2014 Roundtable Series

Class Action

Class actions are evolving and, in the process, have kicked off heated policy debates. Our panel from Northern and Southern California discusses how, as companies become more complex, the courts are examining jurisdiction in national class actions, as the U.S. Supreme Court just did in *Daimler AG v. Bauman* (134 S.Ct. 746 (2014)). The panelists also considered recent cases that have looked at certification—with statistical sampling getting more rigorous review—and consider the trend in class action waivers and arbitration clauses, issues that took center stage in *American Express Co. v. Italian Colors Restaurant* (133 S.Ct. 2304 (2013) and *Oxford Health Plans LLC v. Sutter* (133 S.Ct. 2064 (2013)). Finally, they consider remedial market actions taken by corporate defendants. *California Lawyer* met with Steven A. Ellis of Goodwin Procter; Michael L. Mallow of Loeb & Loeb LLP; Layne H. Melzer of Rutan & Tucker; Joseph Saveri of the Joseph Saveri Law Firm; and Brad W. Seiling of Manatt, Phelps & Phillips, LLC. The roundtable was moderated by *California Lawyer* and reported by Laurie Schmidt of Barkley Court Reporters.

Participants

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EXECUTIVE SUMMARY

MODERATOR: What are the implications of *Daimler AG v. Bauman*? How will the Court's decision impact the ability to bring class actions against large, multi-site corporations?

STEVEN ELLIS: There has been a long-term trend that it has become harder for plaintiffs to succeed in certifying national class actions. *Daimler* is a new piece that contributes to that trend. The court in *Daimler* drew a clear line between general and specific jurisdiction, and made it clear that the existence of continuous and substantial contact with a forum state is relevant only to specific jurisdiction. If a large national company is not headquartered in California, and is not "at home" here, a California court will not have general jurisdiction over the company, even if the company does business in the state every day. And a California court is not likely to have specific jurisdiction over the claims of class members who live in other states, particularly where the allegedly wrongful conduct emanated from another state and the injury occurred in another state. That means that it is going to be much more difficult to bring a national class action against a large corporation in any state other than the state in which the corporation has its headquarters.

Now, it's possible that *Daimler* doesn't quite mean what it seems to say, and it's limited to the truly foreign defendants—who are in another country, as opposed to just in another state. It's a fair question about whether the result would have been different if Daimler had been headquartered in Nevada instead of Germany.

LAYNE MELZER: *Daimler* will make it difficult for plaintiffs to initiate class actions in the forum of their choosing—sometimes labeled "judicial hellholes." As a practical matter, plaintiffs must now sue in their home state (i.e., where they were injured) or the defendant's home state (i.e., where it is incorporated or has its principal place of business). In lieu of forum shopping, you may now see "plaintiff shopping." It will also be more difficult to bring national class actions outside of the defendant's "home state." This may result in more single-state class actions and an increased use of multi-district litigation filings.

JOSEPH SAVERI: I don't think there's going to be that much of a change, as a practical matter. I tend to bring cases on behalf of California citizens in California involving claims that arise in the state. California being what it is, those cases frequently have nationwide scope. If you are suing under federal statutes, for example, or raise other causes of action, those are going to continue to be properly made in California.

Also, *Daimler* is largely about general jurisdiction. People probably have not looked at the rules that apply to specific

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—STEVEN ELLIS

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jurisdiction in a long time, because until now, people have felt that businesses with nationwide footprints across the United States could be sued basically anywhere in the United States because that provides a permissible basis for jurisdiction.

Daimler presents another kind of step along the way where the Supreme Court has expressed an unprecedented solicitude for corporate interests. Ironically, if Daimler or subsidiary MBUSA had been a natural person, the court probably would have found that there were enough contacts with the forum for there to be general jurisdiction. Nonetheless, if one looks at the specific jurisdiction principles, I think people will find that they're more liberal than they imagine.

MICHAEL MALLOW: The parties in *Daimler* dictated the result. You have a plaintiff that has no contacts, you have a defendant that has no contacts, and you have an issue that has no contacts with the subject jurisdiction. So a result other than the one reached would have been quite odd.

The undercurrent to this decision is that the courts are sensitive to the fact that a single court within a jurisdiction is being asked to decide issues on a nationwide or, in this case, worldwide basis. That would be contrary to the superiority requirements of a class action if you were doing a legal analysis focusing on whether a case should be certified.

MODERATOR: Meanwhile, *Duran v. U.S. Bank Nat'l Assoc.* (2014 WL 2219042 (Cal. Sup. Ct.) put statistical sampling under the microscope. What impact do you expect this case to have on class certification?

BRAD SEILING: *Duran* is hugely important. For many years, when the defense would oppose certification and raise issues about how you're going to try this case, the response from the plaintiffs, and often from the courts was, "Well, that's a merits issue, and class certification is just procedure." And then you'd get stuck. You'd get a class certified, and you wouldn't ever get to resolve those issues on the merits, because the pressures to settle rise when you have a certified class.

Now the California Supreme Court is saying you have to look at those issues from a manageability perspective, and you have to look at them *at the certification stage*. So they basically eliminated what used to be that bright-line distinction between certification—just procedural—and the merits. So the certification motion is getting much more fact-intensive, [with] expert witnesses brought in at the certification stage.

ELLIS: It's a fascinating case that I think we'll be studying and parsing, potentially for years. From the defense side, I found it welcome to hear from the California Supreme Court that, even when a class is properly certified, that does not preclude defendants from litigating individual issues. In a certified class action, individual actions don't magically go away. And those individual issues have to be managed in some fair way for defendants, and in some efficient way for the court. If the court can't figure out how to do that, the import of *Duran* is: Don't certify the class.

MELZER: *Duran* is the California equivalent of *Dukes* (*Wal-Mart Stores, Inc. v Dukes*, 131 S. Ct. 2541 (2011)). At the federal level, *Dukes* condemned "trial by formula" in class actions. If liability is plaintiff-centric (e.g. discrimination), individual defenses cannot be overcome by statistical probabilities. In such cases, common issues will rarely predominate—making certification difficult. Before *Duran*, the question was whether this deference to due process would be embraced in California, where courts seemed more sympathetic to the use of statistical sampling. *Duran* instructs that California courts must be equally wary of statistical evidence. Where statistical proof is allowed, the Court must be vigilant to adhere to scientific protocols. Importantly, a defendant must be allowed to attack any statistical assumptions and conclusions with individualized evidence.

SAVERI: One of the things that's happened after *Dukes* is we've hardly seen the demise of class actions under rule 23 of the Federal Rules of Civil Procedure. And I think the same is going to be true in California. One of the questions will be to what extent are the criticisms of the kind of particular procedure in *Duran* something that can be generalized more broadly to class actions? It may turn out that these are largely features

of class actions in the employment and the wage-and-hour area.

SEILING: This does bring California closer into line with where the U.S. Supreme Court is on the class certification question. It's going to be interesting to see how things shake out in the lower courts, because California state courts have historically been more liberal in the application of class action rules than the federal courts.

MALLOW: When I look at cases like *Duran*, *Behrend* (*Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013)), and *Dukes*, the message from the courts that I take away is that a class action may be procedurally a special type of case, but that it does not change the substantive law. There has been this notion, until recently, that if you bring a case as a class action, the fundamental requirements of an individual action can be ignored. But class cases need to satisfy the *prima facie* elements of an individual case. There's no magic about a class action that allows an expert to deviate dramatically from the obligations. There's no magic about a class action that allows a plaintiff to bring a case without causation and without linking damages and injury to the wrong that is claimed.

ELLIS: Twenty years ago, you didn't have the battle of experts at class certification. Now it seems that the California Supreme Court is not merely permitting a battle of the experts at class certification, but it's also demanding it, at least when there's expert testimony about sampling.

SAVERI: I agree that class certification will be more focused on the evidence in the case—the evidence which supports the basic class certification issues. There is a premium then put on careful expert analysis. That can be expensive and time-consuming, and certainly increases the risks of these cases for the plaintiffs, at least to the extent they're contingent fee cases for the lawyers that bring them. Another thing it means is that cases will have to be substantially advanced before the class certification issue is joined. We used to hear a lot about bifurcation—doing class issues first, merits discovery second. This whole discussion assumes that there will have to be substantial inquiry into the merits, so I don't think bifurcation really makes any sense anymore if there's going to be a more elaborate class certification analysis.

MODERATOR: The courts have also been addressing class action waivers and arbitration clauses recently, in cases like *American Express Co. v. Italian Colors Restaurant*, *Oxford Health Plans LLC v. Sutter*, and *Imburgia v. DirecTV* (225 Cal. App.4th 338 (2014)). What trends are you seeing?

ELLIS: I view *Oxford Health* and *Imburgia* as two parts of the same whole. Arbitration is ultimately a matter of contract. In *Oxford Health*, the arbitration clause was silent as to whether there could be class-wide arbitration. *Stolt-Nielsen (Stolt-Nielsen S.A. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010) had previously held that there could not be class-wide arbitration where the agreement was silent—but that holding was based, in part, on the parties' agreement that they did not have an intent to permit class-wide arbitration. In *Oxford Health*, the intent of the parties' silence was disputed, and the arbitrator decided it was to permit class-wide arbitration. Arbitrators have a lot of power, and the Supreme Court accepted that. *Imburgia* is also a contract interpretation case. The Court of Appeal interpreted what it considered to be an ambiguous provision against DirecTV as the drafter of the clause. I think the holding, although controversial, is probably at least defensible doctrinally. But more broadly, it showed how there is still continued reluctance in the state courts to follow *Concepcion* (*AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)).

MALLOW: To be fair, DirecTV's arbitration clause was a remnant from a prior day, when getting stuck in class action arbitration was considered very bad.

ELLIS: Right. No criticism of the drafter, but in hindsight, it's easy to see now where they went wrong.

MALLOW: I agree. But there's still hostility to consumer arbitration agreements that, quite honestly, isn't based on data. It's just a knee-jerk reaction that somehow not

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—MICHAEL MALLOW

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—LAYNE MELZER

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allowing consumers to have a class action mechanism is fundamentally a bad thing, despite the fact that arbitration may be a better result for consumers, particularly in a court system that is not keeping up with the demands for justice because of budgetary constraints. The Supreme Court in *Concepcion* made it clear: You cannot have default hostility towards arbitration, yet we see it over and over. Hopefully, when *Sanchez v. Valencia Holding Co.* (pending before the California Supreme Court as No. S199119) gets decided, we'll get a better window into what the California Supreme Court is thinking, in terms of the attack on arbitration provisions in consumer agreements.

SAVERI: Let me just jump in on that last point. I don't really think that there is much support for the view that cases like *Concepcion* and the trend toward arbitration have not limited the use of the class action device. And I don't think there is much dispute, really, that the beneficiaries of that are corporate interests and the people hurt the most are consumers and members of classes. The purpose of the Supreme Court in those decisions is clear, and to some degree it has been successful.

SEILING: There are policy ways to deal with *Concepcion*. But to the point about courts holding the defendants to the language they drafted, I think that's very appropriate. It is a pretty dramatic thing to insert in a form contract this provision that says you can't follow a procedure that any other litigant would have a right to follow. So it's right for the courts to say, if you're trying to enforce this limiting clause, you better make sure you wrote it properly.

ELLIS: There are costs to our system from over-enforcement of consumer protection laws from lawsuits that don't have merit but get settled because of the risk or the nuisance value. What the courts are trying to do is fine-tune that issue and not have over-enforcement or under-enforcement. I think ultimately these are questions that Congress should try to tackle, although I realize that's difficult in the current political environment.

MALLOW: One of the mandates of the Consumer Financial Protection Bureau is to look at the arbitration issue. The problem is the CFPB's slant against arbitration is clear. You have a consumer advocacy organization that is supposed to be objectively viewing the issues, but in the initial stages of the analysis, it seems it is not objectively reviewing the issues.

MELZER: There is a significant cost to litigation, and in particular class actions. In many circumstances, it is fair to question whether society is benefitted by the results achieved when balanced against the associated costs. In my view, the arbitration debate is less about arbitration being evil, and more about arbitration being something that the parties have agreed to. Some claims may escape judicial or arbitral review—but perhaps those claims were less plaintiff-driven and more lawyer-driven. The Federal Arbitration Act and the Supremacy clause require California courts to honor arbitration agreements—*Imburgia* shows that some continue to resist.

The holding in *Imburgia* seemed very result oriented. The court acknowledged that the Consumers Legal Remedies Act's ostensible prohibition on arbitration was pre-empted by the FAA (and by extension *Concepcion*). Yet, in a contract which expressly stated it was governed by the FAA, this pre-empted law was sufficient to preclude arbitration because the parties stipulated that the arbitration clause would be of no effect if state law would find it unenforceable. This is a very circular approach to get to a result. It also reaffirms that California, in particular, is struggling with *Concepcion*. Cases like *Italian Colors* indicate that the Supreme Court isn't changing its mind about *Concepcion*. Hence, any change is going to have to come at the legislative level.

MODERATOR: Let's move on to a discussion of class action objectors. In *Litwin v. iRenew Bio Energy Solutions LLC* (2014 WL 2200686 (Cal.Ct. App.)), the court found that requiring objectors to attend the final approval hearing in person violated their due process rights. What are your thoughts?

SAVERI: Really, the issue that we're confronting is the situation involving profes-

sional class action objectors—people who, on behalf of non-named class members, file specious repeated objections to class action settlements and threaten to file frivolous appeals of trial court rulings merely to extract a payoff. And that behavior is a kind of lawful extortion. By contrast, there are other lawyers or other plaintiffs who can and do submit legitimate objections and appeal in good faith, and that conduct helps police the settlement process. The policy challenge, and the challenge before the courts, is how to suppress the kind of extortion behavior that most would conclude is a tax on the system without deterring the beneficial conduct. And so far I think the solutions that have been tried have failed.

This particular case was a case in which an objector filed an objection to a settlement but didn't appear at the hearing. And the question was whether you needed to appear at the hearing in order to preserve your appellate rights to hold up a settlement. It seemed to me that if someone was serious about those rights, they would appear at the settlement. But the court said that it's fine if the objector doesn't even show up. I think that's a problem. And plaintiffs' and defendants' counsel alike have a share in coming up with a solution to the problem.

SEILING: There have been a number of recent decisions that concern me. Anytime the appellate courts give credence to the objectors, it just gives them more legitimacy. It's a horrible thing that someone can not show up and still be around to throw a fly in the ointment on appeal with one goal in mind—to get more money.

MELZER: This is a problem that is not going away anytime soon, particularly because we have seen the courts giving class action settlements greater scrutiny. As a consequence, objectors are going to have a louder, stronger voice. The only real solution is making sure the settlement is fundamentally fair. As *Litwin* shows, procedural fairness is critical—because substantive fairness is usually assured through the adversarial process. Notice and a fair opportunity to be heard is critical.

ELLIS: One thing that is strange about *Litwin* is that it was decided on constitutional grounds. The Court said that under the California Rules of Court, objectors may file a written objection and appear at the final approval hearing, but they are not required to do both to have their objections heard. Now that may be a good rule or a bad rule, but it seems this is a question for the California Rules of Court. To elevate it to a constitutional principle strikes me as unnecessary and really quite dangerous. We should want to give both courts and the rule makers maximum flexibility to deal with balancing the interest of permitting good objectors to have their say against the interest of protecting litigants against bad objectors who are injecting themselves into the process to hold things up, and to try to impose a tax.

SEILING: It's interesting when you talk about good objectors and bad objectors. That distinction maybe had more weight, say, ten years ago, when many trial courts were not giving settlements the rigorous review that they do now routinely in state and federal court. Judges in the complex courts in the state courts and most federal judges won't simply sign whatever you put in front of him or her. They are going to look at the issues, examining notice at preliminary approval and getting much more involved than they used to. So I don't know that I've seen a "good objector" in quite some time, but I've seen a number who literally phone it in and don't show up at the hearings, and then extract some sort of toll from someone down the line.

ELLIS: That's a good point, but judges seem to think there are still good objectors today whose voices should be heard.

SAVERI: *Litwin* was a case where the objector didn't even phone it in—didn't even show up. And other than wringing our hands, there have to be mechanisms that should put some teeth into this.

MALLOW: One of the things that's most concerning about it is, in fact, the trial court did consider the objectors' positions and expressly overruled the objections.

ELLIS: The court affirmed on that ground in the unpublished part of the opinion.

I don't really think that there is much support for the view that cases like *Concepcion* and the trend towards arbitration have not limited the use of the class action device.

—JOSEPH SAVERI

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MALLOW: That is a truly disturbing part. Because the judges are keenly aware of the difficulty of objectors to get to a remote courthouse to voice their opinion, they routinely address the objections as if the objector were in the courtroom. Had the trial court not considered the objection, the appellate court's reversal of the settlement may be better taken.

MODERATOR: Changing subjects, let's talk about the impact of company-initiated market actions as a remedy to complaints. When a defendant in a class action institutes a process to satisfy the requirements of California Civil Code section 1782(c)—stops the unlawful action, identifies its customer base, and offers a remedy—what impact does and should that have on the ability of a class to be certified?

MALLOW: We have argued that the market action, if it's done correctly, moots the need for a class action, because it effectively provides the relief that would otherwise be obtained through a class action. We've had some resistance to the argument, though at the end of the day, plaintiffs' counsel generally capitulated that, in fact, the remedy and the procedures instituted do moot the class action. Many clients who recognize that perhaps their business practices do not meet expectations want to provide a remedy but do not want to pay administration fees and/or class attorney's fees and want to initiate remedial measures on their own.

MELZER: I've often said to clients in CLRA or 17200 cases is, "if it's broke, fix it." Sometimes there can be a knee-jerk reaction to think this is somehow admitting liability. But prompt remedial action can be a defense to liability under these consumer-friendly statutory regimes. It can also render class certification difficult because the defendant's self administered remedial program may demonstrate that a class proceeding is not a "superior" means to afford relief.

SAVERI: I hope we would not have become so cynical to believe that the idea that when someone causes a problem, identifies it, and fixes it, that is a bad thing. We should have a system that encourages that.

ELLIS: That's exactly right. And if defendants go down this path, we need to make sure that the remedy provided is complete. If we take a half step, we may find ourselves in the worst of all worlds, having potentially admitted some wrongdoing but still facing a class action lawsuit.

SEILING: And some issues are easier to fix than others. If you're selling a dietary supplement that someone says doesn't work, you can give people their money back. But what if they say it causes some health harms? How you go all the way to settling all of those claims is a difficult thing.

MALLOW: What's interesting is that there are economic theories that have been advanced, particularly at the motion-to-dismiss phase that could frustrate the benefit and purpose of initiating a market action; benefit of the bargain claims are a good example of that. There are some courts that will look at a remedial action and say, "It looks like it takes care of it, but there's this theoretical injury, and because it's a motion to dismiss, I'm going to let the case go on."

ELLIS: Well, if I have to stand in front of a judge or ultimately a jury, I feel very comfortable saying, "Hey, a vendor made a mistake, and as soon as we heard about it we fixed the problem, we pulled the product, and we offered refunds." Often, that may be better than saying, "We heard about a problem, and then we called the lawyers and we went into a defensive posture." ■

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—BRAD SEILING

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