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Choosing Federal or State Court in Consumer Class Actions

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A key decision to be made early in many business cases, whether by the plaintiff on where to file or by the defendant on whether to remove, is whether to have the case heard in state or federal court. The onetwo punch of Proposition 64 — requiring class certification for cases under California Business & Professions Code sections 17200 and 17500 *et seq*. — and the Class Action Fairness Act ("CAFA") — authorizing federal court jurisdiction based on minimal diversity in any case with $5 million in dispute and a defendant corporation outside California — means that more business litigators than ever before need to address this decision. This article describes some of the strategic considerations that go into making that choice.

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Judicial Assignments

The traditional analysis of federal versus state court forum choice often turns on a perception about state court judicial reluctance to grant summary judgment.

Historically, California state courts have utilized a master calendar system. Unlike federal court, which uses a single assignment system (one judge hears all matters relating to the case, with the possible exception of discovery matters which some federal judges refer out to a magistrate judge), the master calendar system allocates tasks in the case to different departments. Motions — demurrers, summary judgment motions, and class certification motions — are heard by the judge who presides over the law and motion department. Discovery motions may be heard by the same judge or by a discovery commissioner or separate discovery motion department. The judge who will preside over the case for trial is not assigned until shortly before the trial: three days before trial in Santa Clara County, for instance, or even the day of trial in San Francisco Superior Court.

The conventional wisdom is that the master calendar system discourages the granting of dispositive motions. The crass explanation is that the law and motion department has little to gain from granting a dispositive motion (because that judge will not need to do the work of hearing the trial) and much to lose (loss of prestige from being reversed on appeal).

A more subtle explanation could also be based on the simple difference in workloads. A busy state court law and motion department can often have a law and motion calendar of 15-25 cases per day. San Francisco Superior Court's two law and motion departments had a total of 130

summary judgment motions heard in June 2007 (52 in Department 301; 78 in Department 302). Alameda County Superior Court's law and motion department heard 43 summary judgment motions the same month. By contrast, a review of the federal court calendar shows around six summary judgment motions heard per judge during the same period.

The decision to end a case is a major one. It requires certainty that the right result is being reached. If judges and their law clerks only have a few hours, or less, to determine whether to grant summary judgment, they may not be able to spend enough time thinking about the problem to feel that ending the case is the right thing to do. The summary judgment briefing may be the first time that the judge has ever heard about the case. Simply having more time to read cases, and to review the deposition testimony and declarations claimed to show material, triable issues of fact, before making a decision may provide the judge with the confidence to make a case-dispositive decision. This, combined with a state summary judgment statute that sharply limits the ability to get summary adjudications on particular issues in the case when the motion will not eliminate an entire cause of action (see Hon. Beth Freeman, "Increasing the Likelihood of Success on Summary Judgment Motions," *ABTL Northern Cali - fornia Report* Summer 2006 (discussing state court limitations on summary adjudication)), has led many practitioners to conclude that their legal arguments will receive a better reception in federal court.

Recent restructuring within the state court system may change the analysis. A number of counties are now on a single assignment system, just like the federal courts. Marin and Contra Costa Counties have long been on a single assignment system; in July 2007, Alameda went to a single assignment system as well.

Meanwhile, the Judicial Council established a "pilot" Complex Civil Litigation Program in 2000, which led to the creation of six complex litigation departments. There are now two judges in Alameda County, one judge each in Contra Costa, San Francisco, and Santa Clara, seven judges in Los Angeles County, and five judges in Orange County, all dedicated to hearing only complex litigation cases. These judges receive special training on how to manage complex civil cases, including class actions, and have additional funding to hire research attorneys.

Evaluating whether to remove a CAFA-eligible case from one of these counties involves a more complicated decision. In the Central District in Los Angeles, for instance, there are 37 federal judges and 24 magistrate judges, including a number of recent appointments. By contrast, in Los Angeles Superior Court, there are only seven state court judges hearing complex cases. In San Francisco, the choice is even more stark: the complex litigation department is Judge Kramer, or on removal the parties will be assigned to one of the 15 federal judges or magistrate judges in Oakland or San Francisco. The relative inexperience of federal judges with consumer class actions (because jurisdiction was only recently vested in them by CAFA over the small dollar amount claims under the Consumer Legal Remedies Act (Civ. Code §§ 1750 *et seq*.) and the Unfair Competition Law (Bus. and Prof. Code §§ 17200 *et seq*.)), combined with uncertainty about which judge will be assigned, will sometimes drive the decision not to push for removal.

Alternative Standards for Class Certification

Another significant consideration in selecting the state or federal forum is the difference in rules governing class certification. Frequently, class certification is the most substantial battle in the case: a denial of a class certification motion is properly called a "death knell." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 (1978). There are both real and perceived differences between federal and state court on these issues.

Post Proposition 64, the law governing class certification in California state court is unsettled, awaiting key decisions by the California Supreme Court. In the *In re Tobacco II Cases*, the trial court decertified a class action post-Prop. 64, holding that Prop. 64 required that each class member have proof of injury-in-fact, and that the required commonality was not present because of individual issues of reliance, "such as whether each class member was exposed to Defendants' alleged false statements and whether each member purchased cigarettes 'as a result' of the false statements." *See* http://www.17200blog.com/TobaccoOrder.pdf (trial court order, March 7, 2005). After the

Court of Appeal affirmed, the Supreme Court granted review on the two key questions (1) whether every class member (or only the named plaintiff) must have suffered injury, and (2) whether every member of the class must have relied on the alleged misrepresentation. Cal. S. Ct. Case No. S147345. (Note: this case still has not been decided, although a companion case regarding preemption of other claims in the case, also titled *In re Tobacco II Cases* was decided August 2, 2007.) The same issue is presented in *Pfizer, Inc. v. Superior Court (Galfano)*, 141 Cal. App. 4th 290, 297, 305-06 (2006) (review granted), where the Court of Appeal held that individual issues about which class members saw which advertisements, or believed them (some, but not all of Listerine's advertisements claimed that the product was "as effective as floss"; some customers didn't see the alleged representation, or would buy the product independent of the representations because of brand loyalty or price), defeated class certification post-Prop. 64. The Supreme Court granted review here too, pending outcome of the *In re Tobacco II Cases*.

Meanwhile, in *McAdams v. Monier, Inc.*, 151 Cal. App. 4th 667 (2007), the Court of Appeal held that a "common inference of reliance" could substitute for actual proof of reliance and permit a case involving different representations to different customers — and in some situations, arguably no representation at all — to go forward as a class action. A petition for review is pending as of press time.

This lack of clarity in the law can be contrasted with more established federal precedent. The closest analogue to the *In re Tobacco II Cases* (alleging deception of consumers by cigarette manufacturers) is the Fifth Circuit's 1996 decision in *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). That case held that individual issues of reliance (also in a consumer versus cigarette manufacturer class action) defeated class certification. Because the Federal Rules of Civil Procedure override any contrary state standard governing class certification, *see Hanna v. Plumer*, 380 U.S. 460 (1965), removing the case to federal court is a way to avoid hinging the outcome on the current uncertainty about how the California Supreme Court will decide the pending cases.

A recent nationwide survey conducted by the Federal Judicial Center found a perception that state court judges were more likely to certify class actions generally, but somewhat surprisingly found no empirical basis for the perception: class actions were equally likely to be certified in state or federal court in the sample studied. *See* Thomas E. Willging and Shannon R. Wheatman, "Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?" 81 *Notre Dame Law Rev.* 591, 635 (2006) (finding class certification granted in 22% of federal court cases, and 20% of state court cases; finding 50% of the certifications in each court were for settlement as opposed to trial and litigation).

Whether such general statistics will apply in California post-Prop. 64 remains to be seen. Ultimately, decisions about forum are best made with a more nuanced view of the differences in law and how they will apply to the facts of the individual case. Recent treatment of a "presumption" of reliance and "common inference" of re - liance in federal and state court highlights why practitioners believe state court is more lenient in granting class certification. In *McAdams v. Monier*, 151 Cal. App. 4th 667, the California Court of Appeal held that a class action could go forward based on a "common inference" of reliance from non-disclosure of a material fact: that red roof tiles would fade to gray, where express representations had been made — lifetime warranty, permanent color, etc., and that reliance could be proven on a classwide basis by showing that the non-disclosure was material. By contrast, in *Poulos v. Caesar's World*, 379 F.3d 654 (9th Cir. 2004), the Ninth Circuit held that class certification was properly denied in a non-disclosure case — plaintiffs complained that they thought the cards they would be dealt in video poker would be randomly distributed, as are cards dealt in real poker — because "some players may be unconcerned with the odds of winning." The fact that the virtual "deck" was allegedly stacked against the players (even though presumably, every player would find this material) wasn't enough: an individualized showing of reliance would be required.

Local Rule Variations

A separate consideration relating to class certification procedures arises from local rules. Compare the case management process in Los Angeles Superior Court with the federal district court for the Central District of California. In state court, the complex litigation department judges will call for an early case management conference where issues such as phasing of discovery (including discovery focused on class certification issues first) will be heard. Some of the state court judges automatically stay all discovery and even filing of demurrers or other responsive pleadings until the initial case management conference is held. This slows the process (preventing the plaintiff from moving the case forward too aggressively in the early stages), and provides time for class discovery. More significantly, many of the state court judges have already made up their minds about issues like whether to allow discovery in support of or opposition to a class certification motion, and have practices on the subject that can be determined by contacting other attorneys who have experience with the judge.

By contrast, in the Central District local rules, the federal court requires that a class certification motion be brought within 90 days of the filing of the complaint (or removal). See C.D. Cal. Local Rule 23-3. This means that class certification motions will be filed and often heard *before* the initial case management conference, and because of Federal Rule of Civil Procedure 26(a), that means they will be heard *before* any discovery has taken place at all. If a plaintiff or defendant believes that they need discovery in order to make or oppose the class certification motion effectively, they may decide that state court is a preferable forum based on this local rule variation.

Winning the Battle at the Cost of the High Ground?

Defense attorneys contemplating removal under CAFA have another key point to consider: how to prove the amount-in-controversy without sacrificing key ground on their theme that no damage was caused.

In a consumer class action, a key defense is that the alleged false labelling or advertising either wasn't material, or wasn't the cause of substantial damage. Even if the product didn't match the labelling or advertising, it nevertheless provided some level of value to the consumer. For example, in *Lamond v. Pepsico, Inc*., 2007 U.S. Dist. LEXIS 42023 (D.N.J. June 8, 2007), the Court found no CAFA jurisdiction over a class action against Pepsi based on alleged benzene contamination of Diet Wild Cherry Pepsi, because people still received a tasty soft drink in a can and thus couldn't sue for a "full refund" (which would have meant that the $5 million in controversy amount was reached). The Court explicitly noted "The irony here is that it is the Defendants who are seeking federal jurisdiction by claiming that the amount-in-controversy exceeds $5 million. Yet, Defendants' entire defense, even assuming the veracity of Plaintiff's allegations, is that the beverages were fit for consumption and that the Plaintiff received the value of her bargain. In other words, there was no loss. This Court understands the 'Catch-22' that the Defendants are in: they want to establish jurisdiction via retail sales and yet are loath to concede that Plaintiff received no or a lesser value from their products." *Lamond*, 2007 U.S. Dist. LEXIS 42023, at *26 n.16.

Many consumer class actions will share this basic feature:the defendant claims that, even if there was a technical legal violation or arguably misleading statement, the plaintiff nevertheless received substantial value in the transaction or "got what they paid for." Trying to prove amount-in-controversy exceeds $5 million under CAFA means acknowledging that plaintiff's damage theory (whether for refund, or some other substantial damage amount) has at least some level of merit.

Differences in Jury Composition and Unanimity Requirement

Differences in jury composition and voting may also influence the decision. California state court juries require only nine out of 12 jurors to reach a verdict, which means a weaker or closer case could lead to a plaintiff's verdict. Federal court requires juror unanimity, which means that a single holdout juror leads to a hung jury and mistrial.

The demographics of the jury pool are also significant. State courts draw jurors only from the county, and the demographics of a particular

county (*e.g.*, San Francisco versus Contra Costa) will play a role in venue selection by the plaintiff. Federal court combines all the counties in the district, leading to a jury pool that dilutes whatever attributes a particular state court county has (whether urban, suburban, rural, liberal, conservative, etc.). Liti - gators taking such demographics into account should also consider the length of a likely trial (which skews juror demographics) and that in federal court, by standing order, individuals can be excused for "hardship" if they live more than 80 miles from the courthouse.

Coupon Settlements

A factor much discussed elsewhere is the new CAFA rule governing "coupon" settlements. (A "coupon" settlement is one in which class members receive some form of credit towards future purchases of the defendant's product or service; such settlements are considered favorable to defendants because they do not require a direct cash outlay, and because they can promote future sales). The federal rule under CAFA limits the availability of attorney's fees to plaintiffs' counsel when the settlement consideration is in the form of coupons, which in turn makes it less likely that plaintiffs' counsel will negotiate and agree to such settlements.

State court has no hard-and-fast rule on the same subject, though it appears that at least some judges in the complex litigation departments may be moving towards a CAFA-like state court practice. *See* "Coupon-Based Settle - ments Get Tougher," *Daily Journal*, May 29, 2007 (reporting trend of state court resistance to coupon settlements).

Part of the evaluation here has to be whether a coupon-based settlement would be appropriate or accepted by a judge in state court under any circumstance (*e.g.*, whether class members are readily identifiable and could receive direct cash payments or whether a "fluid recovery" would be justified). Nevertheless, in some circumstances defendants will want to leave the option of a coupon-based settlement open by remaining in state court.

The decision of whether to fight a class action case in federal or state court is an important one: it makes a difference in ways both obvious and subtle. The best decision is one made with full consideration of all of the differences, and with a detailed examination of the competing factors, instead of a simple assumption that one forum is always better for plaintiffs and the other always better for defendants.

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