

ROUNDTABLE

Consumer Class Actions

EXECUTIVE SUMMARY

These are heady times for consumer class action lawyers as the landscape for class certification changes, standards for Unfair Competition Law cases evolve, and arbitration becomes increasingly an unlikely option for case settlement. And all of these developments come in the wake of 2005's Class Action Fairness Act (CAFA, 28 U.S.C. §§ 1332 (d), 1711-1715), which provided for the removal of California class actions to federal court. In month's roundtable, our

panel of plaintiffs and defense experts from Northern and Southern California discusses these developments.

They are G. Charles "Chip" Nierlich of Gibson, Dunn & Crutcher; Brian S. Kabateck of Kabateck Brown Kellner; Kristen E. Law of Lief, Cabraser, Heimann & Bernstein; Angela Padilla of Orrick, Herrington & Sutcliffe; and David T. Biderman and Philip A. Leider of Perkins Coie. *California Lawyer* moderated the roundtable, which was reported by Krishanna DeRita of Barkley Court Reporters.

MODERATOR: Did *In re IPO Securities Litigation* (471 F.3d 24 (2d Cir. 2006)) change the landscape for class certification in complex securities cases only, or for class actions in general?

NIERLICH: The Second Circuit's decision in *IPO* rejected a bright-line boundary between certification and merits inquiry and held that a trial court must assess all the relevant evidence admitted at the class-certification stage and determine whether each Rule 23 requirement has been met. This rigorous analysis of class certification requirements is not limited to the securities context in which *IPO* arose, as it is a function of Rule 23. Thus courts have applied a rigorous analysis of class certification requirements in non-securities

tiffs to present evidence. *IPO* just reminds us that we cannot skate on thin evidence. Conscientious practitioners already knew that. *IPO* just reemphasizes a standard that we were already satisfying.

BIDERMAN: The standard before *IPO* was so loose. Unless experts were fatally flawed, their opinions had to be accepted. Other circuits have followed the decision, and there seems to be more and more scrutiny at the class-certification stage of the merits of the ultimate claim and requirements of expert testimony. We know our circuit hasn't addressed it, so it's sort of an undecided issue for us. But it did change the landscape. We see it linking up with other heightened-pleading requirement cases, such as the

including the rigorous analysis of class certification standards provided in *IPO* and the pleading requirements set forth in *Twombly* and *Iqbal* (*Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)). If you want to have your class action case go forward, federal courts are requiring more specific allegations and evidence.

LAW: I understand that *IPO* is an attractive decision for defendants to argue that the standard has been heightened. From the plaintiff's perspective, this is the status quo. Good practitioners already understood the importance of submitting robust evidence—for example, an expert declaration describing how liability would be proved classwide, not just that an analysis was possible.

KABATECK: Defendants are certainly submitting more declarations in opposition to class cert motions today than they were three or four years ago, but now we are pushing the envelope into getting into merits discovery. The more you submit and the more you put out there, the more we are going to say we need to do merits-based discovery.

BIDERMAN: You do see an intensification of the amount of discovery before class certification. It's always been very hard to say, "Gee, this only relates to class. This relates to merits." It's always been a pretty tough distinction to make and I think these cases make it harder.

MODERATOR: Do members of a putative class in federal court have to demonstrate standing to sue under Article III—even if they need not demonstrate individual standing under Proposition 64, as

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—Brian S. Kabateck

contexts; for example, the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation* (552 F.3d 305 (3d Cir. 2008)) and in *Hohider v. United Parcel Service* (574 F.3d 169 (3d Cir. 2009)).

LAW: The rigorous analysis of *IPO* is taken expressly from the *Falcon* case from 1982 (*General Tel. Co. v. Falcon*, 457 U.S. 147 (1982)), which addresses a Title VII class action. So we've always known that the Rule 23 requirements must be met—not just supported by some evidence. In other words, this isn't the standard at the motion-to-dismiss stage where all allegations are taken as true. Rather, the burden is on the plain-

Kearns case (*Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009)) and the *Twombly* case (*Bell Atlantic v. Twombly* (550 U.S. 544 (2007))). We see that as telling federal courts that they have to do a lot more scrutiny of the cases during the pleading stage for class certification. We see a change.

MODERATOR: What's the bottom line? Is it getting harder to certify a class in federal court since the Second Circuit decided *IPO*?

NIERLICH: There is an overall trend towards heightened requirements to bring a class action case,

construed by the May ruling in *In re Tobacco II Cases* (46 Cal. 4th 298 (2009)) against Phillip Morris?

LAW: The federal cases and commentary are clear that absent class members are not required to make an independent showing of standing; rather, only the class reps have to establish standing. Once that test is met, the court's inquiry is whether the representative satisfied the requirements of Rule 23. This is not new. So to the extent that any of you want to try to tell me that putative class members or absent class members need to establish standing on an individual basis, I'm not having any of it.

PADILLA: In all of my 18 years of defending class actions, I've never had a case where the absent class members have had to come into court and prove that they have standing. To the extent that there are absent class members who were not injured, then those members get dealt with in the process of claims or however it is that you are going to divide up the pot of money at the end of the day. I feel awkward as a defense attorney saying that I agree that absent class members don't need to prove standing, but my experience has been that that is how it has worked as just a functional matter.

KABATECK: Article III simply requires cognizable injury. *In re Tobacco II* was saying the class representative has to have had some damage. But beyond that, you just default to the standard traditional rules for class certification. I don't think that that's inconsistent at all with Article III.

LEIDER: Article III also says the injury has to be fairly traceable to the defendant's conduct and has to be redressable by the court. So there is a causation element to Article III standing, and in a false advertising case, that's shown by reliance usually. So you have this issue in federal court that's a little different than perhaps in the state court and we have all seen the Ninth Circuit dismiss—for want of jurisdiction—state law claims where Article III isn't met, even though they are class claims. This is going to come up after *Kearns*. Judge Baxter in his dissent cited a long list of cases in federal court that suggest each class member needs to have standing.

NIERLICH: There is an open question as to whether or not members of a putative class need to meet Article III standing requirements. The dissent in *Tobacco II* provided a number of examples of federal cases that were looking at the injury allegedly suf-

“Discovery is a morass. It is swamp, it is quicksand, and to allow a claim to proceed when it doesn't pass legal muster in the pleadings stage on the theory that discovery is going to clean it up, that's a huge mistake.” —Angela Padilla

fered by the putative class members. Federal courts may determine that absent class members without injury should be dismissed on standing grounds, but courts may also address this issue by comparing the type of injury alleged by the named class representative with the injury alleged on behalf of the putative class members to remove absent class members who have not been injured on the basis that their injuries are not typical.

LAW: *Tobacco II* affirmed that California law provides a presumption of class reliance where an alleged misrepresentation is material, and materiality is determined on an objective reasonable person's standard. It is well established California law under *Mass Mutual (Mass. Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1292-93 (2002)) that there's no need for an individualized showing as to what particular misrepresentation or nondisclosure an individual absent class member relied on in order for the court to rule that there was classwide reliance and therefore classwide causation.

PADILLA: The class representatives have to make some allegations that they saw and relied upon and were induced to some extent. But then the plaintiff also has the burden of proving that those advertisements, on a classwide basis, were material.

BIDERMAN: *Tobacco II* says absent class members don't need to show reliance. *Tobacco II* gives such a wide sweep to a broad class of putative plaintiffs who really have been injured. *Tobacco II* talks about what needs to be alleged for reliance. Then you read the *Kearns* case and you need Rule 9 (b) specificity under 17200, which clearly if you are in federal court—even if you are under 17200—you've got to meet those pleading requirements. But the two cases are ships passing in the night. So getting those reconciled is going to be interesting.

PADILLA: So what is the effect of *Tobacco II* on the plaintiff bar's ability to bring sort of pre-Proposition 64 lawsuits? Does *Tobacco II* undermine the curative intent of Prop 64? At first, I was horrified by *Tobacco II* because I thought it was a complete run around

Prop 64. I thought it would open the floodgates to frivolous lawsuits. But in retrospect, I've used it now in a case that's pending in the Central District. I've briefed it and used it to fend off one class action and so far with some success. I don't think it is a complete undermining of Prop 64.

MODERATOR: It's been four years since the Class Action Fairness Act of 2005 was passed. Where are things today? What are the impacts? Good or bad?

KABATECK: Not good. CAFA has created a terrible backlog and workload for federal judges. What's been the effect of that? There are conscientious federal judges that roll up their sleeves and work extra hours. But there are federal judges who leave the bench and federal judges who now are looking for ways to clear their dockets because of CAFA, because they have got a backlog of complex difficult class action cases that four-and-a-half years ago would have been brought in state court. CAFA is a tremendous success if you are a member the Chamber of Commerce, but if you are a plaintiffs lawyer who wants to bring a case in state court, it's been very difficult.

NIERLICH: Federal Judicial Center statistics suggest that new class action cases filed in or removed to federal court increased by 72 percent between 2001 and 2007, and this is especially noticeable in the areas of labor class actions and consumer-protection class actions. At least some state courts are seeing increases in class action filings as well. For example, based on statistics we obtained from the Los Angeles Superior Court, class action filings in that court are up 55 percent in the last three years from about 516 filings in 2005 to 801 filings in 2008. So it's true that CAFA appears to be increasing the volume of class action practice in the federal courts, but at least some state courts, including Los Angeles, are continuing to see substantial growth in class actions filings too.

PADILLA: I have yet to meet a client who when faced with the option of removal says, “No, I'd rather stay in state court.” Every client, even when I advise the client that in that particular jurisdiction, the two are about

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the same, they still want to go in federal court. There is still strong bias towards being in federal court.

LAW: What CAFA didn't do was statutorily increase the number of hours in the day or the number of federal judges on the bench. CAFA puts the added strain on federal judges to be familiar enough with substantive state law to apply it correctly while resisting the temptation to make state common law. So when state issues (which are present in almost every case that I bring), are removed from the state courts—which are superbly positioned to handle those issues—into the federal court, issues of state law are susceptible to misinterpretation.

KABATECK: We are overburdening the Ninth Circuit. It's already 18 months to three years before you get decisions from them. I'm sure there isn't a single person in the room today who hasn't had a federal judge hold a class certification decision for literally months and months and months, just further frustrating the process. If we are going to lose a case, we'd like to lose quickly.

LEIDER: The impact on the federal courts of appeal is an interesting one. There's whole lot of emphasis on this escape valve that they had for diversity cases before—certifying state law questions to the highest court of the state. Now you have a flood of cases where the circuit courts are either going to try and guess what the state courts would do—which is unfortunate because federal courts shouldn't be making state law—or you are going to have them certifying these questions to the state supreme courts and it's going to take dog's years before we have an answer.

MODERATOR: Has there been a proliferation of class action filings lately that has hurt substantive class action cases?

KABATECK: Recently there have been an awful lot of folks—who don't understand class actions—filing class actions and becoming overnight class action specialists. It's very disconcerting. When I started doing class action cases more than a decade ago, judges were very respectful of the cases. They'd look at them very seriously. Now I'm seeing more and more judges raising their eyebrows, looking at cases as if, "Oh, another class action." You've got to almost start behind the line explaining to the court, "No, this is really a justifiable class action." I've seen class actions being brought claiming medical injury, which we know you can't bring. It demonstrates to

me a lack of knowledge and understanding. We have to be vigilant about these kinds of bad class actions. Half a dozen years ago, you'd hardly see a seminar in class actions. Today, I can't pick up my mail without getting a brochure or some sort of e-mail about educational seminars on class action cases.

NIERLICH: There is a difference between a case that is meritorious, but for a small recovery, and a case that cannot be supported on the merits. I understand the role of a class action as to the former. As to a case that is not supported on the merits, that's where it becomes more important to have some sort of heightened scrutiny at the pleading stage, so you can cut off those non-meritorious cases before the parties have to invest substantial amounts of time and money in discovery, in further litigation, and tying up the court's time.

LEIDER: Very few people understand what happens on the defense side at the moment when a complaint is filed or the moment that we get wind that a complaint is going to be filed, especially in tremendously large companies with thousands and thousands of employees. We have a duty to start preserving evidence and it's not an easy thing to do in a giant company with e-mail systems, Blackberrys, mobile phones, and all that. It's a tremendously painstaking, time-consuming, and costly endeavor.

NIERLICH: Which gives enormous leverage, then, to the person who files that case, which might explain why a number of people have branched out into this area of practice.

LEIDER: I think the e-discovery tail is wagging the litigation dog in large measure now in class-action litigation. I think it's an unfortunate development and I hope it changes as time goes on.

LAW: E-discovery presents significant challenges on both sides. Plaintiffs counsel gets flooded with tens or hundreds of CDs filled with millions of pages of documents that present sometimes insurmountable challenges that really place the leverage on the other side. So it cuts both ways.

PADILLA: I think *Iqbal* and *Twombly* got it exactly right and this is where I felt that they understood the difficulty of case management more than judges sometimes do because judges can be very removed from day-in and day-out practice. It's no answer to say that a claim just shy of a plausible entitlement

to relief can, if groundless, be weeded out early in the discovery process through careful case management. Discovery is a morass. It is swamp, it is quicksand, and to allow a claim to proceed when it doesn't pass legal muster in the pleadings stage on the theory that discovery is going to clean it up, that's a huge mistake—at least from the defense bar perspective. Even from the plaintiff's perspective, that can be a terrible mistake, because everyone can be distracted. Discovery is not the antidote to poor pleading.

KABATECK: Tools have always been there for the federal courts to get rid of non-meritorious cases. This seems to be a slippery slope: the courts are being offered an opportunity—without any discovery, without any evidence—to dismiss cases. Now, as a device to weed out weak cases, we certainly want to see if our case doesn't pass muster, but at least give us a chance to do some discovery and investigation of the case first before the courts are doing this kind of day-one thumbnail analysis of the case.

LEIDER: I like the two words you guys keep using, "discovery and investigation," because I find that what a lot of plaintiffs haven't done is any investigation before they file the complaint, and there's a lot of information available to the named plaintiff in these cases that they haven't obtained before they file the complaint. There's a lot of informal discovery

that can be done through investigation before you file a complaint certified under Rule 11.

MODERATOR: Is the California Supreme Court redefining UCL through cases such as *Tobacco II* and its pending review of *Kwikset Corp. v. Superior Court* (171 Cal.App.4th 645 (2009))?

NIERLICH: The people of the state of California redefined the UCL with Prop 64 in 2004. That was very significant. These interpretations by the California Supreme Court are continuing to provide a little more detail about how these cases will be handled.

BIDERMAN: There's a lot of ambiguity in Prop 64, so these two cases are addressing some of the most important issues, and the *Kwikset* case is going to be very interesting. We are going to see whether or not—under the injury and fact prong—there is going to be some basic trimming back of some of the expansive interpretation of what's permissible under class actions under *Tobacco II*. Those decisions are all triggered by Proposition 64.

PADILLA: I'm very interested in understanding why the Supreme Court began review of *Kwikset*. Is it to embrace the holding of *Kwikset* and other cases that while there's injury due to false labels, there is no loss of property or money? All the cases come out the same way—pro defense. The product really has to

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be defective or materially different than how it was advertised. A minor misstatement like the milk was from happy cows or this was made in the USA—that alone is not enough to sustain standing.

LAW: What I anticipate is to assert damages in a situation like this, you have to show one of two things or both: That the product you paid for was defective or deficient in some way, so you didn't get the benefit of the bargain on the purchase that you made, or you paid a premium for that product because you believed that it had an attribute that it didn't actually have.

PADILLA: The court has always held psychic injury is not compensable under the UCL.

MODERATOR: Since the June ruling that Rule 9's particularity requirement was not met in *Kearns*, what is the new standard for UCL fraud allegations to satisfy Rule 9 and to survive a motion to dismiss?

LAW: In our view, the rule has been *Vess* (*Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003)). You have to plead the who, what, when, where, and how. I recently listened to oral argument on this issue in the Ninth Circuit and Willy Fletcher was on the panel

removed, it gets remanded. I want to give the court any chance it can to bounce its case on a remand as opposed to bounce the case for some other reason that puts me someplace I don't want to be, namely the Ninth Circuit.

MODERATOR: What impact do *Twombly* and *Iqbal* have on Rule 9?

LAW: Well, 9 (b) obviously requires us to plead fraud with particularity. But where *Iqbal* really wreaks some havoc is in its interpretation of the second sentence of 9 (b), which reasonably allows plaintiffs to plead malice, intent, knowledge, and other states of mind generally. The *Iqbal* court took a great deal of liberty with the word "generally," stating that the plaintiff's allegation that the defendants discriminated against him on account of his religion, race, and/or national origin and for no legitimate reason was insufficient to plead the relevant state of mind generally under 9 (b) as has been said. That's not the rule that any of us learned in law school.

LEIDER: *Iqbal* is getting cited all the time. I recently had a federal judge dismiss with leave to amend and it was basically a one-paragraph citation of *Iqbal*.

KABATECK: It just goes too far. You could have stopped at the California pleading standards or something similar. Instead, if you read these cases, there's an argument in there that says you have to prove your case.

PADILLA: I don't think it's "prove your case." I think it's "plead more than just the bare bones elements of a cause of action."

MODERATOR: The National Arbitration Forum and the American Arbitration Association (AAA) stopped arbitrating consumer cases this summer. As we all know, consumers win only a minuscule portion of such arbitration cases: have arbitrators favored business?

LAW: There are two issues here: Whether the arbitration fora favored business and whether the arbitration process generally favors business. Probably the answer to both of those is yes.

BIDERMAN: I've got clients who have bent over backwards to try to write arbitration procedures that are extraordinarily fair, and have done everything possible to make it consumer friendly to find the right forum and to provide no big filing fees. Whether arbitration is fair or not really doesn't make a lot of difference if it's going to be a class action case because class action arbitration has a lot of unappealing aspects to it.

KABATECK: If you hear that faint beep, beep, beep in the background, that's arbitration on life support. Pre-dispute mandatory arbitration provisions are unconscionable in most cases.

NIERLICH: State courts have certainly continued to strike down and disapprove class action waivers, and if companies are not going to write arbitration provisions providing for class arbitration and if class waivers are unenforceable, then it will be more difficult to see how you will have a lot of arbitration going forward.

KABATECK: And when you have the National Arbitration Forum and AAA, who are refusing to arbitrate certain cases, and I believe the law says you must arbitrate before AAA, the alternate is to default to JAMS or some other [arbitrator], which means the arbitration is over. I think it's becoming more and more difficult for defendants to arbitrate cases or force arbitration unless both parties agree post-dispute. ■

"There is an overall trend towards heightened requirements to bring a class action case." —G. Charles "Chip" Nierlich

and he quipped that whatever *Vess* said is still right. In his view, it seems, and in mine, *Vess* remains the standard in light of *Tobacco II*.

NIERLICH: If you are filing a case in state court, you must be thinking about the removal and what you would want to plead in the federal court. That's an interesting process from the plaintiff's standpoint.

LEIDER: What I'm hearing from my friends in the plaintiffs bar is that the federal bench isn't nearly as receptive as it once was to managing class actions. Judges that once had more time to spend are a little bit quicker to pull the trigger than they used to be. I think it's got to be tough to be on your side of the table: Do I file in state court and hope it doesn't get removed or just go to federal court?

KABATECK: There are judges that will remand in the Central District. So my hope is that if it does get

NIERLICH: I suspect we'll learn more as we see how circuit courts interpret *Twombly* and *Iqbal* going forward. But I expect courts will continue to grapple with the costs of litigation, especially in the age of electronic discovery, and the need to have some type of robust pleading mechanism up front to weed out non-meritorious cases.

PADILLA: A lot of defendants feel that they don't have due process under the old standard where they have to essentially wait until summary judgment to have their rights indicated in cases that are not meritorious. It is so frustrating for clients to be faced with a legal process where we have to tell them it's going to take 12 to 18 months for this case to be resolved, not even at trial, but on motions to resolve your liability. I'm big fan of *Iqbal* and *Twombly* notwithstanding the changes that they made to the rules, because I think it's a long time coming for defendants to have their due process rights validated.