



Digging Deeper Winter 2010 - 2011

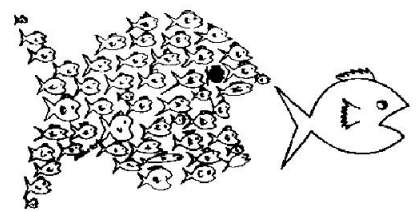
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Class Action Lawsuits - Recent Developments and a Brief Primer

A considerable amount of our practice focuses on class action litigation. For those who may not be as familiar with this area of litigation, a class action suit may occur when many different people combine their similar complaints. This saves court time and allows a single judge to hear all the concerns at the same time, and come to one settlement for all parties. If the court agrees to certify the complaints as a class action, all class members have equal say and rights to any monies or remedies ordered by the court.

CLASS ACTION



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A Class Action is a type of lawsuit in which one person represents everyone who suffered similar harm from the defendant's alleged unlawful conduct. Class action lawsuits often are filed when it would be impractical or prohibitively expensive for

The Year in Review



Welcome to The Year In Review edition of our Digging Deeper newsletter.

We wish everyone a wonderful holiday season and a happy and healthy year to come in 2011!

- Mariam Zadeh

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each person who was harmed to file an individual lawsuit, and they enable small shareholders or consumers to seek recovery from large corporations possessing much greater legal and financial resources. Some of the more important developments in class action litigation are discussed below.

On December 6, 2010, the United States Supreme Court granted certiorari in Wal-Mart v. Dukes. The Supreme Court limited review to two issues, Question I from the Petition, and a second issue included by the Court. The Court said: The petition for a writ of certiorari is granted limited to Question I presented by the petition. In addition to Question I, the parties are directed to brief and argue the following question: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." Question I from the Petition is as follows: Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)- which by its terms is limited to injunctive or corresponding declaratory relief-and, if so, under what circumstances. This decision could run the gamut from a highly fact-specific outcome, to a treatise on discrimination class actions, to a wholesale commentary on the Rule 23(a) requisites.

The Court of Appeal in the matter of Munoz v. BCI Coca-Cola Bottling Company of Los Angeles softens the "fairness" hearing required under Kullar v. Foot Locker and summarizes the obligation of a trial court evaluating a class action settlement as follows:

Munoz v. BCI clearly holds that there is no obligation on parties seeking approval of a class action settlement to state a specific sum that would represent the maximum possible recovery if the class prevailed on all theories. Rather, the Court must have information that permits it to evaluate the strength of the claims compared to the amount offered in settlement. This showing ought to be satisfied by a discussion of the specific risk factors associated with the various theories, along with data about such things as the size of the class. In other words, if a trial court can roughly approximate the magnitude of the claims and the likelihood of recovery, it can fashion the necessary metric.

Meanwhile, we continue to await the decision in Brinker Restaurant v. Superior Court (Hohnbaum) on the standard of meal period breaks, which remains pending before the California Supreme Court. Despite the pending decision, the Court of Appeal (Second Appellate District, Division Eight), in Hernandez v. Chipotle Mexican Grill, Inc., decided that, rather than recommending to the trial court that it certify the meal period claim and await Brinker, it would just tell us what that standard is right now. And, according to the Hernandez Court, the meal period standard is the same standard that applies to rest breaks:

Hernandez admits employers must provide, i.e., authorize and permit, employees to take rest breaks, but contends a different standard applies to meal breaks and thus, the trial court's legal analysis was faulty. This contention is not persuasive. "The California Supreme Court has described the interest protected by meal break provisions, stating that "[a]n employee forced to forgo his or her meal period . . . has been deprived of the right to be free of the employer's control during the meal period." Murphy v. Kenneth Cole Prods., Inc., 40 Cal.4th 1094, 1104 (2007). It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do

[Negotiation](#)

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any particular thing during that time. Indeed, in characterizing violations of California meal period obligations in *Murphy*, the California Supreme Court repeatedly described it as an obligation not to force employees to work through breaks. [Citation.]" (*Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 585, fn. omitted.)

In the class action arbitration front, the U.S. Supreme Court issued a 5-3 decision in *Stolt-Nielsen v. AnimalFeeds International Corp.* that may have eradicated class action arbitration in the employment, consumer, and civil rights arenas. The Supreme Court held that parties to an arbitration agreement could not be compelled under the Federal Arbitration Act to litigate class claims where the arbitration agreement was silent on the issue of class arbitration. The Court relied on the precept that "arbitration is a matter of consent, not coercion," and is a way to resolve "only those disputes that the parties have agreed to submit to arbitration." The Court reasoned that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

Recent Awards

We are pleased to announce that Jeff Krivis and Mariam Zadeh have been selected by their peers for inclusion in the 2011 edition of *The Best Lawyers in America* in the specialty of Alternative Dispute Resolution.



Selection to Best Lawyers is based on an exhaustive and rigorous peer-review survey comprising more than 2.8 million confidential evaluations by the top attorneys in the country.

In addition, Mariam and Jeff were named a Southern California SuperLawyers by Los Angeles Magazine in 2011. Only 5% of attorneys are selected for this honor. The selection process involves an extensive peer recognition system with independent research and a blue ribbon panel review.

Krivis received the additional honor of being recognized as a Top Neutral in 2010 by the Los Angeles Daily Journal.

The Impact of the Irrelevant on Decision-Making

In an excellent article in the New York Times, Robert H. Frank, an economics professor at the Johnson Graduate School of Management at Cornell University, explains how irrelevant information often affects choices in significant ways.



Textbook economic models assume that people are well informed about all the options they're considering. It's an absurd claim, of course, as most economists are well aware.

Even so, when people confront opportunities to improve their position, they're generally quick to seize them. When energy prices rise sharply, for instance, consumers are quick to adjust their thermostats. So most economists are content with a slightly weaker assumption: that people respond in approximately rational ways to the information available to them.

But behavioral research now challenges even that more limited claim. For example, even patently false or irrelevant information often affects choices in significant ways.

Consider the people who set their watches a few minutes ahead, to prod themselves to arrive at appointments on time. When asked what time it is, they effortlessly perform the required subtraction before answering. So, in one sense, the false image on the watch face doesn't fool them at all.

But that same image is fed into their brains through multiple neural pathways. Some lead to the circuits that do the subtraction. But others lead directly to emotional circuits, which react to the image at face value. The resulting anxiety is why the practice works.

An intriguing example of transparently irrelevant information that affects behavior comes from a 1974 report on an experiment by the psychologists Daniel Kahneman and Amos Tversky. In the experiment, subjects first spun a wheel that supposedly would stop at random on any number between 1 and 100. Then they were asked what percentage of African countries belongs to the United Nations. For one group of subjects, the wheel was rigged to stop on 10; for a second group, on 65. On average, the first group guessed that 25 percent belong to the United Nations, but the second group guessed 45 percent.

All subjects would have insisted, correctly, that the number on the wheel bore no relation to the correct answer to the question. Yet, obviously, the number profoundly influenced their responses.

In short, even demonstrably false or irrelevant information can influence judgments, which in turn influence decisions. In such cases, Professors Tversky and Kahneman wrote in 1981, "the adoption of a decision frame is an ethically significant act."

Policy makers have long recognized the potential danger of false statements by advertisers. But in the belief that most adults are suitably skeptical about promotional puffery, Congress has tried to prohibit only the most blatantly false or explicitly misleading claims.

But what about merely irrelevant statements, or only implicitly misleading ones? Standard economic models say such claims are, well, irrelevant, so there should be no need to regulate them. But according to recent behavioral research, it's a distinction without a difference.

[You can read the full article here.](#)

Survival of the Fibbest: Why We Lie So Well



Research suggests we begin lying as toddlers and keep on as adults, but how we deceive changes as we age. In this Wall Street Journal article, Shirley Wang, writes about why we lie so well.

Your child tells you he didn't eat a cookie despite the tell-tale crumbs all over his mouth. You call your boss to

say you're taking "a sick day," feigning a cough while on the phone. You're both lying, but is it the same?

Whether we're 2 years old or 62, our reasons for lying are mostly the same: to get out of trouble, for personal gain and to make ourselves look better in the eyes of others. But a growing body of research is raising questions about how a child's lie is different from an adult's lie, and how the way we deceive changes as we grow.

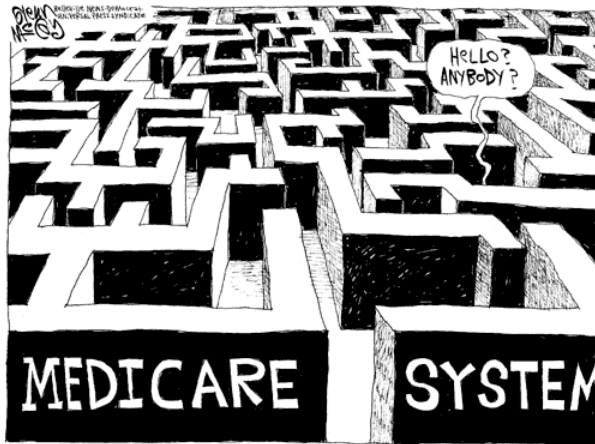
Developmental psychologists are trying to understand lying through behavior. Neuroscientists are tracking which regions of the brain are activated when we spin lies. Their results could shed light on issues from why a tween lies to your face about breaking a vase to whether young children can be trusted to give eye-witness testimony in court. One intriguing new study suggests that lying may spring from a completely different part of the brain in children compared with adults.

What has become clear from studies including the work of Kang Lee, a professor at the University of Toronto and director of the Institute of Child Study, is that lying is a sign of normal maturation.

[To read the full article click here.](#)

Medicare and Its Impact on Personal Injury Settlements

Medicare's increasing involvement in insurance settlements has made it ever more important that parties do all they can in advance of the mediation to ensure that Medicare compliance issues don't become an impediment to settlement.



For every injury or workers' compensation insurance case, it is helpful to consider and inquire about the following:

Is the injured party on Medicare or Social Security Disability now? If so, has Medicare made or is making payments for treatment related to the injuries/conditions in the case? If the answer is yes, then Medicare's conditional payments have a statutory priority right of recovery over all other payments in the settlement.

If the parties are settling a claim, they must ensure any Medicare payments for medical services related to the injury are reimbursed as part of the settlement. If you fail to do this, Medicare will pursue reimbursement, including the attorneys.

In addition, if the parties anticipate a need for future medical care related to this case beyond the settlement date, then there may be a need to address the Medicare Set-Aside (MSA) requirements.

The Collateral Source Rule - Recent Developments

In *Michael King v. Carol Wilmet*, certified for partial publication by the Court of Appeal (3rd Appellate District), considers whether, in a negligence action against a nonpublic defendant, the reduction of a plaintiff's award of past medical expense damages to the dollar amount ultimately paid by the plaintiff's private health insurance to his health care providers is appropriate under the collateral source rule.



The court held in the published portion of the decision that the reduction is inappropriate in light of the public policy conclusions expressed by our state Supreme Court and the Legislature's enactment of specific statutes

governing the operation of the collateral source rule in limited kinds of cases.

As such, the court effectively re-affirmed the 'collateral source rule' in favor of plaintiffs.

Punitive Damages - Recent Developments

In an article in the Los Angeles Daily Journal (May 11, 2010), Judge Rex Heeseman of the Los Angeles Superior Court discusses the decision in *Amerigraphics v. Mercury*. Judge Heeseman's article provides a nice overview of some of the major California



appellate decisions addressing the proper ratio of punitive damages to compensatory damages. The article discusses the *Amerigraphics* decision in light of these precedents, and examines some of the questions raised by *Amerigraphics*. A summary of Judge Heeseman's analysis is provided below.

The Court in *Amerigraphics Inc. v. Mercury Casualty Co.* (2010) Cal.App. LEXIS 377, 2010 DJDAR 4326, considered the amount allowable in punitive damages and arrived at a permissible ratio of 3.8.

In *Amerigraphics*, after awarding compensatory damages of \$130,000, the jury assessed \$3 million in punitive damages, plus \$40,000 in prejudgment interest. Post-trial, the trial judge gave \$346,000 in Brandt fees (i.e., in a "bad faith" lawsuit, the plaintiff policyholder's fees to prove entitlement to policy benefits if the defendant insurer has been found to have acted "unreasonably"). That judge then reduced the punitives to \$1.7 million, 10 times what she considered the compensatories (\$130,000 plus \$40,000).

On appeal, the policyholder claimed the amount of compensatory damages, for purposes of the ratio analysis, should also include Brandt fees. The appellate court disagreed, because those fees sprang from the trial judge's fee award after the jury's verdicts. In support of that conclusion, that court cited *Bardis* for the proposition "actual damages as determined by the jury should be used as the base figure for calculating the punitive damages ratio."

Additionally, *Amerigraphics* observed, the policyholder had cited no authority for its contention prejudgment interest should be included in the ratio analysis; therefore, the trial judge should not have utilized that \$40,000. Nor should there be any such consideration of potential harm - e.g., the harm that would have happened had the policyholder not vigilantly pursued its coverage rights. Instead, referring to *Simon*, "[o]nly

prospective injuries that are foreseeable from the defendant's conduct may be considered. The potential harm that is properly included in the due process analysis is 'harm that is likely to occur from the insurer's conduct.'"

The appellate court concluded the trial judge's reduction to \$1.7 million exceeded the constitutional maximum. Instead, that court fixed the punitives at \$500,000, i.e., a 3.8 to 1 ratio. (It appears this is the first occasion, in California at least, where an appellate court utilized a "fraction" in the ratio.)

[To read the full decision in Amerigraphics click here.](#)

Mediation Confidentiality - The Cassel Case

In *Cassel v. Superior Court*, 179 Cal. App. 4th 152, 101 Cal. Rptr.3d 501, 2009 WL 3766430 (Cal. Ct. App. Nov. 12, 2009), the petitioner sued his former attorneys for malpractice arising from their representation of petitioner in a lawsuit. The



petitioner alleged that during the mediation of that prior lawsuit, his attorney, now the defendant, forced him to accept a settlement for far less than was acceptable to him.

The issue before the appellate court was whether communications between petitioner and his counsel which occurred during the two days prior to the actual mediation and at the actual mediation in which the two of them were the only ones present and participating were protected by mediation confidentiality.

The majority held that such communications exclusively between attorney and client do not qualify for the protections of mediation confidentiality in a lawsuit by a client against his own lawyers. The dissent strongly took issue, noting that this holding contravened both statutory and case law.

As it stands now, the Cassel decision permits the attorney-client relationship to continue to peacefully coexist with the principles requiring confidentiality in mediation. However, the matter is now pending for a ruling before the California Supreme Court and the delicate balance of the attorney-client relationship and mediation confidentiality may tip in one direction or another depending on the Supreme Court's decision.

[To read the full opinion click here.](#)

We realize that it is often difficult to schedule cases with us on short notice or in instances where there are critical time pressures. As a result and in an effort to accommodate our colleagues when faced with this situation, we have instituted the *Last Minute Club*.



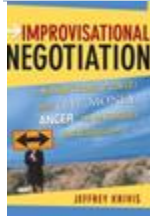
Clients in the *Last Minute Club*, will be notified in the event of a cancellation or opening in our calendar and will be given priority to book that last minute spot. You can choose to be notified by email or phone, at which point we will advise of the date, time and number of hours available.

Please keep in mind that the first to respond with a firm acceptance by all parties of the opening will be able to reserve the date.

We are hopeful that becoming a member of the *Last Minute Club* will help accommodate your firm and serve your needs for any last minute mediations.

[Contact: Heather Reed, Case Manager](#)

Improvistational Negotiation



A Mediator's Stories of Conflict, About Love, Money, Anger and The Strategies That Resolved Them
Written by Jeffrey Krivis

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