California's Uncommon Common Law Class Action Litigation

William R. Shafton

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Modern society seems increasingly to expose [people] to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone . . . there will at best be a random and fragmentary enforcement, if there is any at all. . . . The problem of fashioning an effective and inclusive group remedy is thus a major one.¹

I. INTRODUCTION

Paul Miller was never the same after being physically assaulted in 1989.² The assault left him with head injuries that caused a permanent mental disability. This unfortunate disability entitled Mr. Miller to receive government benefits that he directly deposited into his checking account.³ Mr. Miller, however, ran into trouble when his bank, Bank of America, mistakenly credited extra money into his account that he proceeded to spend.⁴ Without Mr. Miller’s consent, Bank of America withdrew his government benefits to offset the

¹J.D. Candidate, May 2009, Loyola Law School; B.A., Oberlin College. I am deeply grateful for the dedication and diligence of Professor Georgene Vairo and the Loyola of Los Angeles Law Review editors and staff, without whom this Article would have been relegated to an unpublished file on my hard drive. Most importantly, to my beautiful wife and children, thank you for allowing me to complete this Article by waiving what would have undoubtedly been a successful Unfair Competition claim against the law review.


⁴Id. at *2–3. The bank assured him that his “benefit payments would be safe, convenient, and available when needed through direct deposit.” Id. at *3.
bank's error. This left his account with a deficit balance for which the bank charged overdraft fees. Mr. Miller filed suit against Bank of America, arguing that the bank's seizure of his benefits was improper under California law and seeking to recover the allegedly improper fees. While the California Supreme Court will soon review whether a bank may properly withdraw government benefit funds from its customer accounts to satisfy overdraft charges, Mr. Miller's case illustrates a different issue.

Mr. Miller was not the only customer who had their benefit monies seized by Bank of America. In fact, Bank of America maintains accounts for over a million customers who have their government benefit checks directly deposited into their accounts. Given that Mr. Miller lived off of his disability checks, he was not in a position to single-handedly bankroll litigation against Bank of America for the alleged improprieties that resulted in relatively little pecuniary loss to him. Instead, he and a handful of other lead plaintiffs brought claims on behalf of themselves as well as more than a million other similarly situated customers who were subject to the same allegedly wrongful acts by marshalling the utility of three different California statutes: California Code of Civil Procedure ("CCP") section 382 (the primary statute that authorizes class actions), the Consumers Legal Remedies Act ("CLRA") (an alternative mechanism for class action claims involving unfair consumer transactions), and the Unfair Competition Law ("UCL") (which, until 2004, provided for representative actions seeking equitable relief for illegal, fraudulent, or unfair business practices).

California has consistently embraced an equitable approach for adjudicating claims involving questions of general interest or claims...

5. Id. at *3, *8. The bank charged up to $160 per day in overdraft or non-sufficient funds fees. Id. at *8.
6. Id. at *1.
9. CAL. CIV. PROC. CODE § 382 (Deering 2007). For a detailed discussion of section 382, see infra Part II.
10. CAL. CIV. CODE §§ 1750–84 (Deering 2007). For further discussion of the CLRA, see infra Part IV.
11. CAL. BUS. & PROF. CODE §§ 17200–09 (Deering 2007). For additional discussion of the UCL, see infra Parts IV–V.
involving numerous parties. In that vein, the California legislature in 1872 enacted section 382, which “rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice.” Section 382, as well as the CLRA, are founded on California’s long-standing policy of ensuring that justice is served even where “numerous parties suffer injury of insufficient size to warrant individual action” that would otherwise lead to an “unjust advantage to the wrongdoer.”

This Article explores how plaintiffs like Mr. Miller, who do not have the funds to file claims for alleged wrongdoings and/or who have suffered a small pecuniary loss, invoke the class action mechanisms available to them in California and how those mechanisms vary from those available in federal courts. More specifically, Part II of this Article begins with a historical perspective on the development of California’s class action jurisprudence and then introduces the foundational requirements for class certification in California pursuant to section 382. This section also includes examples of seminal and noteworthy California cases discussing these requirements and makes some comparisons of these requirements to the approach outlined in Federal Rule of Civil Procedure 23 (“Rule 23”). Next, Part III highlights some specific distinctions between California and federal class action litigation practice, including statutes of limitations and appellate review of class certification. Part IV focuses on the CLRA and the UCL and how these two vehicles have furthered the state’s policies favoring representative actions. Finally, Part V explores practitioners’ and commentators’ observations of California’s current class action litigation climate. In addition, this section provides a cursory review of the initial impact that the Class Action Fairness Act (“CAFA”) has had on the parties who bring or defend the class action claims.

Ultimately, this Article suggests that California class action practice and procedure, while perhaps not remarkably different than

federal practice, does provide litigants with some subtle differences that must be taken into account. After exploring whether California should appropriately be considered a "judicial hellhole,"[16] this Article concludes with a reflection on the history and the future of equitable class action adjudication in California.

II. AN OVERVIEW OF CLASS CERTIFICATION REQUIREMENTS IN CALIFORNIA AND A COMPARISON TO FEDERAL STANDARDS

While each jurisdiction sets out its own prerequisites for maintaining a class action, the typical class action litigation cycle is relatively universal. The litigation generally begins when a plaintiff, as the class representative, files a complaint on behalf of herself and other similarly situated plaintiffs who are not actually named in the complaint (the represented parties).[17] In the earliest stage of litigation, the court uses the jurisdiction's class certification requirements to determine whether the plaintiff may maintain the action on behalf of the purported class members. For instance, many jurisdictions require that the plaintiff show that her claims are factually and/or legally similar to the claims of the represented parties, that the representative's counsel can adequately represent the interests of all parties, and that the number of represented parties at issue are such that it is impractical to join them all.[18]


[17] Although much less common, a defendant class action arises when a representative defendant defends on behalf of themselves and other similarly situated parties. See Robert R. Simpson & Craig Lyle Perra, Defendant Class Actions, 32 CONN. L. REV. 1319, 1322-23 (2000) (noting that defendant class actions are rare).

[18] The majority of states have modeled their class action statutes upon Rule 23. See Michael Connell, Comment, Full Faith and Credit Clause: A Defense to Nationwide Class Certification?, 53 CASE W. RES. L. REV. 1041, 1042 & n.5 (2002) (noting that the great majority of state class action statutes mirror Rule 23, but three exceptions exist: (1) California and Nebraska, which are based upon the Field Code; (2) New Hampshire, North Carolina, and Wisconsin, which have statutes that do not follow Rule 23; and (3) Virginia and Mississippi, which do not have class action statutes); Kurt A. Schwartz, Note, Due Process and Equitable Relief in State Multistate Class Actions After Phillips Petroleum Co. v. Shuts, 68 TEX. L. REV 415, 425 n.84 (1989).
Class certification is a preliminary, procedural matter that is generally determined prior to any substantive issues. Class certification can provide the plaintiff with an exceedingly strong bargaining position given the defendant's potential exposure to each of the represented plaintiffs. Should the plaintiff prevail in the litigation or settle with the defendant, class members generally are provided with an opportunity to prove that they are entitled to receive their share of the award, subject to certain notice requirements and possible court approval of any settlement.

A. An Early History of California's Class Action Law

While representative litigation dates as far back as the end of the twelfth century, the development of class action procedures is generally considered to be an outgrowth of the equity courts' exception to the rules of compulsory joinder.

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19. See Linder v. Thrifty Oil Co., 2 P.3d 27, 34 (Cal. 2000) (noting that in California class certification is a procedural issue that does not involve the merits of the case, barring a showing that fairness and efficiency demand an examination of the legal sufficiency of the claims). "[N]othing prevents a court from weeding out legally meritless suits prior to certification via a defendant's demurrer or pretrial motion." Id. Cf. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974) ("[N]othing in either the language or history of Rule 23 . . . gives a [federal] court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). Some commentators have suggested that courts should be free to conduct an examination of the merits rather than be forced to certify meritless class action claims. See Bartlett H. McGuire, The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits, 168 F.R.D. 366, 370 (1996) (discussing how some federal courts continue to conduct a merit based inquiry despite the holding of Eisen); Douglas M. Towns, Merit-Based Class Action Certification: Old Wine in a New Bottle, 78 VA. L. REV. 1001, 1044 (1992). Practically, a court must often make factual determinations when ruling on whether or not to certify the case. See 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.84 n.9 (3d ed. 2007) (discussing the Second Circuit's adoption of "the view that courts may, indeed must, consider merits issues to the extent they are necessary to certification determinations" (citing Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 41 (2d Cir. 2006)).


21. See Stephen C. Yeazell, The Past and Future of Defendant and Settlement Classes in Collective Litigation, 39 ARIZ. L. REV. 687, 688 (1997). Yeazell discusses an 1199 case from the court of the Archbishop of Canterbury in which the rector of a parish sued four parishioners as representatives of all parishioners. Id. The rector sought to have the parishioners carry the bodies of their dead several miles to a place where the rector could bury the dead for a fee. Id.

representative actions was furthered by the Field Code,\(^\text{23}\) which New York was the first to adopt in 1848.\(^\text{24}\) The New York legislature then amended the code in 1849 to include the first state statutory language authorizing class actions.\(^\text{25}\)

In 1850, the same year that California joined the Union,\(^\text{26}\) the California Supreme Court heard its first class action case and adopted language similar to the Field Code in order to ensure that parties' rights could be enforced where there would not otherwise be a remedy.\(^\text{27}\) The court avoided a stringent adherence to strict party joinder rules and instead followed the lead of the Field Code, which provided that a single plaintiff could bring a claim on behalf of others not present before the court where the claim involved a question "of a common or general interest, of many persons, or when the parties [were] numerous, and it [was] impracticable to bring them all before the court."\(^\text{28}\)

This open-door policy towards representative actions carried over to California's section 382, which utilized the same language in the Field Code in order to provide a remedy where, for example, "numerous parties suffer injury of insufficient size to warrant individual action."\(^\text{29}\) Congress employed the Field Code language in Federal Equity Rule 38, "the first federal codification of class action

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\(^{25}\) Id. at 48 n.138.

\(^{26}\) See KEVIN STARR, CALIFORNIA: A HISTORY, at xviii (2005).

\(^{27}\) Von Schmidt v. Huntington, 1 Cal. 55, 67–68 (1850).


In 1938, when law and equity merged in the federal courts, Congress embodied Rule 38’s principles in Rule 23. Despite the flexible approach to class action litigation, judges and lawmakers recognized that “group action is also capable of injustice.” Therefore, courts have employed certain criteria to ensure that the mechanism designed to remedy injustice does not itself become a vehicle for abuse. The balance of this section explores those procedural safeguards, which also serve to ensure fairness and protect the absent class member’s due process rights.

B. Requirements for Asserting a Class Action Pursuant to California’s Code of Civil Procedure Section 382

The language of CCP section 382 goes no further than to declare that “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” Notably absent from section 382 are any procedural guidelines for class actions or any specific criteria designating which class actions can be maintained.

In the early 1970s, the California legislature passed the CLRA, which provided its own exclusive procedures, based upon Rule 23, for asserting and maintaining consumer class actions in California. California was one of the few states that did not adopt Rule 23 as its general class action statute, but the California Supreme Court has judicially adopted certain provisions of Rule 23 and advised courts to

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31. See ELIZABETH J. CABRASER ET AL., CALIFORNIA CLASS ACTIONS PRACTICE AND PROCEDURE § 1.01 (2007); For a more detailed discussion of Rule 23 see Part II.B.2.
32. Blue Chip Stamps, 556 P.2d at 758.
33. See Caro v. Procter & Gamble Co., 22 Cal. Rptr. 2d 419, 425 (Ct. App. 1993) (analyzing previous class action cases to establish amount of damages, group litigant benefits, and court benefits as factors for class certification).
34. See 5 MOORE ET AL., supra note 19, ¶ 23.02.
35. CAL. CIV. PROC. CODE § 382 (Deering 2007).
36. In 2002, the California Judicial Council issued a set of rules for management of class action litigation that regulates class notice, motions to certify or decertify the class, discovery procedures to identify class members, and settlement and dismissal of class actions. See CAL. R. CT. 3.760–771.
37. See infra Part IV.
38. CABRASER ET AL., supra note 31.
look to the federal approach when there is no California law on point. As explained below, California’s common law approach now requires that a party seeking class certification under section 382 show that an ascertainable class exists and that there is a “community of interest” among class members.

1. Ascertainable Class

A final judgment in a class action can preclude absent class members from later asserting their own claims or defenses against the adverse party. Given this potentially preclusive effect of a class action, courts must be able to ascertain who is going to be bound by a class action judgment. Thus, a plaintiff in California must show that there is an objectively identifiable class of litigants who have a cause of action against the defendant, although the plaintiff need not prove the existence of specific class members or identify all class members by name. California courts decide whether the plaintiff has met her burden of proving ascertainability by looking at a number of factors, including the class definition itself, the size of the purported class, and the available means of identifying class members.

a. The class definition

The question of whether a class can be logically ascertained begins with how the plaintiff defines the class. However, a well-

40. See Daar, 433 P.2d at 739.
42. Wolff, supra note 41, at 719.
44. See Reyes v. San Diego County Bd. of Supervisors, 242 Cal. Rptr. 339, 343 (Ct. App. 1987). The extent of the correlation between California’s ascertainability requirement and the federal approach under Rule 23 is discussed later in Part II.B.2.
45. While Rule 23 does not specifically demand a clearly defined class, such a requirement is hardly unnecessary in federal class action litigation. For example, in Lopez Tijerina v. Henry, 48 F.R.D. 274, 275-77 (D.N.M. 1969), the court found the plaintiff’s class definition to be untenably vague where the plaintiff attempted to define the class as those individuals with Spanish surnames, individuals of Mexican, Indian and Spanish ancestry, and/or individuals who speak Spanish as their primary language. Id.; see also 5 MOORE ET AL., supra note 19, ¶ 23.21 (discussing an implied condition of Rule 23 that the class definition must be sufficiently specific).
defined class may not be sufficient to establish ascertainability if each putative class member’s right to recover is based on unique facts. For example, in *Weaver v. Pasadena Tournament of Roses Association*, the defendant association advertised that it would sell 7,500 tickets to the Rose Bowl football game. After issuing numbered identification stubs to persons waiting in line in order to determine who would be eligible to purchase one of the 7,500 tickets, the ticket booth closed after issuing only 1,500 tickets, leaving some angry stub holders with no opportunity to purchase tickets. Four of those stub holders approached the Rose Bowl box office on the day of the game and attempted to purchase the tickets but were refused admission. In reviewing the class action brought by those four individuals on behalf of themselves and the other stub holders, the court ruled that there was no “reasonable basis for ascertaining the members of the alleged class.” The court found that the purported 6,000 class members were not necessarily a similarly situated group with common causes of action but instead had separate and distinct claims. The putative class members did not necessarily share causes of action because each class member would have to assert that they were refused admission, that the refusal was wrongful, and that the particular facts of the refusal were sufficient to entitle them to relief under the applicable statutory scheme. Therefore, the class was considered unascertainable.

On the other hand, in the seminal case of *Daar v. Yellow Cab Co.*, the plaintiff filed a putative class action alleging that the defendant overcharged its customers during a four year period. The California Supreme Court found that the class, defined as all the defendant’s customers over that four year period, was appropriately

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46. 198 P.2d 514 (Cal. 1948).
47. *Id.* at 516.
48. *Id.*
49. *Id.*
50. *Id.* at 520.
51. *Id.* at 519–20.
52. *Id.* at 518.
53. *Id.* The court also recognized the overlap in such a situation between ascertainability and the community of interest. *Id.* at 519.
55. *Id.* at 736.
ascertainable.\textsuperscript{56} The court found the class readily ascertainable especially because the defendant could produce an accounting that provided the court with both a ready means of identifying the class members and the amount of each individual overcharge each class member suffered.\textsuperscript{57}

Note that a plaintiff need not prove actual injury to every class member in order to establish ascertainability. In \textit{Hicks v. Kaufman & Broad Home Corp.},\textsuperscript{58} plaintiff homeowners sued the defendant for breach of warranty after discovering that new homes contained an inherent defect that was substantially certain to cause foundation damage during the life of the homes.\textsuperscript{59} Although only some of the class members' homes had actual damage, the court held that actual damage may be an element of proof required to show liability, but it should not be a prerequisite to class membership.\textsuperscript{60} Indeed, the merits of the claim may not be considered during the certification stage.\textsuperscript{61}

\textit{b. The class size}

In federal courts, in order to establish a class action under Rule 23, the plaintiff must show that "the class is so numerous that joinder of all members is impracticable."\textsuperscript{62} In contrast, the language of California's section 382 allows a class action "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court."\textsuperscript{63} This language suggests that, unlike federal courts bound by Rule 23, California courts can also allow a class action where it is in fact practicable to join numerous parties assuming the question is of common interest involving "many" persons.\textsuperscript{64} In fact, in \textit{Bowles v.}
Superior Court, the California Supreme Court approved a class consisting of just ten trust beneficiaries. The court commented that there is no set number satisfying the requirement that there be "many" persons and that the class consisting of the ten trust beneficiaries was "sufficiently broad to cover all the various beneficiaries." Nevertheless, California courts tend to simply examine whether the class size is sufficiently numerous in part because California also requires that utilization of the class action mechanism provides the parties and the court with a substantial benefit.

c. The available means of identifying class members

In determining whether there is an ascertainable class, California courts will also examine whether there is a reasonable means of identifying the class members that will not cause excessive expense or require undue delay. Along these lines, the proponent of the class does not need to individually identify class members in order for the definition of the class to be ascertainable. Instead, California courts look to ensure that the class description is "sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description."

For example, in Reyes v. Board of Supervisors, plaintiff filed a class action alleging that the defendants, the San Diego Board of Supervisors and Department of Social Services, improperly denied benefits to certain class members. The defendants asserted that there would be a high cost of administering any award at the remedial stage, but the trial court found that government records

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66. Id. at 713.
67. Id. at 712–13.
69. See infra Part II.B.3.
70. See Daar, 433 P.2d at 740.
74. Id. at 340.
made the identification of the class relatively easy and did not involve excessive cost or delay.\textsuperscript{75} Since there was a reasonable means of identifying the class that was not unmanageable, the court found the class to be readily ascertainable.\textsuperscript{76}

Similarly, the California Court of Appeal found an ascertainable class in \textit{Clothesrigger, Inc. v. GTE Corp.}\textsuperscript{77} There, the class consisted of long-distance telephone subscribers who were charged for one or more unanswered phone calls.\textsuperscript{78} The court felt untroubled by the fact that the class members would have to identify themselves and prove their individual damages after resolution of the case on the merits.\textsuperscript{79} The court found that this individual determination at the remedy stage did not preclude a finding of an ascertainable class.\textsuperscript{80} Therefore, a class is ascertainable if clearly defined and identifiable without excessive expense or undue delay.

2. Well-defined Community of Interest

The community of interest requirement relates to the language of section 382 that authorizes class actions where the matter is one of "common or general interest."\textsuperscript{81} There is a certain interdependence between this requirement and the ascertainability requirement, given that an ascertainable class "depends in turn upon the community of interest among the class members in the questions of law and fact involved."\textsuperscript{82} In order to determine if there is a well-defined community of interest, California courts look to three factors: (1) whether common questions of law or fact predominate; (2) whether the class representative’s claims or defenses are typical of the class; and (3) whether the class representative can adequately represent the class.\textsuperscript{83}

\textsuperscript{75} \textit{Id.} at 346. The court also found that a class action should not be considered unascertainable out of fear that a problem may exist at the remedial stage. \textit{Id.} (citing \textit{Windham v. Am. Brands, Inc.}, 565 F.2d 59, 70 (4th Cir. 1977)).

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} 236 Cal. Rptr. 605 (Ct. App. 1987).

\textsuperscript{78} \textit{Id.} at 610–11.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} CAL. CIV. PROC. CODE § 382 (Deering 2007).

\textsuperscript{82} Daar v. Yellow Cab Co., 433 P.2d 732, 740 (Cal. 1967).

\textsuperscript{83} See \textit{Richmond v. Dart Indus., Inc.}, 629 P.2d 23, 28 (Cal. 1981).
The California approach is loosely analogous to the federal prerequisites to class actions under Rule 23(a), which requires (1) numerosity (the class is so large that joinder of all members is impracticable); (2) commonality (questions of law or fact are common to the class); (3) typicality (the representative’s claims or defenses are typical of the claims of the represented class members); and (4) adequacy (the representative parties will fairly and adequately represent and protect the interests of the class).84

Similarly, the community of interest requirement reflects Rule 23(b)(3), which allows a class action to pursue damages against the defendant where “questions of law or fact common to class members predominate over any questions affecting only individual members.”85

a. Do common questions of law or fact predominate?

Part of the underlying purpose of class action litigation is to provide efficiency both to the parties and the court.86 In order to further that purpose, courts examine whether common questions of law or fact predominate. Predominance is a comparative concept, evaluating the issues that can be resolved jointly and those that require separate adjudication.87 If the individual issues can be effectively managed, class treatment is not necessarily precluded.88

The commonality requirement is well illustrated by the case of Collins v. Rocha.89 In that case, the defendant told the 44 plaintiff farm workers that he would employ them for two weeks.90 The defendant then drove the plaintiffs 400 miles to a farm, employed them for a few days, but then terminated their employment without providing them with a return ride home.91 The defendant attacked the community of interest of the class by questioning whether each plaintiff relied on the defendant’s representations in the same

84. FED. R. CIV. P. 23(a).
85. Id. at 23(b)(3); see also infra Part II.C. (discussing the types of class actions authorized by Rule 23).
88. Id. at 200 (citing Richmond, 629 P.2d at 33).
89. 497 P.2d 225.
90. Id. at 226.
91. Id.
manner, suggesting that each plaintiff’s reliance could have led to varying damages that would have to be proved individually.\textsuperscript{92} The court was unconvinced, especially because the plaintiffs had all gathered together at the same time to listen to the defendant make the employment offer.\textsuperscript{93} The plaintiffs therefore could be presumed to have relied on the defendant’s one-time representation.\textsuperscript{94} Thus, the court held that common questions of fact existed to sufficiently support a community of interest because each class member’s right to recover did not require separate adjudication of each member’s claim, even though individual class members could be separately required to prove damages \textit{after} judgment.\textsuperscript{95}

On the other hand, the community of interest requirement will likely not be satisfied if each individual class member’s \textit{right} to recover requires separate adjudication of each class member’s claim. For example, in \textit{City of San Jose v. Superior Court},\textsuperscript{96} the plaintiffs brought a class action against the city for inverse condemnation and nuisance, alleging that the flight patterns at a nearby municipal airport caused a diminution of their property values.\textsuperscript{97} In \textit{San Jose}, the defendant’s liability to class members could not be determined as a whole but instead required an examination of facts that were particular to each individual plaintiff.\textsuperscript{98} Thus, because there were “no common questions of law and fact,” the court held that there was an insufficient community of interest and class certification was improper.\textsuperscript{99}

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\textit{b. Are the class representatives claims or defenses typical of the class?}
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The typicality requirement, a prerequisite in both California and federal class actions, seeks to protect the due process rights of absent class members by ensuring that the class representative will pursue

\textsuperscript{92} Id.
\textsuperscript{93} Id. at 227.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 228.
\textsuperscript{96} 525 P.2d 701 (Cal. 1974).
\textsuperscript{97} Id. at 704–05.
\textsuperscript{98} Id. at 710 (noting that the impact of aircraft noise on each individual property varies depending on the use of the land and that the noise level from the planes would not be determinative in evaluating whether an actionable nuisance existed).
\textsuperscript{99} Id.
the action vigorously, which is more likely to occur if the interests of
the members and the representative are unified.\textsuperscript{100}

A class representative’s actual membership in the class is the
starting point for a typicality analysis. For example, in Caro \textit{v.}
Procter & Gamble Co.,\textsuperscript{101} the plaintiff brought a CLRA class action
claiming that the defendant engaged in a fraudulent and deceitful
business practice by representing that its “Citrus Hill” orange juice
was “fresh” when it was in fact reconstituted from frozen
concentrate.\textsuperscript{102} While the plaintiff brought the claim on behalf of
those who were deceived by the defendant’s deceptive labeling and
advertising, the plaintiff himself did not think that the orange juice
was “fresh.”\textsuperscript{103} Therefore, he did not have claims that were typical of
the class.\textsuperscript{104}

Furthermore, if a class action is brought against multiple
defendants, the representative must have a claim against each
defendant.\textsuperscript{105} This requirement is exemplified by the case of Hart \textit{v.}
Alameda County.\textsuperscript{106} There, plaintiff Hart, individually and on behalf
of others similarly situated, brought a class action against twenty-five
different California counties for the return of unused jury fee
deposits.\textsuperscript{107} However, Hart only had individual claims against three
of the twenty-five counties.\textsuperscript{108} The court ruled that the representative
can only maintain claims for which she actually has a cause of
action.\textsuperscript{109} If the representative does not have a personal cause of
action against each defendant, the representative’s claims cannot be
considered to be typical of the class.\textsuperscript{110}

\textsuperscript{100} 7A CHARLES A. WRIGHT ET AL., \textit{FEDERAL PRACTICE AND PROCEDURE} § 1764 (3d ed.
2007).
\textsuperscript{101} 22 Cal. Rptr. 2d 419 (Ct. App. 1993).
\textsuperscript{102} \textit{Id.} at 421.
\textsuperscript{103} \textit{Id.} at 430.
\textsuperscript{104} \textit{Id.} at 431.
\textsuperscript{106} 90 Cal. Rptr. 2d 386 (Ct. App. 1999).
\textsuperscript{107} \textit{Id.} at 389.
\textsuperscript{108} \textit{Id.} at 391.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
c. Do the class representatives adequately represent the class?

The requirements of typicality and adequacy of representation are often related given their similar due process considerations. A plaintiff in both California courts under section 382 and federal courts under Rule 23 must show that the class representative will adequately represent the class. "Adequate representation is the foundation of all representative actions and embodies the due process requirement that each litigant is entitled to his or her day in court."\(^\text{111}\)

The focus of this requirement in California tends to be twofold: (1) whether the representative plaintiff has any interests that are antagonistic to the class; and (2) whether the plaintiff’s attorney is qualified to adequately represent the class.\(^\text{112}\)

i. The representative’s interests may not be antagonistic to the class

The representative’s claims should not be inconsistent with the claims of the other class members.\(^\text{113}\) In examining this issue, California courts take a balancing approach by looking at the extent of the conflicts involved, whether the efficacy of the class action outweighs the conflict, whether there are ways to limit the impact of the conflict, and "'any other facts bearing on the fairness with which the absent class member is represented.'"\(^\text{114}\)

This balancing approach is exemplified by the case of *Capitol People First v. State Department of Developmental Services*,\(^\text{115}\) where a number of developmentally disabled plaintiffs brought a class action against the State for the right to the best services possible, including the right to live in community settings rather than

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112. See McGhee v. Bank of Am., 60 Cal. App. 3d 442, 450 (Ct. App. 1976). These concerns mirror the same issues raised in federal practice under Rule 23. See 5 MOORE ET AL., supra note 19, ¶ 23.25 (outlining a wide variety of issues that can affect the representative’s adequacy).

113. See Capitol People First v. State Dep’t of Developmental Servs., 66 Cal. Rptr. 3d 300, 317 (Ct. App. 2007).


115. 66 Cal. Rptr. 3d 300, 317 (Ct. App. 2007).
be unnecessarily institutionalized. The trial court held that, among other deficiencies, the plaintiffs could not adequately represent the class because of the unique needs of developmentally disabled individuals, finding that what would be best for one plaintiff may not be optimal for another. According to the trial court, conflicts of interest therefore prevented adequate representation of some members of the class who would be best served by institutional treatment.

The California Court of Appeal disagreed. As to whether the plaintiffs' interests were antagonistic to other class members, the court pointed out that "[b]efore the outcome of improved individualized assessment . . . can be realized, the policies that undergird decisionmaking and allocation of resources must be changed. As we explain, the class action mechanism is the only alternative that can achieve this end." Moreover, the court emphasized that the existing avenues for appealing the allocation of state benefits could not provide the type of class-wide relief sought by the plaintiffs. Therefore, the class representatives could adequately represent the interests of the class because any supposed conflicts did not go to the core of the claims and because of the unique need for class action treatment.

In J.P. Morgan & Co. v. Superior Court, conflicts led the court to the opposite conclusion. The class representative was a large-scale copper purchaser who brought a class action on behalf of itself and other purchasers, claiming that the defendants illegally manipulated the price of copper. Because of the nature of the copper industry, one class member could be acting as a buyer of copper and then, in a subsequent transaction, act as a seller of the

116. Id. at 305 (seeking injunctive and declaratory relief pursuant to the state's developmental disabilities law).
117. Id. at 318.
118. Id.
119. Id. at 321.
120. Id.
121. Id. The court also noted that class action treatment was appropriate given the efficiency both to the litigants as well as the courts. Id.
122. See id. at 317.
123. 6 Cal. Rptr. 3d 214 (Ct. App. 2003).
124. Id. at 217.
same set of goods to another class member.\textsuperscript{125} Therefore, the court recognized that members had conflicts of interests because the class representative and other class members were frequently on opposite sides of the same transaction.\textsuperscript{126} For any given transaction, one class member may wish to assert that the price of the goods sold was inflated, while another may wish to assert that the price of the goods was proper.\textsuperscript{127} Due to the extensive conflicts that went to the core of the subject matter of the litigation, the court thus reversed the trial court's class certification.\textsuperscript{128}

ii. The class counsel must adequately represent the class

In a class action context, where the plaintiff's counsel is essentially establishing an attorney-client relationship with absent class members unknown to the counsel, the counsel has a fiduciary duty to protect those absent members and ensure their interest will be competently pursued.\textsuperscript{129} Courts therefore require that the class counsel "must be qualified, experienced and generally able to conduct the proposed litigation."\textsuperscript{130}

As mentioned above, California courts are not alone in requiring the class action plaintiff to demonstrate that she will adequately represent the class.\textsuperscript{131} Both Rule 23 and section 382 seek to protect the rights of the absent class members so that the goals of the class action litigation can be efficiently and competently achieved.

\textsuperscript{125} See id. at 221 (describing a complex distribution channel that involved at least eight different tiers).

\textsuperscript{126} Id. at 227–28.

\textsuperscript{127} See id. This conflict existed not just between the class representative and the putative class members but also among the putative class members themselves. Id.

\textsuperscript{128} See id. at 228 (holding that the failure of the community of interest requirement, specifically the conflicts of interest justify reversing the trial court's certification of the class).


\textsuperscript{130} Miller v. Woods, 196 Cal. Rptr. 69, 77 (Ct. App. 1983).

\textsuperscript{131} See FED. R. CIV. P. 23(a)(4) (permitting class certification only where "the representative parties will fairly and adequately protect the interests of the class").
3. The Class Action Mechanism Must Provide a Substantial Benefit to Both the Court and the Litigants

While California courts have furthered the state’s policy of encouraging the use of class action litigation, courts employ a safeguard against abuse by requiring that the class action yield “substantial benefits” for the court and the parties. In federal courts, substantial benefits are also required by the language of Rule 23(b)(3) namely, that the “class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

California courts generally employ a multi-factor, factually-specific analysis to determine if the class action would yield substantial benefits. For example, in Blue Chip Stamps v. Superior Court, the trial court certified a class that consisted of persons who sought to recover excess tax reimbursements that they paid to the defendant trading stamp company while redeeming stamps for merchandise. The California Supreme Court subsequently rejected class certification because it found that the benefit to the class members would be minimal compared to the expense involved in litigating the claim and distributing any award. The decision was based on a number of factors including: the small size of the potential recovery to class members (some with claims as small as eighteen cents, making it unlikely that such members would ever bother to come forward to prove their claim), the fact that the defendant had already changed its allegedly wrongful practice before the class action was filed, the fact that the defendant had turned the money at issue over to the public treasury, and the court’s

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133. See Kaye v. Mount La Jolla Homeowners Ass’n, 252 Cal. Rptr. 67, 79 (Ct. App. 1988) (“Class certification is a procedural device designed to save time and minimize costs. California courts have liberally interpreted the procedural prerequisites for class certification creating, and fostering an environment conducive to the extensive use of class actions in a variety of contexts to simplify complex litigation.”).
134. See infra Part II.C. (discussing the types of class actions authorized by Rule 23 including a “(b)(3)” damages class action).
135. FED. R. CIV. P. 23(b)(3); see also Fireside Bank v. Super. Ct., 155 P.3d 268, 282 (Cal. 2007) (applying section 382 in holding that a requirement of class certification is proof that “proceeding as a class is superior to other methods”).
137. Id. at 757–58.
138. Id. at 758.
recognition that fashioning an economically viable remedy was unlikely.\textsuperscript{139} Other California courts have denied class certification based on similar factors.\textsuperscript{140}

C. Types of Classes Available

Class actions by their very nature are designed to bind absent class members. The certification requirements discussed above provide procedural safeguards and answer the question of who is to be bound. In addition, courts must address two important questions that also go to the absent members' due process rights: (1) whether the putative class members have the option to opt-out in order not to be bound by the litigation; and (2) whether the absent members must receive notice of the litigation.\textsuperscript{141} The answers to these two questions will depend on the type of class action brought by a plaintiff/class representative.

1. Class Types Under Rule 23—the Federal Court Approach

Rule 23(b) establishes three permissible types of class actions. Once the federal court is satisfied that all of the requirements of Rule 23(a) have been satisfied, the court will then determine whether the class can proceed under one of the three class types established by Rule 23(b).\textsuperscript{142}

a. The Rule 23(b)(1) class

First, a Rule 23(b)(1) class exists when class treatment is required to avoid prejudice that would result if individual actions were allowed.\textsuperscript{143} More specifically, a Rule 23(b)(1)(A) class is

\textsuperscript{139} Id. at 757–59 (holding that leaving the money in the hands of the public treasury was the most equitable solution).

\textsuperscript{140} See Newell v. State Farm Gen. Ins. Co., 13 Cal. Rptr. 3d 343, 348 (Ct. App. 2004) (holding that a class consisting of policy holders of earthquake insurance was not certifiable where individual issues predominated and where class adjudication could not provide substantial benefits to the court or litigants); Basurco v. 21st Century Ins. Co., 133 Cal. Rptr. 2d 367 (Ct. App. 2003) (finding that class treatment was not the superior method of adjudicating insureds' litigation involving earthquake damage claims, especially where there was a predominance of individual issues and where adequate alternatives were available).


\textsuperscript{142} The class type dictates not only whether or not the member is entitled to mandatory notice and/or the availability to opt-out of the class, but also dictates the type of damages that can be sought by the class.

\textsuperscript{143} FED. R. CIV. P. 23(b)(1) ("A class action may be maintained if Rule 23(a) is satisfied and if . . . prosecuting separate actions by or against individual class members would create a risk of:
appropriate in situations where, absent class treatment, the defendant would be subject to multiple rulings that might establish conflicting standards of conduct for the defendant.\textsuperscript{144} Rule 23(b)(1)(B) is appropriate where the class members might be harmed if they were forced to separately adjudicate their claims against the opposing party.\textsuperscript{145} Under both 23(b)(1)(A) and 23(b)(1)(B), courts have certified classes in matters of labor, government, trustees of financial accounts, and in other situations where the defendant acts in a way that uniformly affects all members.\textsuperscript{146}

For example, in \textit{Coleman v. Wilson},\textsuperscript{147} the court granted certification for a 23(b)(1)(B) class where mentally ill state prisoners alleged that the government provided inadequate mental health care.\textsuperscript{148} On the other hand, in \textit{Contract Buyers League v. F & F Investment},\textsuperscript{149} a group of African-American purchasers of land sought to certify a 23(b)(1) class against the defendants for fraud.\textsuperscript{150} The court held that the 23(b)(1) class was not appropriate because there was no threat of inconsistent adjudication where variations could be attributed to the specific facts of each transaction, rather than a uniform common practice of the defendant.\textsuperscript{151}

\textsuperscript{144} \textit{Id.} For example, a landowner may be subject to multiple lawsuits that all seek abatement of a nuisance on the owner’s land. In this situation, the landowner could be subject to numerous judgments that establish conflicting standards of conduct for the landowner. \textit{See} FED. R. CIV. P. 23 advisory committee’s notes (1966 Amendments).

\textsuperscript{145} \textit{See} FED. R. CIV. P. 23(b)(1)(B). This class type is commonly invoked in situations where the class members are seeking money damages from a “limited fund.” A limited fund involves a situation where “recovery will come from a fixed pool of assets that is or may be insufficient to satisfy all of the claims against the fund.” \textit{5 Moore et al., supra} note 19, ¶ 23.84. If the class members were forced to separately adjudicate their claims, litigants who obtained judgment quickly may collect all of the sought-for relief, whereas other litigants who were slower to the courthouse finish line may find the available pool of funds had been depleted by the other litigants. Note that, except in limited fund situations, a (b)(1)(B) class is not appropriate for a class primarily seeking money damages. \textit{See} id.

\textsuperscript{146} \textit{See} 5 Moore et al., supra note 19, ¶ 23.42.

\textsuperscript{147} 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).

\textsuperscript{148} \textit{Id.} at 1293.

\textsuperscript{149} 48 F.R.D. 7 (N.D. Ill. 1969).

\textsuperscript{150} \textit{Id.} at 14.

\textsuperscript{151} \textit{Id.}
Under a 23(b)(1) class, the plaintiff is generally not required to provide individual notice to the entire class.\textsuperscript{152} The lack of notice may raise certain due process considerations, but the drafters of the 2003 amendments to Rule 23 were concerned that the cost of notice could cripple class actions.\textsuperscript{153} Therefore, Rule 23 vests courts with the discretion to balance the anticipated benefits of notice versus the costs of notice in order not to unduly deter the plaintiff from pursuing class-wide relief.\textsuperscript{154}

Rule 23 does not allow a class member of a (b)(1) class to opt-out in order to pursue the litigation separately. Allowing a member of a 23(b)(1) class to opt-out could lead to the very problems the class type was designed to avoid: “inconsistent adjudications or adjudications that would impair other class members’ individual interests.”\textsuperscript{155} Nevertheless, federal courts demand that 23 (b)(1) and (b)(2) class members be provided with notice in certain circumstances, especially where the class seeks monetary damages in addition to injunctive relief.\textsuperscript{156}

\textit{b. The Rule 23(b)(2) class}

The second class type, a 23(b)(2) class, exists where the class representatives are seeking injunctive or declaratory relief because the defendant has acted (or failed to act) “on grounds generally applicable to the class.”\textsuperscript{157} A 23(b)(2) class is often invoked by class action litigants alleging civil rights violations. For example, in

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\textsuperscript{152} \textsc{Fed. R. Civ. P. 23(c)(2)} (“[T]he court may direct appropriate notice to the class.”). Under Rule 23, the plaintiff generally pays for class notice. \textsc{See Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178-79 (U.S. 1974)} (\textquotedblright Where . . . the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit\lq\rq).\textsuperscript{153} \textsc{See Fed. R. Civ. P. 23 advisory committee’s notes (2003 Amendments)}; 5 \textsc{Moore et al., supra note 19, ¶ 23.100}.\textsuperscript{154} \textsc{Fed. R. Civ. P. 23 advisory committee’s notes (2003 Amendments)}.\textsuperscript{155} 5 \textsc{Moore et al., supra note 19, ¶ 23.100}.\textsuperscript{156} \textsc{See Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)} (holding that because the appellant was denied an opportunity to opt out of the (b)(1) and (b)(2) class action which sought both injunctive relief and monetary damages, the appellant should not be precluded from separately pursuing his claim against the defendant for monetary damages even though the injunctive relief award was binding upon the appellant); \textsc{In re Temple, 851 F.2d 1269, 1270 (11th Cir. 1988)} (holding that because petitioners did not have a right to opt out of the (b)(1) class, the trial \textquoteleft\textquoteleft court’s failure to notify petitioners of the certification hearing violated due process\textquoteright\textquoteright).\textsuperscript{157} \textsc{Fed. R. Civ. P. 23(b)(2)}. \textquoteleft\textquoteleft[T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” \textit{Id.}
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Dukes v. Wal-Mart, Inc., a class of 1.5 million female employees sought injunctive and declaratory relief, lost pay, and punitive damages as a result of Wal-Mart’s alleged violations of Title VII of the 1964 Civil Rights Act. The Ninth Circuit affirmed the trial court’s certification, finding that Wal-Mart both acted (by paying women less than men) and failed to act (by failing to promote equally qualified women) in a manner that was generally applicable to the class.

In federal courts, the availability of money damages for a 23(b)(2) class is limited. Some circuits will not certify a 23(b)(2) class where monetary damages are more than incidental to the plaintiffs’ claim or where such damages require an individual determination. For example, in Allison v. Citgo Petroleum Corp., the plaintiff sought injunctive relief and monetary damages (including compensatory, punitive, and other equitable monetary damages such as back pay) for the defendant’s allegedly racially discriminatory employment practices. The Fifth Circuit explained that monetary relief predominates when the relief “being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member’s case.” Because an awarding of monetary damages to the plaintiffs would require an analysis of “subjective and intangible differences of each class member’s individual circumstances,” the court upheld the denial of 23(b)(2) class certification.

On the other hand, in Molski v. Gleich, the Ninth Circuit refused to adopt the bright-line distinction made in Allison between incidental and non-incidental damages because to do so would “nullify the discretion vested in the district courts by Rule 23.” In

158. 509 F.3d 1168 (9th Cir. 2007).
159. Id. at 1174.
160. Id. A class need only show that the defendant acted or refused to act in a way that was generally applicable to the class. Id. at 1186 n.13 (citing Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001)).
162. Id.
163. Id. at 416.
164. Id. at 413.
165. Id. at 418. The court went on to explain that a (b)(3) class was not available because individual issues predominated. Id. at 419.
166. 381. F.3d 937 (9th Cir. 2003).
167. Id. at 950.
order to determine whether or not monetary damages were the "essential goal" of the litigation, the court instead looked at the specific facts of the case at hand in order to assess the "intent of the plaintiffs in bringing the suit." In *Molski*, the named plaintiff filed a class action on behalf of himself and other disabled individuals against the defendant petroleum company for an alleged denial of proper access to California gas stations (considered public accommodations) and for violations of state and federal anti-discrimination laws. The court concluded that because the defendant acted in a way that applied generally to the class and because issues of individual injury claims were preserved, certification as a 23(b)(2) class was appropriate.

As with a 23(b)(1) class, class members in a 23(b)(2) class do not have the right to opt-out of the class, and notice is at the discretion of the court. However, courts have construed the Rule 23 requirements as sufficiently "flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions."

c. The (b)(3) class

The third class type, a 23(b)(3) class, exists where the class action is superior to other available methods for adjudication and common questions predominate. A class seeking money damages

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168. Id. (citing Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1240 (9th Cir. 1998)).
169. Id.
170. Id. at 941.
171. Id. at 950. Even though the case settled after certification, and the settlement decree included damages, the court still found (b)(2) classification proper because the actual damages did not "flow directly from liability to the class as a whole." Id. at 949–50.
172. See FED. R. CIV. P. 23(b)(2), (c)(2)(A).
173. Eubanks v. Billington, 110 F.3d 87, 94–96 (D.C. Cir. 1997) (recognizing that while some courts have allowed opt out rights in a (b)(1) or (b)(2) class, the plaintiffs in the employment discrimination case at hand failed to demonstrate that "basic fairness" demanded they be allowed a right to opt out); see also Holmes v. Continental Can Co., 706 F.2d 1144, 1160–61 (11th Cir. 1983) (holding that the trial court abused its discretion by failing to allow plaintiffs to opt out of a 23(b)(2) class in which class plaintiffs sought monetary damages, injunctive and declaratory relief).
174. FED. R. CIV. P. 23(b)(3). The rule establishes the following four factors for the court to evaluate when considering certification of a (b)(3) class: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Id.
is a typical example of a 23(b)(3) class,\textsuperscript{175} where the class representatives are "seeking to remedy a common legal grievance."\textsuperscript{176} For example, in \textit{Contract Buyers League} discussed earlier, the court turned to whether the defendant's "broad pattern of similar activity" was sufficient to justify a finding that common questions of law or fact predominated under 23(b)(3) after determining that a (b)(1) class was not appropriate.\textsuperscript{177} Even though the claims of each class member were based upon individual contracts with the defendant, the plaintiffs alleged that the defendant defrauded the class members through a common exploitative scheme.\textsuperscript{178} The court found that these common questions of fact, as well as the common questions of law surrounding the allegations, predominated.\textsuperscript{179} Furthermore, the court ruled that class adjudication was superior to individual claims as it would avoid a multiplicity of actions and avoid delay in securing relief for the aggrieved parties.\textsuperscript{180} Therefore, the court ruled that the class representatives satisfied the Rule 23(b)(3) requirements.\textsuperscript{181} Upon certification of a 23(b)(3) class, the court must direct notice to all class members, using the best notice that is practicable in the circumstances, and must give class members an opportunity to exclude themselves from membership in the class and/or to make an appearance in the matter within a specified timeframe.\textsuperscript{182}

2. California's Approach to Class Types

California's section 382 does not designate specific class action types, nor does it speak to whether a potential class member has a right to opt-out or receive notice. In California, however, "it is well established that in the absence of relevant state precedents, trial courts are urged to follow the procedures prescribed in [R]ule 23 . . . for conducting class actions."\textsuperscript{183}

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\textsuperscript{175} See S MOORE ET AL., supra note 19, \textsuperscript{1} 23.44.
\textsuperscript{177} 48 F.R.D. 7, 11 (D. Ill. 1969).
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 11–12.
\textsuperscript{180} Id. at 12.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Frazier v. City of Richmond, 228 Cal. Rptr. 376, 381 (Ct. App. 1986) (citing Green v. Obledo, 624 P.2d 256, 267 (Cal. 1981)).
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California courts have thus adopted the federal approach outlined in Rule 23(b).\textsuperscript{184} When California courts face a situation where a class could fit within either (b)(2) or (b)(3), the "trial court must be vested with considerable discretion in determining under which subdivision the action will proceed."\textsuperscript{185} When the nature of relief proposed by the plaintiff or the characteristics of the parties make it possible to certify under 23(b)(1), (b)(2), or (b)(3), courts tend to favor classifying the class under 23(b)(1) or (b)(2).\textsuperscript{186} This tendency, shared by the federal courts,\textsuperscript{187} reflects a general preference for uniform adjudication provided by a mandatory class, at least where the plaintiff is primarily seeking injunctive or other non-monetary relief.\textsuperscript{188} Mandatory classes also avoid the costs associated with the mandatory notice and opt-out procedures involved with a 23(b)(3) class.\textsuperscript{189}

Similar to the federal approach,\textsuperscript{190} the certification of a 23(b)(2) class in California does not prevent the court from granting monetary relief.\textsuperscript{191} For example, in Frazier v. City of Richmond,\textsuperscript{192} a class of police officers and firefighters sought a declaratory judgment that their salaries, for the purposes of calculating their retirement benefits, included the City’s payments for insurance and health care contributions.\textsuperscript{193} In determining whether the plaintiffs’ action was a 23(b)(2) or (b)(3) class, the court concluded that "where the

\textsuperscript{184} Id. See CAL. R. CT. 3.766 for California’s specific notice provisions for class actions, including the possibility that a court may require the defendant to pay for class notice.

\textsuperscript{185} Frazier, 228 Cal. Rptr. at 381.

\textsuperscript{186} Id. at 382 (citing 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775, p. 31 (1972)); see also Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966). After the 1966 amendments to Rule 23, the preference for the mandatory class type was first articulated in Van Gemert in which the defendant sought to consolidate a number of plaintiffs’ securities claims consolidated as a (b)(1) or (b)(2) class action. Id. at 126–27. The court held that “where the stricter requirements of 23(b)(1) and 23(b)(2) are squarely presented by the plaintiffs’ claims Rule 23(b)(3) is not applicable.” Id. at 130.

\textsuperscript{187} See ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.20 (2007).


\textsuperscript{189} See CONTE & NEWBERG, supra note 187, § 4.20.

\textsuperscript{190} 5 MOORE ET AL., supra note 19, ¶ 23.43 (noting that certification under 23(b)(2) is improper if monetary damages are the primary relief sought but proper where monetary relief is limited and incidental to injunctive or corresponding declaratory relief).

\textsuperscript{191} See CONTE & NEWBERG, supra note 187, § 4.14.

\textsuperscript{192} 228 Cal. Rptr. 376, 377–78 (Ct. App. 1986).

\textsuperscript{193} Id. at 377–78.
monetary relief sought is integrally related to and would directly flow from the injunctive or declaratory relief sought, 23(b)(2) status is appropriate." As such, the court supported its determination on the basis that any monetary relief would directly flow from a declaratory ruling in the plaintiff's favor.

D. An Overview of Class Certification Through the Lens of Mr. Miller's Class

The Miller case, discussed earlier in this Article, provided an example of how one injured plaintiff could summon the procedural power of a class action to represent, in his case, millions of others. Mr. Miller's individual damages were insufficient to justify bringing his claim individually against the bank, but the class action against Bank of America could lead to a class award exceeding one billion dollars. Of course, the class must be certified before any class award may be granted.

1. The California Class Action

Plaintiff Paul Miller sought to certify a class which was defined as:

All California residents who have, have had or will have, at any time after August 13, 1994, a checking or savings deposit account with Bank of America into which payments of Social Security benefits or other public benefits are or have been directly deposited by the government or its agent.

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194. Id. at 382.
197. California courts usually require a hearing in order to determine whether or not to certify the class. See Carabini v. Super. Ct., 31 Cal. Rptr. 2d 520, 523 (Ct. App. 1994) (“Due process requires an order with such significant impact on the viability of a case not be made without a full opportunity to brief the issues and present evidence.”). However, a certification hearing would not be necessary where “all issues are resolved by stipulation of the named parties and approved by the court.” CAL. R. CT. 3.764(e).
198. Order Certifying the Class at 1, Miller v. Bank of Am. N.T. & S.A., No. 301917 (Cal. Super. Ct. Oct. 16, 2001). The order was entered subsequent to a certification hearing held four months prior to the entry of the order. Id.
With the class so defined, the court proceeded to examine whether it was an ascertainable class. Because the members shared objectively identifiable characteristics—California residents with Bank of America accounts during the period at issue who received their government benefits via direct deposit into their account—and because the class was sufficiently numerous to make joinder impracticable, the court held that the class was ascertainable. 199

The court then examined whether the plaintiff had demonstrated a sufficient community of interest. The plaintiff’s complaint alleged that the defendant’s business practice “applied to all members of the class.” 200 Bank of America allegedly had an established business practice of seizing funds from accounts that contained directly deposited government benefits to cover overdraft fees and other account charges, 201 and the questions concerning this common practice were sufficient to convince the court that “[c]ommon issues of law and fact predominate[d] over individual issues to be litigated in this case.” 202 Therefore, the court found that there was a sufficient community of interest to justify class certification. 203

Finally, the court declared that litigating the claims of roughly one million class members as a class action was “superior to alternative means for the fair and efficient adjudication. . . .” 204 With that, the court granted the motion to certify the class. 205

199. Id.
200. Id. Given this similar treatment, there was no dispute that Mr. Miller’s claims were typical of the class.
203. Id. Note that the court made no mention of the adequacy of the class representative or his counsel. However, the lead counsel for the plaintiffs, James C. Sturdevant and Thomas J. Brandi, were both experienced class action attorneys. See Thomas J Brandi Profile, http://www.brandilaw.com/bio/ThomasBrandi.asp (last visited Feb. 23, 2008); James C. Sturdevant Profile, http://www.sturdevantlaw.com/Staff.php?Staff=3 (last visited Feb. 23, 2008).
204. Order Certifying the Class, supra note 198, at 2.
205. Id.
2. A Hypothetical Federal Class Certification\textsuperscript{206}

Using the facts of \textit{Miller}, the federal certification procedures outlined by Rule 23 could have yielded the same result. The million-plus class members would clearly satisfy the numerosity requirement of Rule 23(a)(1).\textsuperscript{207} As the California Superior court found, the plaintiff’s claim that the bank’s practice affected all class members uniformly would likely raise a common question of law and thereby satisfy Rule 23(a)(2)’s demand that the plaintiff show the claims involve common questions of law or fact.\textsuperscript{208} Mr. Miller’s claims did not appear to be in any way atypical of other purported class members, and so the requirement of typicality under Rule 23(a)(3) would be met.\textsuperscript{209} Finally, Rule 23(a)(4)’s requirement of adequacy of representation would likely be satisfied because of the experience of plaintiffs’ lead counsel and because Mr. Miller’s interests were aligned with the other class members.\textsuperscript{210}

If the federal court held that the plaintiff met the four threshold requirements of Rule 23(a), a federal court would then turn to Rule 23(b) to determine whether any of the three class types were appropriate. Although the \textit{Miller} complaint sought injunctive relief in order to stop the alleged violations,\textsuperscript{211} the dominant purpose of the claim was to obtain monetary damages, therefore making a 23(b)(3) class appropriate.\textsuperscript{212}

Under a 23(b)(3) class, Mr. Miller would have to establish that common questions of law or fact predominate over questions affecting individual class members.\textsuperscript{213} Because the fundamental issue

\textsuperscript{206}. In federal courts, hearings to determine class certification are not required but are routine. \textit{See} Marcera v. Chinlund, 565 F.2d 253, 255 (2nd Cir. 1977) (holding that because the plaintiffs were denied a hearing that would have provided them a “full opportunity to establish that the requisite of class certification exist[ed],” the motion denying class certification was reversed and remanded for hearing); \textit{MANUAL FOR COMPLEX LITIGATION} (FOURTH) § 21.21.

\textsuperscript{207}. \textit{See supra} Part II.B.2 (discussing the Rule 23(a)(1) numerosity requirement and its relation to California’s “community of interest” requirement under section 382).

\textsuperscript{208}. \textit{See supra} Part II.B.2.

\textsuperscript{209}. \textit{See supra} Part II.B.2.

\textsuperscript{210}. \textit{See supra} Part II.B.2.


\textsuperscript{212}. The actual court order in \textit{Miller} did not address any of the Rule 23(b) class types. \textit{See} Order Certifying the Class, \textit{supra} note 198, at 1.

\textsuperscript{213}. \textit{See supra} Part II.C. (discussing the three types of classes permitted pursuant to Rule 23(b)).
applicable to all class members would be whether the defendant’s actions amounted to an illegal seizure of government benefits under California law, a federal court could find the predominance requirement to be satisfied. Finally, given that a class action would efficiently and effectively resolve the claims on behalf of all class members, the class action would likely be found to be the superior method of adjudication compared to other alternatives. Therefore, a federal court could reasonably find that the requirements of Rule 23(b) were met and the action could be certified.

The Miller case and the hypothetical federal counterpart illustrate that, at least as far as the certification requirements of section 382 and Rule 23, the differences between the two are not terribly remarkable. Given the extent to which California has borrowed from the statutorily based Rule 23, this is hardly a surprise. Because Rule 23(a) demands that litigants satisfy the four prerequisites of numerosity, commonality, typicality, and adequacy of representation, the federal approach may give “at least the appearance of a tighter framework of analysis.”214 In the end, any variance between state and federal certification may have more to do with the specific judge granting or denying certification than the certification procedures themselves.215 However, there are a few other distinctions between California and federal practice that are more clearly divergent, to which this Article now turns.

III. NOTABLE DISTINCTIONS BETWEEN CALIFORNIA AND FEDERAL PROCEDURE

A comprehensive comparison of every detail of California and federal class action practice is beyond the scope of this Article.216 However, this section will highlight two important issues in California and federal class action practice: whether a trial court’s decision regarding class certification can be immediately appealed and whether filing a class action tolls the statute of limitations for the members of the purported class.

215. See infra Part V.
216. For a more detailed treatment, see COHELAN, supra note 214 and CABRASER ET AL., supra note 31.
A. Appellate Review of Class Certification

Class certification is "often the whole ball game." As Judge Easterbrook of the Seventh Circuit explained:

[J]ust as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Therefore, a litigant must be aware of what avenues the jurisdiction makes available to seek review of an unfavorable class certification ruling.

1. California's Approach

CCP section 904 establishes that, generally, only final judgments are appealable. A denial of class certification is not technically a final order because the named plaintiff can still theoretically maintain the action against the defendant on an individual basis. Therefore, using a strict textual analysis, an order denying class certification should not be appealable under California law. However, if the court's order essentially terminates the action as to the class (known as a "death-knell" order), the order is considered "final" as to that class, and the plaintiff has a right to directly appeal the order.

For example, in General Motors Corp. v. Superior Court, the trial court ruled that the plaintiff's class action could continue only against one of the two defendants and only for one of the two causes of action. The California Court of Appeal, relying on the
California Supreme Court’s holding in *Vasquez v. Superior Court*,224 ruled that such an order was not appealable because it did not effectively dismiss the action as to all members of the class.225 The *General Motors* court reasoned that granting a right to appeal on “each detail of a class certification order would delay trials and vex litigants with multiple proceedings.”226 Where the order does act as a death knell, however, “a plaintiff who fails to appeal from one loses forever the right to attack it.”227

In contrast, a California class action defendant does not have a right to appeal an order granting class certification.228 A defendant can only appeal an order granting class certification after there has been a final judgment.229 Alternatively, a defendant may petition the court of appeal for a writ of mandate. The court has discretion to grant the writ, which may be appropriate in order “to prevent a failure of justice where there is no adequate remedy in the ordinary course of law.”230 In addition, the court of appeal may grant the writ where it finds that the trial court abused its discretion in granting certification.231

2. The Federal Approach

Federal Rule 23(f) provides for discretionary interlocutory appeal—an appeal prior to the conclusion of the trial—of a district court’s ruling on class certification.232 Unlike California’s approach, a party in federal court may seek an interlocutory appeal from either the grant or denial of class certification, so long as the petition for

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224. 484 P.2d 964, 967–81 (Cal. 1971) (holding that an order dismissing one of two causes of action in a class action was not appealable).

225. Gen. Motors Corp. v. Super. Ct., 244 Cal. Rptr. 776, 778 (Ct. App. 1988). The court also noted that the granting of class certification is not a “death-knell” order and therefore not directly appealable. *Id.*

226. *Id.* at 779.


231. *See Blue Chip Stamps*, 556 P.2d at 759.

appeal is filed within ten days of the district court’s order.\textsuperscript{233} As the Advisory Committee Notes to Rule 23 indicate, “[t]he court of appeals is given unfettered discretion whether to permit the appeal,” much like the discretion of the Supreme Court to decide whether to grant a petition for certiorari.\textsuperscript{234}

Despite this open-ended discretion, the Rule 23 Advisory Committee Notes suggest that review of a court’s class certification order is justified in only three scenarios: (1) where the order amounts to a “death knell” for the plaintiff (i.e., the plaintiff representative is denied class certification and can no longer shoulder the burden of the litigation alone); (2) where the order amounts to the “death knell” for the defendant (i.e., the grant of class certification essentially forces the defendant “to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability”); and (3) where the class action involves a fundamental issue of law that is unsettled.\textsuperscript{235}

The Ninth Circuit has adopted these Advisory Committee guidelines in determining when review of class certification decisions is appropriate.\textsuperscript{236} Moreover, like other circuit courts,\textsuperscript{237} the Ninth Circuit has added an additional basis for review: where “the district court’s decision is manifestly erroneous.”\textsuperscript{238}

For instance, in \textit{Chamberlan v. Ford Motor Co.},\textsuperscript{239} Ford argued that the district court’s order, certifying a class of over one hundred thousand members who collectively sought close to one hundred million dollars, amounted to a death knell for the litigation, forcing the company into the prospect of an “all or nothing” trial.\textsuperscript{238} The Ninth Circuit, however, was not convinced “that the damages claimed would force a company of [Ford’s] size to settle without

\textsuperscript{233} Id. advisory committee’s notes (1998 Amendments).
\textsuperscript{234} Id. advisory committee’s notes (1998 Amendments).
\textsuperscript{235} Id.
\textsuperscript{236} Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005).
\textsuperscript{237} \textit{See In re Lorazepam & Clorazepate Antitrust Litig.}, 289 F.3d 98, 105 (D.C. Cir. 2002); \textit{see also} Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 144 (4th Cir. 2001).
\textsuperscript{238} Chamberlan, 402 F.3d at 959. The court clarified that unlike some other circuits, a party need only show that the error is manifest, “even absent a showing of another factor.” Id. The error most likely to invoke review is an error of law as opposed to an erroneous application of law to the facts of the case. \textit{See id.}
\textsuperscript{239} Id.
\textsuperscript{240} Id. at 960.
relation to the merits of the class’s claims.”

The court held that Ford failed to demonstrate that it lacked the resources to defend the matter or that doing so would prove “ruinous” to Ford. In addition, the court found that Ford failed to show that the district court’s ruling as to class certification was questionable. The Ninth Circuit essentially held that even if Ford were to establish that class certification would terminate the litigation, any appeal of the certification order would be futile unless the district court was found to have somehow abused its discretion in certifying the class.

Ultimately, California courts provide plaintiffs with a right to appeal a class certification order that acts as a death knell to the class action, but the same right to appeal is not available in federal courts. However, federal courts utilize much more flexible criteria than California courts in determining whether or not an appeal is proper. The federal approach also provides an avenue of appeal for both parties, whereas only the party asserting the class has the right to appeal after a denial of class certification in California.

These differences are more than just procedural technicalities. In California courts, if a judge seeks to resolve issues in a way to avoid being reversed on appeal, the propensity might be to certify the class rather than face what would certainly be appeal of a death knell order. If it later turns out that class certification is not supported, the judge can subsequently decertify the class.

Regardless, California courts, by providing a right to a class action plaintiff for a death knell order, give plaintiffs a significant strategic advantage over defendants who have no right to appeal the

241. Id. (quoting In re Lorazepam, 289 F.3d at 108).
242. Id. (citing FED. R. CIV. P. 23 (f) advisory committee’s note (1998 Amendments)).
243. Id.
244. Id. at 960–61 (citing Blair v. Equifax Check Servs., 181 F.3d 832, 835 (7th Cir. 1999)). The Chamberlain court also suggested that the established criteria reflect the two prong purpose of Rule 23(f). First, the rule can “restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritous claim or defense before trial.” Id. at 957–58 (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000)). Second, where the “need is sufficiently acute,” the rule can empower a court of appeals to take an “earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law.” Id. (quoting Waste Mgmt. Holdings, 208 F.3d at 293).
246. See Telephone Interview with William L. Stern, Partner, Morrison & Foerster LLP (Jan. 16, 2008).
grant of certification. More than just a policy favoring class actions, this advantage shifts the balance of power in favor of the plaintiff. Perhaps the court in General Motors should have been more forthcoming and stated that the death knell doctrine is intended to avoid delaying trials and vexing plaintiffs with multiple proceedings. 247

Given the extensive impact that a class certification order can have on the settlement dynamics between parties, California courts may be well served by providing the defendant with an opportunity to appeal an order certifying the class, just as plaintiffs are now afforded an opportunity to appeal a denial of certification that acts as a “death knell” to class adjudication. However, assuming that a certification that exceeds a trial court’s discretion is the exception rather than the rule, the availability of a writ of mandate may be sufficient to protect the defendant. 248 A defendant’s right to appeal a certification order could be exploited as a tool to delay the case and increase the expense to the opposing party. In all, the Rule 23 approach likely affords the most neutrality by allowing a court of appeals ample discretion over whether or not to review a certification order. If California adopted the federal approach of allowing appellate courts discretion over whether or not to grant a petition by either party for review of a certification order, state courts could still employ public policy to favor class adjudication but would do so without structurally affecting the practical outcome of the underlying litigation (i.e., whether or not a case settles). Even the most fervent advocate of litigation reform would have a difficult time claiming that a state court of appeal was a “judicial hellhole.” 249

247. Contra Gen. Motors Corp. v. Super Ct., 244 Cal. Rptr. 776, 779 (Ct. App. 1988) (noting that granting a right to appeal on “each detail of a class certification order would delay trials and vex litigants with multiple proceedings”).


249. See infra Part V (discussing whether or not California courts can fairly be considered biased). But cf. Freer, supra note 248, at 27 (noting that “the degree to which Rule 23(f) is a roadblock to federal plaintiff classes varies from circuit to circuit”). Professor Freer found that the Ninth Circuit is more likely to reverse certification on appeal than other federal circuits. Id. More specifically, he found that “[t]he state appellate courts have reversed certification only once in ten cases, while the Ninth Circuit has reversed certification in two of five cases.” Id. These numbers, though admittedly based upon a small sample size, suggest that “whenever courts are given absolute discretion—as they are under Rule 23(f)—they can define their roles, and we should not be surprised if they define those roles differently.” Id. at 28.
B. Statutes of Limitation

Statutes of limitation operate on the theory that unless the plaintiff has “put the adversary on notice to defend within the period of limitation,” the defendant’s right to be free from stale claims prevails over the plaintiff’s right to prosecute those claims. In the context of representative actions, the question remains whether the defendant has been put on notice of claims against him or her from absent class members and whether the class suit tolls the statute of limitation for absent class members if the class is not ultimately certified.

The concern raised by courts is that failing to toll the statute of limitations for the claims of absent class members could convert a class action into a trap “for those who have expeditiously allowed their rights to be maintained by a class action.” In American Pipe & Construction Co. v. Utah, the Supreme Court held that filing a class action tolled the statute of limitations for all members of the purported class, even if some members were unaware of the litigation. The Court believed that to hold otherwise would “frustrate the principal function of a class suit” because each class member would be required to file an individual suit or otherwise intervene in the underlying action in order to insure that their claim was tolled. The Court found that this problem was “precisely the multiplicity of activity which Rule 23 was designed to avoid.” The Supreme Court justified this approach, noting that through the filing of a class action, the defendant is made aware not only of the substantive claims “brought against them, but also . . . the number and generic identities of the potential plaintiffs who may participate in the judgment.” This tolling of class members’ claims has been liberally applied in federal courts, even where the class action was never certifiable in the first place.

251. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 590 (10th Cir. 1961) (citing York v. Guar. Trust Co., 143 F.2d 503, 529 (2d Cir. 1944)).
253. Id. at 551.
254. Id.
255. Id.
256. Id. at 555.
257. See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350–51 (1983). The tolling of a statute of limitations may not apply if a party is attempting to “relitigate an earlier denial of class
Justice Blackmun wrote a concurring opinion in *American Pipe* in which he cautioned that the decision should not be an invitation for lawyers to file pleadings as a class action merely to protect "members of the purported class who have slept on their rights." He commented that some claims should be barred as prejudicial against a defending party who did not receive proper notice of the assertions against them.

While federal courts are bound by the majority opinion in *American Pipe*, the California Supreme Court in *Jolly v. Eli Lilly & Co.* adopted a narrower reading of *American Pipe* that was in line with Justice Blackmun’s concerns. The California Supreme Court outlined two policy issues to consider when determining whether to toll the statute of limitations for absent class members: (1) to promote and protect the efficacy of the class action device; and (2) to protect a defendant from unfair claims.

The plaintiff in *Jolly* pursued a class action for personal injury damages against the defendant drug manufacturer, claiming that the defendant’s defective drug harmed the fetuses of pregnant women who ingested the drug. The plaintiff alleged that a previous class action filed against the defendant tolled the statute of limitations as to their otherwise barred claims. The court ruled that the plaintiff could not rely on a previously filed class action in order to toll the statute of limitations because the prior class action did not seek personal injury damages and therefore did not put the defendant on notice of the nature of the damages claim. The court commented that where a previous putative class action (such as a personal injury mass tort) fails to "meet the community of interest requirement in that each member’s right to recover depends on facts peculiar to each

259. *Id.* at 561–62.
261. *Id.* at 934–36.
262. *Id.* at 925–26.
263. *Id.* at 933. The previous action could not be certified because of the lack of common questions of law or fact, a common problem in mass tort claims. *Id.* at 934.
264. *Id.* at 936.
particular case, such claims may be presumptively incapable of apprising defendants of 'the substantive claims being brought against them." The court warned that a lack of commonality will not only defeat certification but would also make the *American Pipe* tolling doctrine inapplicable. Therefore, after considering the policy of protecting the efficacy of the class action device and the defendant, the court held that the *American Pipe* doctrine should not apply to the plaintiff's claims in *Jolly*.

Three years later, the California Court of Appeal heeded *Jolly*'s warning but did not extend the holding. In *Becker v. McMillan Construction Co.*, plaintiff Becker brought an individual property damage claim against the defendant builder involving property damages in a housing development built by the defendant. One of Becker's neighbors had previously filed a class action against the defendant, but that action was denied certification due to the lack of common questions of law or fact. Becker's claim would have been barred by the statute of limitations, but he argued that his claim was tolled from the time his neighbor's class action was filed until the time that it was ultimately denied certification.

The *Becker* court drew a distinction between class actions for personal injuries—where it can be rather difficult for a defendant to be on notice as to the number and identities of the potential claimants, thereby making the tolling doctrine inappropriate—and class actions for property damages—where a defendant can more readily ascertain the number of claimants and the extent of claims, thereby making the tolling doctrine more appropriate. In *Becker*, the court found that the earlier class action put the defendant builder on notice as to the number of claimants (from the number of homes that the defendant built) as well as the identity of the potential claimants. In addition, while a lack of commonality was enough to

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265. *Id.* at 937 (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974)).
266. *Id*.
267. *Id.* at 936.
269. *Id*.
270. *Id.* at 493.
271. *Id*.
272. *Id*.
273. *Id.* at 496.
274. *Id*.
defeat class certification of the prior action, the court noted that "[v]ariables in proof of causation and damage are not as extreme for this type of property damage as for personal injury mass tort cases." The court found that the defendant was provided with sufficient notice to justify tolling the statute of limitations while the class action was being considered. After reaffirming the holding and reasoning of Jolly, the court therefore concluded, as Justice Blackmun likely would have, that because the defendant in Becker was on notice as to the same subject matter and the same type of claim, the statute of limitations was tolled while the class action was being considered.

California courts have an express preference for class action adjudication, but by following Jolly and narrowing the scope of American Pipe, that preference gives way to the policy consideration of barring stale claims. In practice, a putative class member who receives notice of a class action may not have the legal sophistication or the patience to read through the notice and assess whether their individual claim is sufficiently similar such that it would satisfy the community of interest standard, as required by Jolly. Therefore, while California's approach appropriately bars claims by those who have slept on their rights, the claims of unsophisticated class members may be inappropriately barred who, in reliance of a class action notice, merely hit the snooze button one too many times by assuming their claim is being represented in the class action.

275. Id. at 497.

276. Id. (holding that, consistent with the California Supreme Court's approach in Jolly, the American Pipe tolling doctrine "can only be determined by individualized attention to the identity of the claimants and the nature of the claims involved, and by a careful weighing of the important policy considerations in this area").

277. Id.

278. Id.

279. See Richmond v. Dart Indus., Inc., 629 P.2d 23, 30 (Cal. 1981) (explaining that California "has a public policy which encourages the use of the class action device"). On the other hand, some suggest that Rule 23's policy considerations of "promoting judicial economy and effectiveness" are met by failing to toll class members personal injury claims. Jerold S. Solovy et al., Class Action Controversies, in PRAC. LAW INST., CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 499, 551 (1994) (suggesting that Rule 23 considerations are met by failing to toll class members personal injury claims in Jolly because those members should not have relied on the prior class action which did not seek personal injuries).
IV. CALIFORNIA'S STATUTORY ALTERNATIVE FOR CONSUMER CLASS ACTIONS

For quite some time, California has "enjoy[ed] a high reputation for both the quantity and the quality of its consumer protection law."\textsuperscript{280} A full treatment of the statutory protections afforded to California consumers is well beyond the scope of this Article.\textsuperscript{281} However, this section explores the relevant provisions of the CLRA and the UCL as they relate to the California class action litigation climate.

\textit{A. The CLRA}

In addition to section 382, California plaintiffs have an additional statutory mechanism to bring a consumer class action: the Consumers Legal Remedies Act.\textsuperscript{282} The passage of the CLRA was prompted, at least indirectly, by the civil unrest of the late 1960s.\textsuperscript{283} In 1967, President Lyndon Johnson directed the National Advisory Commission on Civil Disorders to report on the causes of the unrest and riots, which caused millions of dollars of damage and led to over eighty deaths.\textsuperscript{284} The commission's report\textsuperscript{285} highlighted certain social and economic problems that resulted from deceptive business practices.\textsuperscript{286}

Shortly thereafter, in 1970, the California legislature provided its citizens with a statutory vehicle to "protect consumers against unfair and deceptive business practices and to provide efficient and

\textsuperscript{280} See WILLIAM L. STERN, BUSINESS AND PROFESSIONS CODE § 17200 ch. 1 (2007) (commenting that the UCL is "the toughest pro-consumer law in California (and perhaps the nation)") [hereinafter STERN TREATISE]; Richard Wright, Toward a Consumer Code for California, 5 PAC. L.J. 529, 529 (1974).

\textsuperscript{281} For a detailed treatment of UCL and CLRA practice, see STERN TREATISE, supra note 280.

\textsuperscript{282} CAL. CIV. CODE §§ 1750–84 (Deering 2007).

\textsuperscript{283} See James S. Reed, Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act, 2 PAC. L.J. 1. 5–7 (1971) ("[U]nfortunately the low income, unsophisticated person is most often the victim of deceptive sales practices.... The Kerner Commission found that much of the violence in recent urban disorders was directed at stores and other commercial establishments in disadvantaged neighborhoods. Rioters seemed to focus on stores operated by merchants who, they believed, had been charging exorbitant prices or selling inferior goods.").

\textsuperscript{284} NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

\textsuperscript{285} See id.

\textsuperscript{286} Id.; see also Reed, supra note 283, at 5–7.
economical procedures to secure such protection."287 In line with the act’s origins, CLRA claims require that the plaintiff be an “individual” consumer who pursues a claim for a transaction relating to “personal, family, or household purposes.”288

1. Asserting a CLRA Class Action Claim

The CLRA provides a non-exclusive remedy for consumers who have been subjected to any of the twenty-three enumerated “unfair methods of competition and unfair or deceptive acts or practices.”289 Of the twenty-three, one of the more frequently invoked provisions of the CLRA is the prohibition against including an unconscionable provision in a consumer contract.290 More than just an affirmative defense to the enforceability of a contract, the CLRA “supplies an affirmative right to relief for consumers who allegedly are injured by an unconscionable contract provision.”291

For example, in Truta v. Avis Rent A Car System, Inc.,292 the plaintiff brought a class action against the defendant rental car company for including an allegedly unconscionable collision damage waiver provision into the rental agreement in violation of the CLRA.293 In holding that the trial court erred in granting the demurrer to the CLRA claim, the California Court of Appeal noted that while the state’s unconscionability statutes provided authority

287. CAL. CIV. CODE § 1770 (Deering 2007).
288. Id. § 1761(d); see also Cal. Growers Ass’n v. Bank of Am., 27 Cal. Rptr. 2d 396, 403 (Ct. App. 1994) (holding that the plaintiff, an association representing retail and wholesale grocers, was not a consumer as defined by the CLRA and therefore was not entitled to relief under that statute). A consumer, in the context of the CLRA, is “an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.” CAL. CIV. CODE § 1761(d).
289. CAL. CIV. CODE § 1760 (Deering 2007).
290. Julia B. Strickland & Lisa M. Simonetti, 2007 Overview of California’s Unfair Competition Law and Consumers Legal Remedies Act, STROOCK SPECIAL BULL. (Stroock & Stroock & Lavan LLP, L.A., Cal.), Jan. 2007, at 53–54, http://www.stroock.com/SiteFiles/Pub488.pdf [hereinafter Stroock 2007 Overview] (mentioning that in addition to the prohibition of unconscionability, other frequently invoked CLRA provisions include the prohibition of “bait and switch” rebate offers and the prohibition of misrepresentations regarding the rights or terms of a written contract). See, e.g., Pollard v. Ericsson, Inc., 22 Cal. Rptr. 3d 496, 501 (Ct. App. 2004) (citing CAL. CIV. CODE § 1770(a)(17) which prohibits “[r]epresenting that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction”).
292. 238 Cal. Rptr. 806, 816 (Ct. App. 1987).
293. Truta, 238 Cal. Rptr. at 818.
for a defense to the enforceability of the unconscionable contract or clause," the legislature (by virtue of the CLRA) "has provided a damage and injunctive remedy to consumers injured by unfair business practices arising from a contract provision deemed unlawful by reason of its unconscionable nature." The CLRA does not follow section 382 class certification requirements. Instead, the CLRA requires a California court to certify a CLRA class action if the representative plaintiff can meet these four exclusive criteria: (1) it is impracticable to bring all of the class members before the court; (2) common questions of law or fact predominate; (3) the representative plaintiff's claims are typical of the class; and (4) "[t]he representative plaintiffs will fairly and adequately protect the interests of the class." These class certification criteria are virtually identical to the prerequisites found in Rule 23(a) and are interpreted accordingly.

2. Major Differences Between CLRA and Section 382 Class Action Procedures

Class actions brought under the CLRA are subject to the same procedural rules as other class actions, and while there is certainly overlap between the CLRA and section 382, they are different in certain key respects. As the California Supreme Court first announced in Hogya v. Superior Court, CLRA claimants need not prove that the class action is a superior method of adjudication, as required under section 382, nor must the claimants show a

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294. See CAL. CIV. CODE § 1670.5 (Deering 2007). "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Id.

295. Truta, 238 Cal. Rptr. at 816.

296. CAL. CIV. CODE § 1781(b)(4) (Deering 2007). The CLRA demands that "the court shall permit the suit to be maintained on behalf of all members of the represented class if" the class criteria are met. Id. § 1781(b).

297. See FED. R. CIV. P. 23(a); supra Part II.B.; see also Reed, supra note 283, at 14 (mentioning the lack of legislative history addressing the class action procedures of the CLRA but noting that the CLRA should be read in the spirit of the principles of equity and in line with the California Supreme Court's cognizance of Rule 23). The CLRA was passed three years after the California Supreme Court's decision in Daar which decided the year after the 1966 amendment to Rule 23. See Daar v. Yellow Cab, 433 P.2d 732, 742 (Cal. 1967).

298. See CAL. R. CT. 3.760(a).

299. 142 Cal. Rptr. 325 (Ct. App. 1977).
substantial benefit to the public in order to obtain class certification.\textsuperscript{300}

In Hogya, the plaintiff, on behalf of himself and approximately 350,000 other consumers, brought a CLRA claim against a meat packer that falsely represented its beef as “choice” quality when it actually only qualified in the lesser category of “good” quality.\textsuperscript{301} The trial court found that the plaintiff satisfied the four statutory requirements discussed above.\textsuperscript{302} Nevertheless, the trial court declined to certify the class for two reasons.\textsuperscript{303} First, the total amount of actual damages (the difference in price between the “choice” and “good” categories of beef) was relatively small at $160,000.\textsuperscript{304} Moreover, it was highly unlikely that any single class member’s share would exceed ten dollars, and this made it unlikely that a member would come forward to assert their right to a portion of the damages if the suit were successful.\textsuperscript{305} Second, litigating this claim was expensive for both parties and a burden on the court, and the trial court found that these burdens outweighed the expected benefits of certifying this class.\textsuperscript{306}

Despite the findings of the trial court that class treatment was not necessarily the superior method of adjudication and did not necessarily provide a substantial benefit to the parties and the court, the California Supreme Court held that if the four CLRA statutory certification requirements are met, the court \textit{must} certify the class.\textsuperscript{307} The approach outlined by the court differs from section 382, in that a trial court may exercise its “sound discretion” whether or not to certify a class under section 382.\textsuperscript{308} This can be seen as an expression of the CLRA’s purpose to prevent or control exploitative

\begin{footnotesize}
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\item \textsuperscript{300} \textit{Id.} at 334.
\item \textsuperscript{301} \textit{Id.} at 327.
\item \textsuperscript{302} \textit{Id.} at 332 (referring to the requirements set forth in \textsc{Cal. Civ. Code} \textsection 1781(b) (Deering 2007)).
\item \textsuperscript{303} \textit{Id.} at 331.
\item \textsuperscript{304} \textit{Id.} The CLRA allows for actions to proceed where the total damages is as low as $1,000. \textsc{Cal. Civ. Code} \textsection 1781(a)(1).
\item \textsuperscript{305} Hogya, 142 Cal. Rptr. at 331.
\item \textsuperscript{306} \textit{Id.}
\item \textsuperscript{307} Reed, \textit{supra} note 283, at 5.
\item \textsuperscript{308} Hogya, 142 Cal. Rptr. at 333 (citing to \textsc{Blue Chip Stamps v. Superior Court}, 556 P.2d 755, 762 (Cal. 1976)). \textit{Cf.} \textsc{Cal. Civ. Code} \textsection 1781(b) (providing that the court \textit{shall} certify the class action if the four requirements are shown).
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practices, as well as California's general preference for and encouragement of class adjudications.309

The *Miller* case provides another quick glimpse at CLRA certification. Mr. Miller asserted that Bank of America misrepresented that it had a right to seize directly deposited government benefits in order to recover bank fees, and that these actions were actually a violation of applicable laws.310 At trial, the jury found that the bank's conduct was in violation of the CLRA, which prohibits "representing that a transaction . . . involves rights . . . which it does not have or involve, or which are prohibited by law."311 As discussed previously, the facts of *Miller* would likely yield class certification under the requirements of Rule 23(a) and Rule 23(b),312 and certification of the *Miller* claims would certainly be appropriate under the CLRA given that the four class certification requirements are the same as Rule 23(a) alone.

3. Other CLRA Procedures

Before leaving the subject of the CLRA, note that to seek monetary damages, the CLRA requires a plaintiff to first make a written demand at least thirty days before filing a claim, requesting that the offending party rectify the stated wrong.313 This notice requirement may help promote negotiation and settlement.314 In addition, it provides the defendant with an opportunity to satisfy potential claims in a way that reduces the chances of facing a class action in that particular forum.315 Unlike section 382, the CLRA

309. See Discover Bank v. Super. Ct., 113 P.3d 1100, 1103 (Cal. 2005) (protecting a right of a consumer to class action where "the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration"); Sav-On Drug Stores, Inc. v. Super. Ct., 96 P.3d 194, 209 (Cal. 2004) (commenting that California has a public policy which encourages the use of class actions).


311. CAL. CIV. CODE § 1770(a)(14) (Deering 2007) (emphasis added). The trial court also found that the agreements between the bank and class members were unconscionable in violation of CAL. CIV. CODE § 1770(a)(19). *Miller,* 2004 WL 3153009 at *2.

312. See supra Part II.D.2.

313. CAL. CIV. CODE § 1782 (Deering 2007). The notice requirement does not apply to a plaintiff seeking injunctive relief.


315. See, e.g., Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions,* 36 GA. L. REV. 353, 404 (2002). For example, a hypothetical plaintiff provides notice to a defendant bank of an intent to bring a CLRA claim for the bank's representation that its
does not necessitate that “a plaintiff show a probability that each
class member will come forward and prove his separate claim to a
portion of the recovery.”\textsuperscript{316} Additionally, the CLRA allows for actual
damages, punitive damages, injunctive relief, and attorneys’
fees\textsuperscript{317}—unlike the UCL, which only provides for restitution and does
not provide for attorneys’ fees.\textsuperscript{318}

\textbf{B. The UCL’s Former Quasi-Class Action}  

California’s current Unfair Competition Law\textsuperscript{319} has undergone a
significant evolution. Dating back to the 1872 enactment of the
state’s Civil Code, California legislators provided for a cause of
action for certain business torts, such as commercial disparagement,
trade secret theft, and trade name infringement.\textsuperscript{320} Today, after over
a century of amendments and case law development,\textsuperscript{321} the UCL
protects parties from “any unlawful, unfair or fraudulent business act
or practice and unfair, deceptive, untrue or misleading
advertising.”\textsuperscript{322} In line with the statute’s purpose of preserving fair
business competition,\textsuperscript{323} the UCL has been applied broadly to protect
against both “‘anti-competitive’ business practices” as well as to
protect the public from fraud and deceit.\textsuperscript{324} Indeed, “with its broad
liability standards and powerful equitable remedies, the UCL has
been the foremost ‘sword’ for plaintiffs’ lawyers in California.”\textsuperscript{325}

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\textsuperscript{317} CAL. CIV. CODE §1780(a)(1)–(5) (Deering 2007).
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\textsuperscript{318} See STERN TREATISE, supra note 280, at ch. 8-A.
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\textsuperscript{319} CAL. BUS. & PROF. CODE §§ 17200–09 (Deering 2007).
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\textsuperscript{320} See Robert C. Fellmeth, California’s Unfair Competition Act: Conundrums and
www.clrc.ca.gov/pub/BKST/BKST-Fellmeth.pdf (discussing the UCL’s statutory predecessor,
former Civil Code section 3369).
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\textsuperscript{321} Id. at 232–33.
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\textsuperscript{322} CAL. BUS. & PROF. CODE § 17200 (Deering 2007).
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\textsuperscript{323} See Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 552 n.3 (Cal.
1999).
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\textsuperscript{325} Stroock 2007 Overview, supra note 290, at 1; see William L. Stern, The Reliance
Element in State Consumer-Fraud Class Actions, 23 REV. BANK. & FIN. SERV. 1, 4 (2007)
(noting that the UCL “has long been one of the most pro-consumer in the nation”).
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Unlike the CLRA, which details 23 prohibitions, the UCL is open ended and entrusts the court to determine the applicability of the prohibition. However, the only kind of monetary damages available under the UCL is restitution, while the CLRA allows for much broader remedies.

Until recently, the UCL provided unique mechanisms to bring representative actions, including the ability of a party to bring a "private attorney general claim," where even a non-affected party had standing to bring claims on behalf of the public at large. However, in 2004, California voters passed Proposition 64, which made a number of amendments to the UCL, not the least of which was removing the "private attorney general" provision. In addition, departing from a decades-old practice, the proposition now requires that the plaintiff show an injury in fact as a result of the defendant's conduct. Moreover, after 2004, a UCL claimant must satisfy section 382 class certification requirements in order to bring any representative action under the UCL.

Prior to Proposition 64, the requirements to bring a quasi-class representative UCL claim were less stringent than those specified by

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326. See STERN TREATISE, supra note 280, at ch. 10-C (comparing the UCL with the CLRA). As an example, the plaintiff in Miller brought a UCL claim against Bank of America. The court focused on how the seizure of the account holders' government benefits qualified as unlawful, unfair and fraudulent conduct which amounted to a violation of the UCL. See Miller v. Bank of Am. N.T. & S.A., No. CGC-99-301917, 2004 WL 3153009, at *21 (Cal. Super. Ct. App. Div. Dec. 30, 2004) (noting that "an act or practice may be unfair, constituting a violation of the UCL, even if it is neither unlawful nor fraudulent"). The UCL also authorizes public prosecutors to pursue representative actions, outside the confines of section 382, against an offending party on behalf of the general public. This provision was not affected by Proposition 64 discussed later in this section. STERN TREATISE, supra note 280, at ch. 1.

327. STERN TREATISE, supra note 280, at ch. 10-C (noting that the CLRA provides "damages, punitive damages, statutory damages and attorney fees," while the UCL only allows restitution and does not provide for attorney fees).

328. Id. at ch. 7-B.

329. California utilizes a proposition system allowing the public to introduce legislation through a ballot initiative. See 2007 Stroock Overview, supra note 290, at 1 (discussing Proposition 64).

330. See id.

331. See STERN TREATISE, supra note 280, at ch. 7-B. In the context of claims for misrepresentation under the UCL, a recent California Court of Appeal case, currently before the California Supreme Court, held that the language added by Proposition 64 ("as a result of") indicates that both the named plaintiff and the class members must have relied on a misrepresentation. This is a departure from the traditional "likely to mislead" test that the courts had previously employed. See Stern, supra note 325, at 4 (discussing Pfizer Inc. v. Superior Court, 45 Cal. Rptr. 3d 840 (Ct. App. 2006), review granted, 146 P.3d 1250 (Cal. 2006)).

332. See Stern, supra note 325, at 4.
section 382. For example, in the case of Fletcher v. Security Pacific National Bank, a plaintiff sought to bring a class action for breach of contract as well as a representative UCL action claiming that the defendant engaged in an unfair trade practice by calculating interest on the basis of a 360-day year. The court found that a class action for breach of contract in which the plaintiff sought money damages was improper because the knowledge of each customer must be established separately for each transaction, making class adjudication unwieldy with a class size in excess of 50,000 members. However, the court held that under the UCL, it "possesses the authority to order restitution of moneys, in the absence of individualized proof of lack of knowledge, in order to preclude an entity which has engaged in an unlawful trade practice from improperly profiting from its wrongdoing."

While California courts have a stated policy favoring class adjudication, Proposition 64 represented at least some narrowing of that policy by requiring that UCL claimants meet the section 382 requirements before pursuing a representative UCL claim. The following section discusses the political environment that facilitated the passage of Proposition 64 in a state that some assert is decidedly pro-plaintiff.

V. CALIFORNIA’S CURRENT CLASS ACTION CLIMATE:

The modern class action has a long history, with procedural roots dating back to the Chancery courts of equity in the seventeenth century. More recently, class actions have a history of stirring up controversy, with even small changes to procedural rules stirring "large passions and strong rhetoric."

333. See STERN TREATISE, supra note 280, at ch. 7-B.
335. Id. at 53.
336. Id. at 54.
337. Id.
338. See Yeazell, supra note 21, at 1067.
Earlier sections of this Article reveal ways in which small procedural differences can have an effect on the outcome of a claim. This section explores whether or not California’s class action procedures and overall litigation environment justify classifying California as a “judicial hellhole” and whether there is sufficient support for the common belief that defendants receive more favorable treatment in federal court. Next, this section explores three pieces of legislation—CAFA, California’s Proposition 64, and a failed bill to amend California’s class certification procedure to more closely resemble Rule 23—in order to explore to what extent the tides of California’s litigation climate have turned. This Article concludes that California’s common law approach favoring class action adjudication is, on the whole, being faithfully served.

A. Is California's Class Action Litigation Environment Decidedly Biased?

A recent study shows that California ranks as the fifth worst state in the category of “Treatment of Class Action Suits and Mass Consolidation Suits.” Tom Donohue, the President and CEO of the U.S. Chamber of Commerce, theorized that “California’s low ranking is not surprising, given the fact that California courts are willing to certify class action lawsuits most other jurisdictions would toss out.”

341. See, e.g., supra Part III.A. (discussing the impact of allowing a right of a plaintiff to appeal a death knell order denying class certification while denying the same right may have an impact on settlement dynamics).

342. See supra note 16 and accompanying text.

343. U.S. CHAMBER INST. FOR LEGAL REFORM, LAWSUIT CLIMATE 2007: RATING THE STATES 11 (2007), http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Climate_Report.pdf [hereinafter RATING THE STATES]. The survey was sponsored by the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce. The results are based upon interviews of 1599 “in-house general counsel, senior litigators and senior attorneys who are knowledgeable about litigation matters at companies with annual revenues of at least $100 million.” Id. at 26.

344. Id. at 11. The poll ranked California’s overall litigation climate as the sixth worst in the country, and California’s jury predictability ranked as the third worst in the country. Id. at 1, 13.

Advocates at the Institute for Legal Reform suggest that such opinions are based on observations that the California legal system demonstrates a strong predisposition towards plaintiffs. However, the opinions of those polled could just as easily be a reflection of the sheer volume of litigation in California. For example, according to one recent study, approximately 50 percent of California state-court class action plaintiffs in 2006–2007 chose Los Angeles for venue, even though the Harris Poll reported Los Angeles as having the least fair litigation environment in the country. The opinions could also be skewed by publicity that surrounds high-profile litigation centered in California. For instance, an American Tort Reform Association ("ATRA") report explained that Los Angeles was known as "the Bank" because it was a location for plaintiffs attorneys to extract "Astronomical Awards." The ATRA report discusses awards against Phillip Morris where individual plaintiffs were awarded punitive damages in the amount of $3 billion in one case and $28 billion in another. Though the awards were later reduced, the report suggests that "[t]he Bank clearly needs to hire a guard who will stop the looting and apply the law."

While coverage of high-profile litigation and opinion polls of corporate counsel may have something to offer when assessing California’s class action climate, an objective determination of whether or not California courts are “willing to certify class action

346. See Harris Poll, supra note 345 (commenting on California courts’ willingness to certify class actions that other jurisdictions would not and on California juries’ tendency to award “disproportionately large judgments in civil cases”).
348. Harris Poll, supra note 345.
350. Id.
351. Id.
352. Id.
lawsuits most other jurisdictions would toss out\textsuperscript{353} requires the kind of empirical analysis that, to date, is not available.\textsuperscript{354}

Nevertheless, there is a common wisdom that the federal courts are tougher than state courts on class action plaintiffs,\textsuperscript{355} and there may be structural reasons—such as the resources available to a federal judge—that may lead a class action defendant to prefer federal court.\textsuperscript{356} For example, a federal judge with a smaller caseload and the invaluable resource of dedicated law clerks may have the opportunity to delve deeper into a sophisticated area of law than her state-court counterpart.\textsuperscript{357} In addition, members of the federal bench may, as a whole, have more experience dealing with larger class

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\item California Stuck Near Bottom in Ranking of Legal Climate, \textit{INLAND EMPIRE BUS. J.}, May 1, 2007, \textit{available at} http://findarticles.com/p/articles/mi_qa5342/is_200705/ai_n21288327 (quoting Tom Donohue, President and CEO of U.S. Chamber of Commerce).
\item See \textit{CABRASER ET AL., supra} note 31, \S 1.03(3)(C) (lamenting “an unfortunate dearth of published case law” involving California class certification decisions); \textit{TOM WILLG\textsuperscript{\textregistered}LLING & EMERY LEE, FED. JUDICIAL CTR., PROGRESS REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES ON THE IMPACT OF CAFA ON THE FEDERAL COURTS 4 (Nov. 2007), http://www.fjc.gov/public/pdf.nsf/lookup/cafa1107.pdf/$file/cafa1107.pdf (remarking that “reliable data on class action activity in most state court systems simply do not exist”). A significant first step in an empirical analysis would be to tally the state class actions filed and determine the rate of certification as well as a determination of how likely a certified class is to settle prior to a final judgment. A comprehensive empirical study comparing California and federal certification practice would be difficult to say the least. A thorough study would need to cull and tally class action certification motions and orders at the state and federal courts. In addition to calculating the raw number of filings, the optimal study would inspect not only whether or not the class was certified but the bases upon which class certification was made by tracking which certification requirements were or were not satisfied.
\item Juliana Kreese & Benjamin C. Rosenbaum, \textit{The New Face of Class Action Litigation: an Interview with Professor Tobias Barrington Wolff of UC Davis Law School}, 6 U.C. DAVIS BUS. L.J. 12, 12 (2005), http://blj.ucdavis.edu/article.asp?id=586&print=true (noting that “[i]n most places, federal courts are more skeptical than state courts about allowing class actions to proceed”).
\item Interview with David Fischer, Adjunct Professor, Loyola Law School, in L.A., Cal. (Feb. 6, 2008) (discussing the ways in which federal procedural rules are generally less forgiving than California state court rules) [hereinafter Fischer Interview]. Federal judges are generally perceived as tougher for a number of reasons, including the fact that their lifetime appointments leave them less concerned, as a body, about the burdens of being reappointed. In addition, while the state jurists are usually of a very high caliber, the appointment process to the federal bench tends to result in a more consistently top-of-the-line caliber of jurist. \textit{Id}. Moreover, federal juries may be more universally “cosmopolitan,” while state juries can, in some circumstances, be reflective of a local neighborhood. \textit{Id}.
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actions and may be more familiar with the class action standards and procedures.\textsuperscript{358}

The question remains whether these or other factors actually have an impact on the likelihood of certification in federal or state court. One empirical study, prepared by the Federal Judicial Center in 2005, challenged the common conception that defendants receive generally more favorable treatment in federal court when it comes to class certification.\textsuperscript{359} The study found that "[i]n both federal and state courts, cases were almost equally likely to be certified as class actions."\textsuperscript{360}

Regardless of the availability of definitive empirical data, many practitioners on both sides of the "v." agree that the particular judge they draw is one variable that can have a profound impact on the outcome of a case.\textsuperscript{361} With a relatively small community of class action counsel, word of a few decisions that reveal a particular jurist's inclinations can result in a disproportionate number of class action filings before a judge that plaintiffs' attorneys believe will be more amenable to their clients.\textsuperscript{362}

With close to 1,500 judges in the California Superior Court system,\textsuperscript{363} tracking jurists' propensities for the general assignment pool would be rather prohibitive. However, in 2000, California initiated a complex court system that provided a subset of judges

\textsuperscript{358} See Simonetti Interview, supra note 357; Heinmann et al., supra note 357, at 2.
\textsuperscript{360} Id. at 35. The study compared the two following data sets: (1) 118 cases that were removed to federal court and then remanded back to state court; and (2) 165 cases that were removed to federal court but not remanded. Id. It is possible that other variables are masking the likelihood of certification in state versus federal courts (i.e., differences within the court system such as circuit splits within the federal court system or differences in counties in the state court system).
\textsuperscript{361} Telephone Interview with William L. Stern, Partner, Morrison & Foerster LLP (Jan. 16, 2008) [hereinafter Stern Interview No. 1] (commenting that the selection or assignment of the judge is one of the most, if not the most, important decisions or factors impacting the case); Telephone Interview with Timothy Cohelan, Partner, Cohelan & Khoury (Feb. 6, 2008) [hereinafter Cohelan Interview] (explaining that whether in state or federal court, the certification process can be enormously influenced by the judge).
\textsuperscript{362} See Stern Interview No. 1, supra note 361 (discussing California state court's case assignment system that provides plaintiffs with the ability to select the county for suit and thereby maximize the chances of certification).
with supplemental training and other resources to help them manage the complex cases assigned to them. A number of class actions in California are referred to the program, which maintains a separate calendaring and judicial assignment system. Clearly, the ability to discern a judge's receptivity to certification becomes more valuable in counties that only have one judge on the complex panel or where all of the judges share the same propensities.

Class action plaintiffs, as "masters of the complaint," have more say as to which venue will hear the case, and they can therefore craft the complaint to take advantage of what they see as procedural or substantive advantages that each venue offers. While it may be true that some California procedures and class certification requirements encourage class actions, enforcement of this policy cannot in good faith be construed as an unfair or unjust application of the law. California's certification doctrine is sufficiently developed to provide a court of appeal with ample criteria to reign in any trial court's overzealous certification. Professor Arthur Miller's assessment is as poignant now as it was some thirty years ago: "The sad truth is that there has been too much advocacy, making it difficult to separate fact from fantasy." Advocates who wish to


365. JUDICIAL COUNCIL OF CAL., COMPLEX CIVIL LITIGATION PILOT PROGRAM 1–2 (2008) http://www.courtinfo.ca.gov/programs/innovations/documents/SI_Brief_ComplexCivLit.pdf. The complex panel has some advantages of the federal courts in that the cases are heard by judges with experience in class actions and are free from the confines of California's accelerated timetable to facilitate speedy dispositions. See Simonetti Interview, supra note 357.

366. See Stern Interview No. 1, supra note 361. Alameda County has two judges dedicated to the program; Contra Costa, San Francisco, and Santa Clara Counties each have one judge; Los Angeles County has seven judges; and Orange County has five judges. See FACT SHEET, supra note 364, at 3–4.


368. See Sav-On Drug Stores, Inc. v. Super. Ct., 96 P.3d 194, 209 (Cal. 2004) (noting that "this state has a public policy which encourages the use of the class action device" (quoting Richmond v. Dart Indus., Inc., 629 P.2d 23, 30 (Cal. 1981)). "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." Id. (quoting Richmond, 629 P.2d at 27).

369. Schwartz et al., supra note 16, at 217 (discussing how the even-handed application of the law is the "primary remedy for the problem of judicial hellholes").

370. Miller, supra note 339, at 665.
limit the application of the class action device or establish further procedural safeguards to ensure equitable treatment may be better served by addressing the underlying policy considerations of existing practice, rather than making unsubstantiated assertions that the California judiciary is in some way prejudiced against corporate defendants.

B. Recent Legislation Involving Class Action Litigation

In 2004, it was business as usual in Washington D.C., as election-year politicking kept lawmakers from reaching an accord on a proposed Class Action Fairness Act that would have shifted certain state class action lawsuits to federal courts. In the same year, but on the other side of the coast, Arnold Schwarzenegger utilized his political clout in his first year as governor of California to back Proposition 64, which sought to require plaintiffs to satisfy standing and class certification requirements in order to bring a representative action. The eventual passage of the two pieces of legislation were touted as a victory for corporate defendants in leveling the class action playing field, and yet neither turned out to be a panacea for the defendants bar.

1. California’s Proposition 64: The Public Clarifies the Public Policy

Proposition 64 was sponsored by the Civil Justice Association of California (“CJAC”), which had been working for close to ten


373. See About the Civil Justice Association of California, http://www.cjac.org/about/index.cfm (last visited Oct. 24, 2008). The non-profit organization, which also operates a separate political action committee, “is active in both the Legislature and the courts, working to reduce the excessive and unwarranted litigation that increases business and government expenses, discourages innovation, and drives up the costs of goods and services for all consumers.” Id.
years to curb "shakedown" lawsuits. While the business community had awareness of and supported efforts to reform the UCL, the public became aware of the issue when the Trevor Law Group sent thousands of demand letters to small businesses offering not to sue if they paid settlements amounting to thousands of dollars apiece. Another firm sent similar demand letters to hundreds of ethnic grocery stores and nail salons, sparking public sympathy and disdain. While legislators on both sides of the aisle recognized the problem, California lawmakers still did not pass legislation to address the issue.

The CJAC therefore introduced Proposition 64 as a ballot initiative, but early field polls showed the measure was only garnering 26 percent support. These early polls lulled the opposition into a certain amount of complacency, but the proposition’s supporters recognized that many voters did not pay attention to ballot initiatives until much closer to the election. By the time opponents of Proposition 64 began to mobilize, all of the available media slots had already been sold. Will Stern, the principal author of Proposition 64, suggests that of all of the factors that led to the initiative’s eventual passage, Governor Schwarzenegger’s endorsement was paramount. By backing the measure, the first-year governor put his clout to the test. Not only did he pass, Schwarzenegger got an “A+” as the voters passed every
proposition that he endorsed and rejected every measure he opposed.\textsuperscript{382}

After Proposition 64, a plaintiff must now show that she suffered an injury in fact from the alleged wrongdoing.\textsuperscript{383} Because the “private attorney general” provision was removed, a plaintiff who wishes to bring a representative action must comply with the requirements of section 382.\textsuperscript{384} While these and other modifications to the UCL were seen as key victories to help curb frivolous lawsuits,\textsuperscript{385} the proposition also provided one point of clarity that favored plaintiffs. Some cases before Proposition 64 suggested that a section 382 class action would not be proper for a UCL claim because the UCL had its own provisions for representative actions and because section 382 classes did not require substantial benefits to the court and litigants.\textsuperscript{386} By codifying the authorization to bring a UCL claim as a class action and requiring that the plaintiff has suffered an injury in fact, Proposition 64 may have decreased the number of UCL lawsuits but ensured that those filed are more potent.\textsuperscript{387}

\section*{2. Other Attempts to Limit Class Actions in California Have Not Been Successful}

While Governor Schwarzenegger’s support of Proposition 64 in 2004 may have been pivotal,\textsuperscript{388} his support of later efforts to modify California’s class action procedure\textsuperscript{389} did not have the same impact.\textsuperscript{390}

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\bibitem{382} Jordan Rau, \textit{Key Ballot Measures Go Governor's Way}, \textsc{L.A. Times}, Nov. 3, 2004, at A1. A number of newspapers also endorsed Proposition 64 which, Mr. Stern suggests, may not have occurred without the governor’s support. \textit{See} Stern Interview No. 2, \textit{supra} note 375.
\bibitem{384} \textit{See supra Part II.B.}
\bibitem{385} \textit{See Memorandum from William L. Stern, \textit{supra} note 383.}
\bibitem{386} \textit{See} Frieman v. San Rafael Rock Quarry, Inc., 10 Cal. Rptr. 3d 82, 91 (Ct. App. 2004); Kavruck v. Blue Cross of Cal., 134 Cal. Rptr. 2d 152, 161–62 (Ct. App. 2004); \textit{see also infra Part II.B.}
\bibitem{387} Telephone Interview with Kimberly A. Kralowec, Partner, Schubert Jonckheer Kolbe & Kralowec LLP (Jan. 29, 2008) [hereinafter Kralowec Interview].
\bibitem{388} \textit{See supra Part V.B.1.}
\bibitem{389} \textit{See Press Release, Civil Justice Ass’n of Cal., Governor Schwarzenegger Announces Support for Class Action Reform Bill} (May 7, 2007), \textit{available at} http://www.cjac.org/publications/news/detail.cfm?HeadlineID=1215.
Assemblywoman Nicole Parra introduced a bill, sponsored by the CJAC, that proposed bringing California’s class action certification requirements and related procedures closer to Rule 23. In addition to eliminating “any presumption or policy in favor of class certification,” the bill sought to make other changes to class certification procedures that are not present in Rule 23, not the least of which was allowing a defendant the right to appeal an order granting class certification. Having learned their lesson after Prop. 64, Democratic advocates recognized that “[w]hile progressives were asleep at the switch on Prop 64 we can no longer afford to rest.” Consumer protection advocates launched prompt opposition to AB 1505, which, at least in part, led to the bill dying in committee.

Undaunted by the setback, the CJAC continues to introduce legislation aimed at reducing “excessive and unwarranted litigation,” including sponsoring a bill that would allow both the plaintiff and defendant the right to immediately appeal an order certifying or decertifying a class. The tensions between the business groups and consumer advocacy groups are likely to continue into the future, and only time will tell if business interests can garner sufficient support to change what consumer advocacy

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05112007TS.htm (noting that a motion for the committee to vote on AB 1505 “did not proceed for lack of a second”).


392. Id.


396. See AB 1505 Dies in Committee, supra note 393; California Chamber of Commerce, supra note 390.


groups consider to be an unbroken system that is not in need of fixing. 399

3. The Impact of the Class Action Fairness Act.

After the passage of CAFA in 2005400 in which “Congress threw open the doors of the federal court and invited complex state litigants to enter,”401 early reports indicate that some litigants are accepting Congress’s invitation. The most recent report from the Federal Judicial Council showed a “marked increase in the number of diversity cases filed in or removed to the federal courts in the post-CAFA period.”402 The increase in federal class action activity could be the result of CAFA’s expanded federal jurisdiction, or it could also be a reflection of an overall increase in class action activity.403

Another study, commissioned by the CJAC and conducted by O’Melveny & Myers, LLP, studied class action filings across six California counties.404 This report indicated that despite the passage of CAFA, the volume of class action filings in California state courts actually increased slightly in recent years—with 1,093 class actions filed in 2004–2005, 1,180 filed in 2005–2006, and 1,156 class action

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399. See Rachele R. Rickert, Class Actions: There Is No Reason to Fix What Isn’t Broken, ABTL REP. (Ass’n of Bus. Trial Law., San Diego, Cal.), Summer 2007, at 4, 15 available at http://www.abtl.org/report/sd/abtl-report-summer-2007.pdf (arguing that California’s class action law is sufficiently developed and allows the court the flexibility it needs to exercise California’s strong public policy in favor of class action adjudication). “[While no reform is necessary, any reforms to California’s class action procedures must be carefully crafted so that the benefits of class action litigation are not destroyed or significantly delayed.” Id.

400. Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.). Previous versions of CAFA had been presented to Congress but did not garner sufficient support. However, “[t]he 2004 election gave [President Bush] a temporary boost in, as he put it, his ‘political capital’ . . . .” Kreese & Rosenbaum, supra note 355, at 12. After the election in 2004 the Republican party had “the political strength in the Senate to push it through, and so they did.” Id.


403. Id.

404. Press Release, Civil Justice Ass’n of Cal., supra note 347. The information gleaned from the docket was supplemented by an inspection of the actual complaints filed as well as information provided by local bar associations and commercial vendors. Id.
complaints filed in 2006–2007. Therefore, it may be that CAFA has led to an increase in class actions being heard in federal court and that there is an increase in overall class action filings in both federal and state courts.

Another possible factor is that class action plaintiffs are choosing to file in federal courts to avoid the expense and delay of the battles over removal and remand. The plaintiff who originally files in federal court can choose the “district court within the circuit that they view as having favorable procedural and legal rules, geographic connection to the litigation, or judges that they perceive to be predisposed to rule in favor of class certification.”

A defendant may also not always wish to remove a case to federal court. Given the availability of a separate complex court system in certain California counties, a defendant may prefer to stay in state court before an experienced judge with a track record of even-handedness, rather than taking a chance by removing to federal court before an unknown judge who may turn out to be less friendly to the defendant’s interests.

However, where CAFA’s jurisdictional requirements are satisfied and the defendant is so motivated, CAFA does provide the defendant with the expected benefit of being able to remove the case as a way out of a “judicial hellhole.” CAFA also provides a defendant with an opportunity to seek a federal judge who may have a defendant-friendly (or at least friendlier) predilection. Federal courts may be more receptive to a federal preemption defense, and defendants may prefer a slower, more protracted litigation timeline

405. Id. Forty-seven percent of the class actions filed were employment matters. Id. Many of the “Wage and Hour” class actions are not deemed complex and are therefore subject to the general assignment process rather than the complex litigation panel. See Cohelan Interview, supra note 361.


408. Simonetti Interview, supra note 357. For an example of a state court system that has become generally less amenable to the plaintiff’s interests, see Stephen Burbank, The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View, 156 U. Pa. L. Rev. (forthcoming 2008).

409. See supra Part V.A (discussing some ways in which the experience and resources of the federal judge may be desirable to the corporate defendant).

410. See id. (discussing the impact that assignment of a particular judge can have on a case).
employed by some federal courts, compared to a "fast-track"
docketing sometimes demanded by state courts. Moreover, the
federal rules of evidence and procedure may, in some circumstances,
inure to the benefit of the defendant.

Setting aside whether defendants actually do receive more
favorable treatment in federal court than in state court, Professor
Richard Marcus points out that the judiciary is not a static entity,
and notes:

There is no particular reason to assume the enduring
attractiveness for business interests of federal-court views
on class certification and related matters, compared to state-
court views, so one possible result of CAFA's jurisdictional
policy would be to empower federal courts of the future to
become more creative in favor of class-action treatment
than they have in the past. That impulse might be furthered
by the Congressional acknowledgement in CAFA that class
actions are a valuable technique for aggregating claims.

Professor Marcus notes that it is difficult to predict who the
"winner" and "loser" will be as a result of procedural changes. If
history is any indication, changes to procedure that are believed to
strongly favor defendants may, over time, actually favor plaintiffs.

411. See Simonetti Interview, supra note 357.

412. For example, federal judges tend to be stricter in adherence to procedural rules, whereas
California judges, in certain circumstances, must accommodate an attorney's excusable neglect or
inadvertence. See Fischer Interview, supra note 356 (discussing CAL. CIV. PROC. CODE § 473(b)
(Deering 2007)). Defense counsel who is more readily familiar with the federal courts may
therefore have an advantage over counsel who is more familiar with California state practice.

413. See Thomas E. Willging & Shannon R. Wheatman, Attorney Choice of Forum in Class
("Although generally accepted among attorneys, there is little empirical evidence supporting the
belief that state and federal courts differ generally in their treatment of class actions.").

414. See Marcus Interview, supra note 406 (suggesting that a change in the political climate
in Washington could lead to different appointments to the federal bench that, in turn, could make
the federal court more desirable for plaintiffs). Indeed, we may be seeing a shift in the Texas
state courts, where, according to Professor Stephen Burbank, the courts have made class
certification more difficult than in many circuit courts. See Burbank, supra note 408, at 17 n.70
(citing Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430 (Tex. 2007)).


416. Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress,
59 Brook. L. Rev. 761, 789 (1993) ("Although the 1966 perspective might have been that a
number of 'establishment defendants' would blanch at the increased availability of class actions,
the perspective a quarter century later is not so one-sided. Some defendants may view class
actions as an important tool to deal with widespread liability.").

417. Id.
For example, CAFA's settlement approval provisions require that defendants provide notice of a proposed settlement to the appropriate state and federal official.\textsuperscript{418} Therefore, it is possible that after the parties have engaged in protracted negotiations, a federal or state regulator could object to the settlement or bring a separate investigation.\textsuperscript{419} This notice provision is hardly pro-defendant as an investigation could lead to additional exposure subsequent to any investigation.\textsuperscript{420}

In addition to providing procedural safeguards to ensure class settlements are equitable,\textsuperscript{421} CAFA's proponents argued that federal jurisdiction over multi-state class actions was necessary to place "the determination of more interstate class action lawsuits in the proper forum—the federal courts."\textsuperscript{422} Others argue that CAFA is an unabashed effort at "forum shopping because defendants believe they will improve their chances of success markedly in class actions if they are in federal courts."\textsuperscript{423}

As Professor Marcus suggests, "[o]bjections that CAFA is pro-defendant may also be overtaken by events. As the academic flip-flop on preferences for litigating in federal court between the 1970s and the present illustrates, current preferences may change."\textsuperscript{424} Therefore, the question remains whether California's flexible common law approach is fundamentally different than the statutory framework that is allegedly more defendant-friendly.

\section*{C. California's Uncommon Class Action Under Common Law}

In his book exploring how the common law can respond to and contribute to social change, Oliver Wendell Holmes his position as follows:

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely

\begin{footnotesize}
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\item \textsuperscript{418} See 28 U.S.C. § 1715 (2005).
\item \textsuperscript{419} Simonetti Interview, \textit{supra} note 357.
\item \textsuperscript{420} \textit{Id.}
\item \textsuperscript{422} \textit{Id.} at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 6.
\item \textsuperscript{423} Alan B. Morrison, \textit{Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions}, 57 STAN. L. REV. 1521, 1523 (2005).
\item \textsuperscript{424} Marcus, \textit{supra} note 340, at 33 (footnote omitted).
\end{itemize}
\end{footnotesize}
understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy.\(^{425}\)

The bulk of this Article has addressed the specific procedural differences between Rule 23 and section 382. Perhaps the one overarching difference is that California's approach under section 382 is a common law scheme that provides judges with increased flexibility and freedom to exercise California's long-standing preference for, and protection of, the utilization of class actions.\(^{426}\)

Certainly, "California class action practice is dynamic," and the courts have been actively involved in that dynamism.\(^{427}\) Even if California were to codify its class action procedure "into a series of seemingly self-sufficient propositions, those propositions [would] be but a phase in a continuous growth."\(^{428}\) Like many human endeavors, "the law is always approaching, and never reaching, consistency."\(^{429}\)

VI. CONCLUSION

Class action litigation can instill thoughts of Frankenstein monsters or knights in shining armor, and class action counsel can be


\(^{426}\) See Stern Interview No. 1, supra note 361 (commenting that California is one of less than a hand-full of states who have not codified their class action procedures either by statute or by rules of civil procedure, and noting that a common law system tends to be more accommodating to change). By way of comparison, a majority of states across the country have adopted Rule 23, and all but three have codified their class action law. See supra note 18 and accompanying text.

\(^{427}\) CABRASER, supra note 38, § 1.03(c) (commenting on how the California courts "have been prolific in this area"). Ms. Cabraser, in discussing whether courts should make an initial inquiry into the merits of a case prior to certification, comments that:

[A]n adversary system depends upon the clash of competing advocacy and evidence to reach a balanced truth, practitioners for defendants opposing certification would do well to remind the court that the aggregation of worthless or trivial claims into a class action juggernaut may threaten corporate survival, if there is no call for harsh punishment and no misfeasance to punish or deter.

\(^{428}\) HOLMES, supra note 425, at 32.

\(^{429}\) Id.
vilified as "bounty hunters" or held out as vindicators of the rights of the masses. Regardless of the hyperbole, "class actions in California are alive and well." In either the statutory or common law scheme, the road to salvation for a judicial hellhole may indeed lie with the "fair and just application of the rules of law." In California, even if unbound by a statutory framework, courts continue to respect the entrenched history of representative adjudication while safeguarding its legitimacy so that equity is served to all who come before the court.


431. See Kralowec Interview, supra note 387.