# 2015 Roundtable Series

# Class Action

California courts continue to resist class action waivers, particularly those included in employment contracts and those relating to actions brought under the state's unique Private Attorney General Act. On the immediate horizon are two important cases, one where the U.S. Supreme Court has agreed to consider a California appellate court's ruling rejecting an arbitration clause and a class action waiver, and the other where the high court will consider the requirements for standing to assert statutory claims. Meanwhile, federal cases are now addressing the question of how to ascertain a class, which used to be limited largely to California.

*California Lawyer* met for an update with Steven A. Ellis of Goodwin Procter; Graham B. LippSmith of Kasdan LippSmith Weber Turner; Michael L. Mallow of Sidley Austin; Layne H. Melzer of Rutan & Tucker; and Brad W. Seiling of Manatt, Phelps & Phillips. The roundtable was reported by Laurie Schmidt with Barkley Court Reporters.

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## EXECUTIVE SUMMARY

**MODERATOR: Let's start with class action waivers, in view of new case law and potential federal agency action. How are recent rulings affecting your practice, and what do you see on the horizon?**

**LAYNE H. MELZER:** California courts have demonstrated an ongoing antipathy toward class action waivers and the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (131 S. Ct. 1740 (2011)). For example, in *Imburgia v. Directv, Inc.* (225 Cal. App. 4th 338 (2014) [cert. granted]), the California court of appeal concluded, notwithstanding an arbitration clause and class action waiver, that the parties intended to contract around the *Concepcion* rule. The Ninth Circuit looked at the very same clause in *Murphy v. Directv, Inc.* (724 F. 3d 1218 (9th Cir. 2014)) and came to the exact opposite conclusion, holding that the arbitration clause in question had an enforceable class action waiver.

The U.S. Supreme Court reinforced its views in *American Express Co. v. Italian Colors Restaurant*, (133 S. Ct. 2304 (2013)). Even if arbitration will potentially result in the loss of valuable federal statutory antitrust rights, the Federal Arbitration Act (FAA) requires enforcement of arbitration agreements containing class action waivers. Now that *Imburgia* is before this Court, I expect a reversal.

The Court is also mulling the certiorari petition in *Bridgestone v. Brown* (216 Cal. App. 4th 1302 (2013)), a case in which the state appellate court ruled that waivers under California's Private Attorney General Act (PAGA) are unenforceable. The logic of the state courts in *Bridgestone* and *Iskanian v. CLS Transportation* (59 Cal. 4th 348 (2014)) is that the employee in a PAGA action is acting as an agent for the state attorney general so isn't tethered by a private agreement to individually arbitrate employment-related disputes. If it takes the case, I predict the U.S. Supreme Court will reverse *Bridgestone* and confirm that PAGA waivers are enforceable.

**BRAD W. SEILING:** What's really interesting about *Imburgia* is how it gets to the U.S. Supreme Court. The California Supreme Court didn't want to take it, and the U.S. Supreme Court accepts. I don't know the statistics, but that's not the usual way that cases make it to the U.S. Supreme Court. It's also unusual because the clause at issue was a pre-*Concepcion* arbitration clause. I think it's pretty clear they're going to disagree with the state court, but how far they're going to go will be interesting.

**MICHAEL L. MALLOW:** Well, how far does all of this go? The attention we're seeing is caused by the plaintiffs bar going to the extreme to try to undermine arbitration and class waivers and the defense bar trying to exploit them to the full extent possible to protect their clients. So Brad [Seiling], your point is a great one. We need the courts to define the boundaries of these arguments.

**STEVEN A. ELLIS:** Until now, the U.S.

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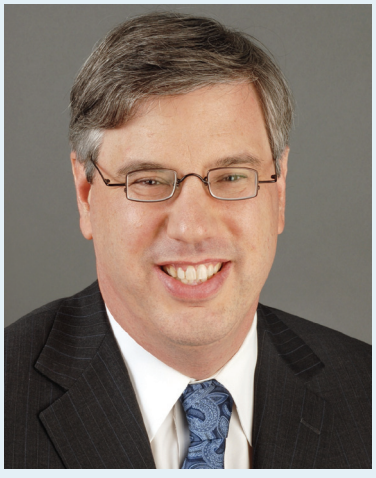

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Supreme Court has said, "Yeah, we mean what we say, and even in this case, the waiver is enforceable." And when we get to the PAGA cases—*Iskanian* and *Hopkins v. BCI Coca-Cola Bottling Co.*, Case No. 13-56126 currently pending before the Ninth Circuit, and *Brown v. Superior Court*, an unpublished state Court of Appeal decision from last year with a pending certiorari petition—we're dealing with cases that at least are susceptible of being characterized as state government action. If class action waivers are enforceable in these cases, I'm wondering if everything is fair game.

**MODERATOR: Do you see courts modifying other specific California-specific concepts beyond PAGA?**

**ELLIS:** Qui tam statutes were mentioned by the court in *Iskanian*. I think you could conceive of other statutes as well. I know the plaintiffs' bar would certainly push for that.

**GRAHAM B. LIPPSMITH:** It's not just California that's really taking a hard look at these arbitration clauses; it's state and federal courts all over the country. As a plaintiffs lawyer, I'm actually much happier with *Imburgia* going before the Supreme Court than *Iskanian*, because the *Imburgia* case has an arbitration clause with strange parameters that are pretty unique to the circumstances.

**ELLIS:** On the defense side, many of us are tracking what the Consumer Financial Protection Bureau is going to do. They might try to say the businesses covered by their regulations cannot, as a matter of policy, impose class action waivers in contracts with consumers. If that happens, it will change the dialogue here because, so far, it's been a pretty one-sided fight: In seemingly every case that's come before it, the U.S. Supreme Court has ruled in favor of arbitration and a class action waiver.

**LIPPSMITH:** The CFPB's findings show a disturbing trend in the world post-*Concepcion v. AT&T*. What it's revealed is that a whole sector of litigation that would, otherwise, have been brought by consumers has been wiped off of the face of the planet. It's not a matter of whether people are getting good results in arbitration or fair results in arbitration, because the findings show that people are just not bringing arbitration claims at all that otherwise would have been filed in the pre-*Concepcion v. AT&T* universe. There is still uncertainty about how the CFPB will act on its findings, but the response will likely be a product of the political climate.

**MODERATOR: Could recent activity at the National Labor Relations Board challenge the case law in a meaningful way?**

**ELLIS:** I'm not seeing a lot of carryover into the consumer class action area, in part because of the unique nature of labor law, but we've certainly seen in the class action waiver area, and more generally in class certification law in California, that employment cases have been driving the case law. If you look back at the last ten years of litigation, I would say half or more of the cases that have been important in these areas have been employment cases.

**MODERATOR: What effects will *Robins v. Spokeo* (742 F. 3d 409 (2014)) have with regard to questions of standing?**

**MELZER:** The U.S. Supreme Court has just granted certiorari in that case, where the plaintiff sued for statutory damages under the Fair Credit Reporting Act (FCRA) despite having no actual financial injury. In reversing defendant's successful motion to dismiss on Article III standing grounds, the Ninth Circuit concluded that Congress can in effect create standing by prohibiting certain conduct and authorizing a statutory penalty against violators. This, however, seems to conflate "injury in fact" with an "injury in law." If the petitioner is right, it is also unconstitutional. A ruling by the U.S. Supreme Court in Spokeo could have huge implications for those of us who defend class actions. Historically, statutory damage cases are easier to certify and the total claimed "damages" are often extremely large.

**SEILING:** This is another interesting area to me where the politics and the law collide, and congressional action could have forestalled this issue. You create a statute like the Telephone Consumer Privacy Act, that has statutory damages, but you don't think

through the fact that people make a lot of phone calls, and it's easy to get to $1 billion pretty quickly. So the fix for that is to do what Congress has done in things like the Truth In Lending Act and the Electronic Fund Transfer Act, which cap the amount of statutory damages in a class act to avoid the situation of "annihilating" damages.

**ELLIS:** There's a really interesting theoretical issue that these cases have raised: Is it sufficient for Article III standing for there to be an alleged harm to some protectable interest if it is not reducible to dollars and cents? For example, someone broke into my health insurer's database and now knows things about me that they're not entitled to know, but I can't say that it has cost me any money. They didn't open a bank account in my name and borrow money or anything like that. I see both sides of the argument, and the Court could be protective of the right of Congress or a state legislature to say you do have an interest even if it's not readily reducible to lost money or property.

**MALLOW:** There are a couple variants of this discussion. One is that Congress or some statutory body says we believe these actions, even though they do not necessarily cause any actual injury or financial injury, should carry a dollar figure. So there you have statutory damage with no injury. There are plenty of areas of law where injury is recognized absent out-of-pocket loss. An example is defamation, which is inherently individual, but there's injury, and there's a way to prove that injury and reduce it to a dollar figure. But these types of individual injuries don't work in class actions

**LIPPSMITH:** That's where I disagree. In this modern world where companies are aggregating data at unprecedented rates, even with a very slight breach, millions of people's personal information can be released. If companies are going to compete in the world where they maintain big data, store it and mine it, why can't consumers bond together to confront the reality of what happens when companies make mistakes with the data?

**MELZER:** No one is saying there shouldn't be consequences for legitimate losses where a defendant has broken the law. The problem arises where there is no real financial injury nor any real public revelation of personal information, as in most of these data breach cases. There has been a breach, data has been accessed or taken but aside from the fear of identity theft or other mischief there has been no actual injury. But you have plaintiffs suing precipitously and asserting certain claims that carry statutory per violation penalties which when aggregated can be devastating. Unfortunately, these efforts are actually counterproductive to redressing any legitimate injuries because plaintiffs' lawyers define the class so as to jettison those with "actual injury" if it makes it harder to certify such classes. In the end, no one really benefits.

**MALLOW:** We see variations of the same theme. Automotive is the perfect example of where you'll have 1 or 2 percent of a vehicle population experience a particular alleged defect, and yet the class action is brought on behalf of all owners of that vehicle. And for the most part, you're dealing with folks who actually have suffered no injury whatsoever, other than some amorphous allegation of a diminution in value.

**LIPPSMITH:** I do think cases brought for statutory violations serve as very strong enforcement and a disincentive for companies to do a lot of the things that they do. And it's a system where, if there's not government oversight in a particular area, plaintiffs lawyers can step in. I think it's an important aspect of what class action mechanisms are there for, which is to take something that might otherwise go unchecked and correct it. The statutory violation cases are a response to the world that we're living in, and what technologies have enabled big companies to do with people's private information. I see these actions as critically important because I don't know how else this kind of conduct would be regulated.

**MELZER:** Point well taken, Graham [LippSmith]. But I'll echo my earlier remarks. Where the statutory remedy isn't tethered to actual damage, a class action is not the answer. This is where government enforcement plays an important role. The attorney general's or district attorney's

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—GRAHAM B. LIPPSMITH

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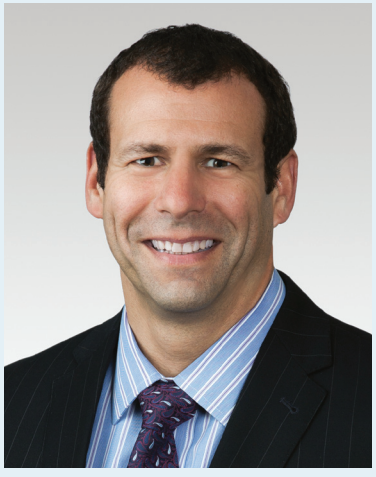
"The rise of big data means it's less and less likely that nobody has any record of a purchase.... [and] that self-identification is unfair to defendants."

—MICHAEL L. MALLOW



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office, through its consumer enforcement division, can intercede to enforce the law in a way that is fair.

**MODERATOR: The Ninth Circuit rejected new standards for ascertainability set in *Carrera v. Bayer Corporation* (727 F.3d 300 (3d Cir. 2013)), but then so did the Third Circuit, at least implicitly. Where is this split headed?**

**MELZER:** In ascertainability, there are really three concepts at work. One, case law tells us the class definition must be objective; otherwise, liability will not be amenable to common, class-wide proof. Two, the class must not be over-inclusive and capture individuals who have not been injured by the challenged conduct. If the class is over-inclusive, you have an Article III standing problem. But the confusion really starts with the third concept, which is that you need a feasible way to find injured plaintiffs.

The Third Circuit has had a series of ascertainability cases that highlight the problem. *Marcus v. BMW of North America, LLC* (725 F.3d 349 (3d Cir. 2012)) was a case involving run-flat tires (RFT). All of the tires had a similar alleged defect (premature failure), and the plaintiffs defined the class in terms of individuals who had been required to replace their RFTs. The Court concluded there were myriad reasons a class member might have replaced an RFT other than the purported defect. Hence the class was unascertainable.

Then you had *Carerra*, which is a false advertising case regarding a dietary supplement. All of the sales in question involved a product that was alleged to have been falsely adverted, but the purchases were "low value" so most consumers lacked proof of purchase and the defendants lacked records showing who bought the supplements. Ultimately, the only way to establish class membership was self-identification, for people to raise their hand and say. "I bought that." The Court rejected self-identification on due process grounds—both the defendant's due process rights to challenge the plaintiffs' veracity and the plaintiffs' due process right to avoid dilution from fraudulent claims.

But another panel of the Third Circuit in *Byrd v. Aaron's Inc.* (2015 U.S. App. LEXIS 6191) appears to be saying we must be careful to avoid confusing manageability with ascertainability. In a case like *Carerra*, where you can arguably prove every product was "defective" it matters less whether you can identify everyone who's entitled to a refund or a discount, because the defendant, in fairness, owes the entire sum to "someone" if not everyone. Courts in the Ninth Circuit have so far rejected *Carrera's* due process argument when it comes to self-identification unless the class is over-inclusive.

**SEILING:** Ascertainability used to be the argument that everyone would sort of skip over, because it was a definitional thing. We can define the class; the class is all the people who enrolled in this service but did not consent. And you would scratch your head and say, "Wait a minute. How do you figure out who didn't consent without asking them individually?" And courts would say, "No, that's a commonality issue; it's not an ascertainability issue. We've got a definition, and we can move forward." I think now courts start looking at that issue more closely, and there will be arguments available that didn't exist previously.

**LIPPSMITH:** It's interesting when you talk to people who litigate outside of the California courts because, to them, ascertainability is a completely new issue. The defense has used *Carrera* to morph ascertainability into an issue of due process for the defendant. The plaintiffs lawyer's knee-jerk reaction in the federal courts is to say that ascertainability isn't a requirement under Rule 23, so we don't need to address it. But doing California class work, litigators have always had ascertainability as a standard. It's never spelled out because we don't have a statute like Rule 23, where it lays out each of the elements in a neat package. But there's nothing new or novel about addressing ascertainability for California class action lawyers. It's the spin that's different.

**MALLOW:** To tie two worlds together, the rise of big data means that it's less and less likely that nobody has any record of a purchase. We have shopping clubs tracking transactions; most people are paying with some form of plastic, which can also often track purchases; and online purchases give you something to establish that an actual

purchase was made. With the availability of proof of purchase, there has to be an acknowledgement that self-identification is unfair to defendants.

**SEILING:** So I'll take off my defense hat and disagree with my defense colleagues here. When you think about a retail class action where there's a claim of false advertising based on a label–say the product says it will grow you hair, but it doesn't, and you can see from my photo why I chose that example—the defendant knows exactly how many units it sold. The fact that it doesn't know exactly who bought those products doesn't seem to me to be something that should stop a class action from going forward. We can say we sold one million bottles of this stuff to people, and they all were subjected to the same statement on that label, and it's material because that's what the product is supposed to do. That sounds like the type of situation class actions were made for.

**LIPPSMITH:** The reality is in the consumer market, people don't save receipts for small purchases. And if that's going to be your bar to recover in a class action case—that you have a receipt—that winds up gutting the fundamental purposes of having consumer laws and allowing the class action mechanism to enforce them. It's like what we said about data breaches: The reality is not everything fits in a nice, neat little law box. So you see the courts showing where the cracks are and sometimes missing the differences between what actually happens in the world versus in the law.

**ELLIS:** But if the class gets diluted by people fraudulently raising their hands, there's an argument that the true members of the class have been injured because their recovery is diluted when they must share with those who are included improperly.

**MALLOW:** What we really need to have is flexibility for a court to analyze what the definition of the class is, what the nature of the causes of action are, what the nature of the injury is, and what information is or could be available to specifically identify people when making the determination whether there's ascertainability, manageability, or superiority. But to foreclose the court from analyzing those factors, as some have suggested, should be a nonstarter.

**MODERATOR: Now that certification is playing such a big role in class action practice, how are settlements and claims administration changing?**

**LIPPSMITH:** Over time, the mere threat of a class certification motion being decided is, by itself, resolving fewer cases. There was a time when essentially all you had to do was conduct your preliminary discovery and file your class cert motion and, if the case was halfway decent, that would instantly initiate settlement discussions. Maybe those first discussions wouldn't totally resolve the case, but lawyers could move cases through pretty efficiently after that.

**MELZER:** I agree. There is a renewed emphasis on due process that, if it didn't start with *Dukes v. Walmart*, certainly was underscored by it. And California has reinforced this approach with *Duran v. U.S. Bank* (59 Cal. 4th 1 (2014)), making class certification a mini trial on Rule 23 issues.

**SEILING:** There's no reason it shouldn't be a "mini trial." I mean, it is such a significant thing from both perspectives. You go from having a relatively small claim, to having a significant claim that could amount to a material event for the company. So the parties should be able to convince the court one way or another with real evidence, and I don't see any reason why *Daubert* standards shouldn't apply: If you're going to bring in evidence and you're going to bring in science, it should be good science, and it should be science that you'd feel comfortable putting in front of a jury if the case were proceeding to trial.

**LIPPSMITH:** Except for one major procedural situation that comes up in every case: bifurcation of discovery on class issues. Bifurcation is a routine requirement by judges and often a routine proposal by defendants who don't want people like me snooping around their evidence.

**MALLOW:** But we're not talking about experts opining on the ultimate merits of the case. We're talking about experts opin-

"The emphasis on due process, if it didn't start with *Dukes v. Walmart*, certainly was underscored by it. And California has reinforced this approach with *Duran v. U.S. Bank*."

—LAYNE H. MELZER

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"It's always hard to define exactly what discovery relates only to class issues and what relates only to the merits. There's so much overlap."

—BRAD W. SEILING

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ing on its class certifiability. Why wouldn't there be a well-taken *Daubert* challenge to the expert's testimony related to class certification or class certifiability? The same with damages: Economists will say we can assess injury and damage on a classwide basis. I agree if a judge is going to bifurcate discovery, it would be an unfair requirement to have the plaintiffs have their expert ready to testify on the merits, but if that bleeds into class certification, that expert should be ready to satisfy the *Daubert* standards.

**SEILING:** I'm not sure the notion of bifurcating discovery is still getting traction.

**LIPPSMITH:** It's still happening.

**ELLIS:** And the problem is?

**SEILING:** It's a little bit of a sandbag. And it's always hard to define exactly what discovery relates only to class issues and what relates only to the merits. There's so much overlap.

**ELLIS:** I do agree with Graham [LippSmith] that if we are going to require plaintiffs to make a higher showing at class certification, the plaintiffs have to have a fair opportunity to develop their case and meet that showing through discovery. And that may mean the line has moved a little bit about what's fair game and what's not. So even in a case where you're trying to bifurcate discovery, with the first phase relating to certification only, the plaintiff's side is going to get more than they would have received 20 years ago.

**MELZER:** I think bifurcation really is more a trap now for the defendant because, until you get a little bit into your case, you don't know how deeply you need to go into the merits at class certification. And so about the only place I'm halfway comfortable drawing the line would be when we talk about the remedy. Bifurcating discovery into "damages" or the defendant's profits, losses, and costs can almost always be deferred until after certification.

I had a nutraceutical case recently where the fight was over the efficacy of a joint-protection supplement. Efficacy would seem like a common "merits" issue that you could bifurcate, but the truth was that plaintiffs' evidence showed, at best, that this particular supplement worked for some people and not for others. To demonstrate a lack of commonality and predominance required that we wade heavily into the merits at the class certification and we did defeat class certification in that case because we delved deeply into the merits.

**MALLOW:** Yeah, I had a case not too long ago where bifurcation was completely flipped. Plaintiffs' counsel wanted it. I had to explain to the judge why we didn't want it, just for that exact reason.

**MODERATOR: That seems like a reasonable segue into the future of mass joinders; are they a viable way to address some of these concerns—on either side?**

**MALLOW:** Mass joinder has been around for a long time. When I started my career in Washington, D.C., as an asbestos personal injury defense lawyer, the Baltimore courts would join 8,000 or more plaintiffs in a single trial. As for issue classes, they're not being used as envisioned; particularly when plaintiffs' counsel says, well, we'll do an issue class on liability. An issue class has to be very narrow—like whether a particular representation was made and disseminated sufficiently to have a class-wide impact.

**SEILING:** It's going to open a huge Pandora's box for abuse, and judges ought to be careful what they wish for if they do that. It's not a very efficient way to litigate a case that really should be a class action. ■