royal Park Investments SA/NV: Subsequent History (Cont'd)

- Renewed motion for class certification nevertheless denied for failure to satisfy predominance requirement (cont'd):
    - Individual inputs would be required for damages model:
        - *dates when defendant discovered breaches*
        - *time it would have taken to process a repurchase demand based on breaches*
        - *willingness or ability of warranting parties to repurchase a loan*
        - *whether allegedly breached loans would have been rejected, repurchased, or cured by warrantor*
    - Statute of limitations would depend on class member's residence, requiring individualized analysis

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Foster v. Green Tree Servicing LLC, No. 15-cv-01878, 2017 WL 5508371 (M.D. Fla. Nov. 15, 2017)

- Claims under Fair Debt Collection Practices Act and Florida's analogous law against mortgage servicer
- Alleged defendant attempted to collect a debt while knowing plaintiffs were represented by counsel
- **Proposed class included all individuals in Hillsborough County, Florida:**
  - *(1) who had a mortgage loan serviced by Green Tree . . .*
  - *(2) that Green Tree acquired after it was in default*
  - *(3) who were represented by counsel regarding the mortgage debt*
  - *(4) and whom Green Tree contacted directly in an attempt to collect the mortgage debt after it was notified they were represented by counsel*
  - *(5) on or after August 12, 2014*

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Foster (Cont'd)

- District court held that class was not ascertainable because determining class membership would require review of thousands of defendant's customer files:
  - Defendant had conducted a file-by-file review of a sample of relevant servicing files that included a "cease communication" flag
    - *With respect to less than half of the sampled files, the defendant was aware that the customer was represented by counsel*
    - *With respect to less than a third of the sampled files, the customer was in default when defendant acquired the loan and contacted the customer directly*
    - *Could include individuals with whom defendant was permitted to communicate directly, despite the flag*
  - Defendant showed that only way (for defendant) to determine why file included a "cease communication" flag was to conduct a loan-by-loan review
  - Defendant demonstrated that file-by-file review would be required to determine whether defendant had actual knowledge the customer was represented by counsel and the date it acquired knowledge, among other customer-specific information

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674 (D. Md. 2017)

- TCPA claims against defendant auto finance company
- Defendant allegedly made unauthorized automated calls to plaintiff's cellphone despite his revocation of consent
- Plaintiff's proposed class included "all persons within the United States who, on or after February 26, 2012
    1) *received a non-emergency telephone call from [defendant],*
    2) *to a cellular telephone, and*
    3) *through the use of an automatic telephone dialing system."*

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Ginwright (Cont'd)

- Defendant argued that common issues would not predominate given individualized consent issues
    - Customers complete non-standard forms from a variety of different car dealerships that differ in language and terms

Whether a customer provided or revoked consent would differ on a case-by-case basis

- Defendant did not present the argument as an ascertainability challenge, and the court found that the class was ascertainable
- District court held that common issues relating to class members' consent would predominate over any common issues, and that it could not conduct mini-trials to resolve individual class members' claims

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Noel v. Thrifty Payless Inc., 17 Cal. App. 5th 1315 (1st Dist. 2017) *petition for review granted* 411 P.3d 525 (Cal. 2018)

- Plaintiff bought an inflatable swimming pool that "turned out to be much smaller than the pool pictured on the box"
- **Trial court held that putative class was not ascertainable with respect to plaintiff's UCL and False Advertising Law claims**
  - *Proposed Class: "All persons who purchased the Ready Set Pool at a Rite Aid Store located in California within the four years preceding [November 18, 2013]"*
  - *In support of class certification motion, plaintiff submitted no evidence that class members could be readily identified, or identified at all, from defendant Rite Aid's records*
  - *Plaintiff's counsel had been substituted in seven days before hearing on class certification motion but did not request continuance of hearing, withdrawal of motion, or opportunity to supplement evidence in support*

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Noel (Cont'd)

- According to the appellate court, plaintiff "failed to articulate and support with evidence any *means of identifying* potential class members, as required by law":
  - *"The theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action . . . The ascertainability requirement is a due process safeguard, ensuring that notice can be provided 'to putative class members as to whom the judgment in the action will be res judicata.'" (quoting Sotelo v. MediaNews Grp., Inc., 2017 Cal. App. 4th 639 (2012)).*
  - *Pointing to interrogatory responses identifying number of pools sold and returned did not offer "a glimmer of insight into who purchased the pools . . . Unless [plaintiff] could propose some realistic way of associating names and contact information with the 20,000-plus transactions . . . there remained a serious due process question in certifying a class action."*
- Court distinguished *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290 (2015), which held that a class plaintiff need not identify individual class members or specify a means to personally notify such members before attaining class certification

Potential conflict between *Noel* and *Aguirre* likely lead to California Supreme Court's review of *Noel*

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Kendall v. Scripps Health, 16 Cal. App. 5th 553 (2017)

- Plaintiff challenged health facility's emergency room billing and collection practices
- Putative class included "self-pay" patients (lacking insurance or government benefits) who signed a form agreement during emergency room intake process and who were allegedly charged at rates higher than reimbursement amounts received from insurers for patients who have policy coverage or from medical governmental benefits providers
- Defendant argued, among other things, that variability and complexity of billing arrangements for individualized patient care rendered class not ascertainable

Exemplar Federal District and State Court Ascertainability Cases (Cont'd)

Kendall (Cont'd)

- Appellate court agreed that class was not ascertainable:
  - *Plaintiff did not explain "how potential self-pay class members, who have claims of injury from their receipt of bills containing allegedly excessive [charges], can be found through his suggested methods and then distinguished from those patients who should not be included in the class (*e.g.*, if the nonmembers' care costs were ultimately subject to discounting or payment in full by insurers, governmental benefits providers, or charity)"*
  - *Though theoretically possible to run a database query to identify certain supporting information, it was "not appropriate to require Scripps to create new computer programs to satisfy [plaintiff's] demands"*
  - *Individualized analysis of payment records would be required, rendering the action inappropriate for class treatment*

Strategies for Raising or Overcoming Ascertainability Issues

Strategies Defendants Use to Effectively Raise Ascertainability Issues

- *Characterize issue as predominance concern*
- *Characterize issue as a superiority concern*
- *Insist on a* Comcast *damages model that addresses ascertainability concerns*
- *Insist on a trial plan that addresses ascertainability concerns, even if characterized as a process for testing standing and injury requirements*
- *If necessary, re-raise issue at trial*

Strategies Plaintiffs Use To Overcome Ascertainability Issues

- *Argue that ascertainability relates to the class definition, and that if the class is defined according to objective criteria, the class is ascertainable*
- *Argue that plaintiffs do not need to be able to identify all class members at the class certification stage*
- *Argue that issue can be dealt with later, such as through a claims administrator*

Discussion

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