Law Is Too Harsh on Class Counsel

Recently, at the Governor's urging Assemblymember Audra Strickland introduced ABX8 38, which would create a massive change in California class actions. The bill attempts to make class certification more difficult and costly, and reduce fees to plaintiff's counsel. If passed, class action attorneys would be squeezed at both ends (increased litigation costs and less fees). While the bill is potentially beneficial to some corporate interests, it would harm law-abiding businesses by allowing lawbreakers to gain a competitive advantage by offering lower prices to consumers. Of even greater concern, this bill will injure the public's ability to retain competent counsel in medium sized claims. Large claims will always be litigated, but as the costs and risks increase, lawyers will only be willing to take on larger cases.

We posit that the bill is based upon publicly held misconceptions surrounding class actions and class counsel: that class action attorneys are receiving "unjust" compensation, and counsel is motivated solely by fees. Alarmingly, this perception also influences the judiciary, who retaliate against class action attorneys by way of self-made tort reform – primarily by denying motions for class certification, failing to approve settlements and/or reducing attorneys' fees.

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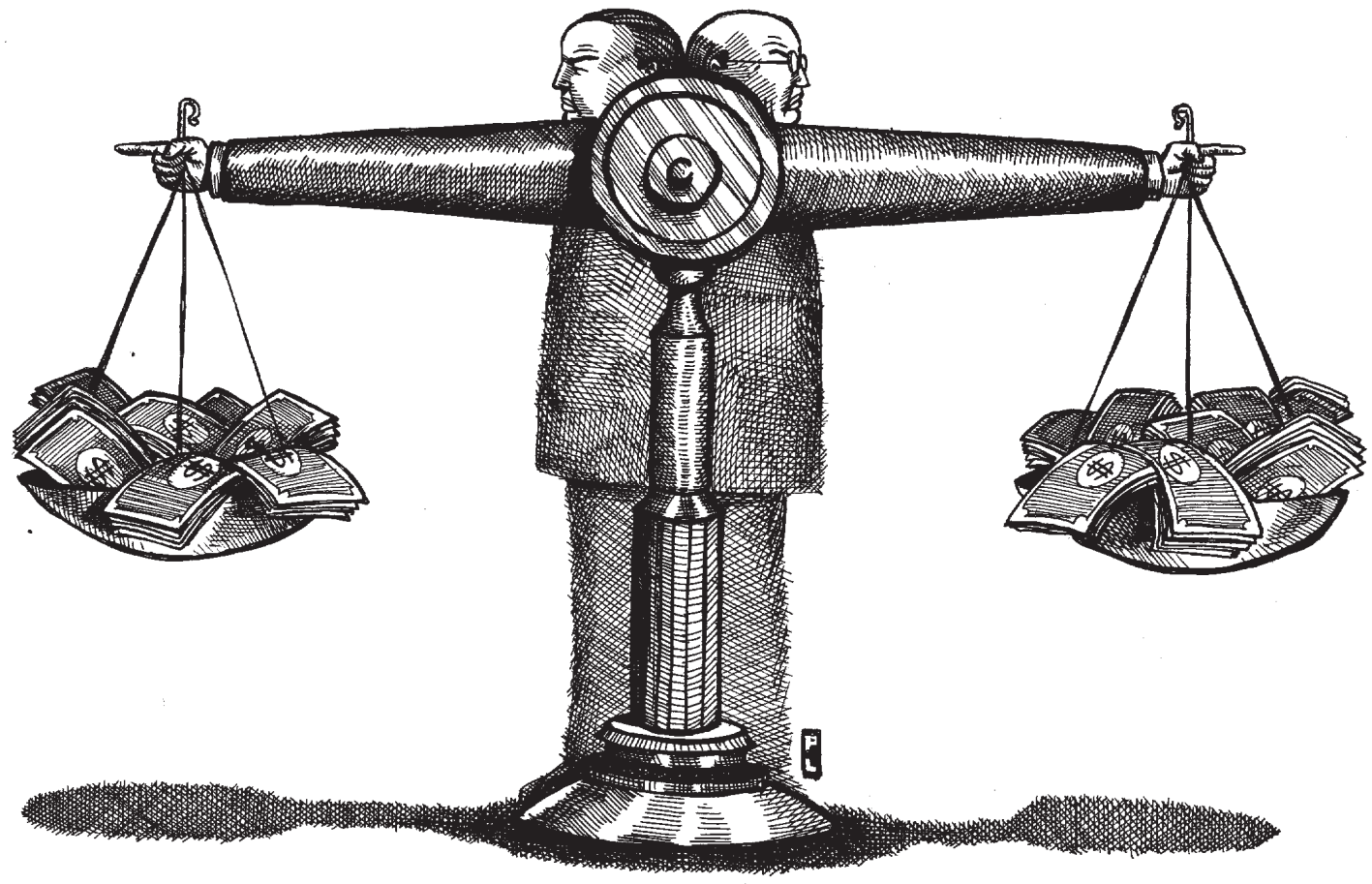

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The certification motion is the most important motion in the case. While many cases settle before certification, class counsel must prepare the case under the assumption that a certification motion will be heard. Under the Central District of California's Rule 23-3, the certification motion must be filed within 90 days of filing the complaint. Several sitting judges rarely extend this deadline, resulting in stalling techniques by defendants to gain a tactical advantage.

The preparation for class certification in wage and hour case for example may involve the review of potentially tens of thousands of pages of documents, interviews with hundreds or even thousands of class members, numerous depositions and, of course, the actual drafting of the motion. According to the Administrative Office of the Courts, in its "*Second Interim Report From The Study of California Class Action Litigation*" (February 2010), class certification motions filed from 2000-2005 had a 46 percent chance of being granted.

Assuming the parties wish to settle the case instead of litigate, they can not just settle immediately. Discovery must be completed to enable the counsel for the plaintiff and the court to properly evaluate the amount of the settlement and its fairness to the class. *Kullar v. Foot Locker* (2008) 168 Cal. App.4th 116, 129. The due diligence necessary for settlement at times can be similar to the preparation required for class certification.

Sometimes, settlements are negotiated early on in the case. However, such is *not* the norm considering several recent unresolved legal issues and hesitation by general counsel to pay substantial settlements in tough economic times. Meal break cases, for example, have been difficult to settle since the decision in *Brinker v. Superior Court*, (2008) 165 Cal.App.4th 25 (review granted on Oct. 22, 2008). Many courts are staying actions pending the decision in the *Brinker* case.

In the event that the parties settle the case, the parties often enter into months of negotiations regarding the details of the settlement.

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Small details, if left unattended can create litigation on the back end despite efforts of the parties to finalize the case. When all of the settlement documents are completed, the parties submit the settlement documents to the court for preliminary approval. At this stage, the court determines whether the settlement is fair, adequate, and reasonable.

Recently, courts have been scrutinizing settlement terms down to the punctuation. Courts often require parties to fine-tune the agreement, or go back to the drawing board altogether. If, on the other hand, all goes well and preliminary approval is granted, class counsel will move for final approval within a few months. It is only after the court finally approves the settlement that class members are paid and the attorneys, who have been working for months (or years) on contingency, can be compensated.

Class counsel does not simply receive a check and take his portion of the settlement. Rather, in class cases, the fees are approved by the percentage of the fund method or the lodestar method. In contrast to the percentage of the fund method, the lodestar method requires an analysis of the hours worked on the case. Lodestar judges have free reign to evaluate the attorneys' hours and are governed only by an abuse of discretion standard. Hours of hard work are sometimes simply ignored by courts without reason. While defense counsel is paid hourly by their corporate client for time worked, class counsels' hours in the case can be arbitrarily erased by the court.

In the process of cutting class counsel's fees, some courts trim counsel's hourly rates, while ignoring the fact that defense counsel has been paid more per hour than the plaintiff's lawyers have even requested. Worse, sometimes courts fail to acknowledge the risk class counsel endured or the hard work actually performed. Although case law actually states that class counsel is entitled to a loadstar multiplier of their actual fees in state court, some judges have failed to properly estimate the risk of class litigation. The 9th Circuit benchmark is 25 percent of the amount recovered. Yet, this benchmark analysis is often ignored or given little attention by many courts.

If this recent judicial trend continues, an ethical conundrum may result for class counsel. Class counsel may be disinclined to invite early settlement discussions or turn down reasonable offers to increase the number of hours worked on the case. Such a problem does not present itself in a percentage of the fund settlement.

The problem with early settlement from class counsel's prospective is two-fold. Take the following scenario: two class action cases are litigated simultaneously. In one case the attorney's fees are $240,000.00, and in the other they are $60,000.00. Assume class certification is denied in the first case and the second case settles for $1,000,000. In the second case, class counsel requests 30 percent of the settlement fund created, or $300,000.00. Class counsel's requested 30 percent of the fund compensates for the firm's hours worked on both cases (adding the $240,000 and $60,000 worth of time spent on both cases). In essence, the attorney's win compensates for the loss.

The court, however, might look at the attorney's five times lodestar multiplier ($300,000 requested fees ($60,000 incurred fees = 5) and reduce it to a 1.5 multiplier (or $90,000). Factoring in the loss on the first case, the attorney now earns only 30 percent of the hourly rate for all hours worked. In this scenario, a lawyer would be better off resisting mediation and settling his case on the eve of class certification.

The threat of courts reducing fee requests places class action lawyers in a quandary. Do they reach an early settlement or should they resist settlement to put in more hours to justify the percentage fee in the court's eyes? Moreover, this potentially harms defendants who may want to resolve a case quickly and without added expense to their clients. The new reality potentially forecloses this option and forces the parties to engage in costly litigation on every class case.

The common fund method, as compared to the lodestar method, more accurately addresses risks in the legal marketplace. Furthermore, the lodestar approach puts a huge indirect strain on defendants and the judiciary by potentially removing the option of early resolution. In order to stay in business, class counsel must win or settle cases. The public wants lawyers to continue to take on difficult cases that are beneficial to classes of individuals who are not being treated fairly. If class counsel does not receive an enhanced multiplier for this risk, lawyers will not pursue these cases and many clients will be left without legal representation.

While there are some in the plaintiff's bar who may be making many times their hourly rates, most struggle to maintain their hourly rates on a yearly basis. Given this reality, both the judiciary's self-made reform and the Governor's proposed bill are too harsh on class counsel. Unless the goal is to kill class actions, the lodestar method as it is currently implemented in the lower courts doesn't compensate attorneys for the significant risks they undertake. Without the enforcement mechanism of class actions, companies are given free reign to find loopholes in the law, knowing that individuals will not pursue these cases on an individual basis.

Letter to the Editor

California Supreme Court Case Was Not About a Forum-Shopping Plaintiff

On behalf of the family of Terry McCann, a deceased California businessman and philanthropist, I am writing to express their grave disappointment at your coverage of the California Supreme Court's decision in *McCann v. Foster Wheeler*, 2010 DJDAR 2473. The article that ran in your February 19 edition was legal journalism at its worst, and displayed a lack of objectivity that unfortunately is now routine when you cover asbestos litigation in the California courts.

Your abandonment of journalistic integrity begins with the headline itself: "*Ruling Discourages Forum Shopping*." But the Supreme Court's decision had absolutely nothing to do with forum shopping. Indeed, directly contradicting the headline, your piece states that "no one accused Plaintiff Terry McCann of forum shopping." Since the Supreme Court stated that "it is clear that plaintiff's move to California was not motivated by a desire to take advantage of the opportunities afforded by California law and cannot reasonably be characterized as an instance of forum shopping," we thank you for that concession.

Mr. McCann lived in California since 1975, and became the executive director of Toastmaster's International, a California-based company with an international presence. He was also a past president of the Surfrider Foundation, growing out of his lifelong love of athletics, which earned him a gold medal in wrestling for the United States at the 1960 Olympics. He had a love for surfing in Southern California's coastal waters, and a desire to protect those waters for future generations of Californians.

This was actually a case in which the Court was called on to balance multiple factors weighing in the governmental-interest test for choice of law analysis. The specific conflict was between Oklahoma's statute of repose targeted at real property improvements, and California's statute of limitations. Forum shopping and "stemming the tide" of California filings had nothing to do with it. But somehow your coverage of Mr. McCann's appeal, in his home state's court, inevitably became another tale of a "forum-shopping plaintiff" clogging up California's overburdened court system. Shame on the *Daily Journal*. That works a grave injustice to the memory of Terry McCann, an innocent asbestos victim and a Californian of some repute. If Terry McCann was a "forum shopper," as your article insinuates, then literally no Californian should be allowed to file a claim for injuries in the courts of this state.

As ever, the *Daily Journal* was quick to provide an outlet for the opinions of Mark Behrens, an insurance lobbyist. But with any degree of objectivity, it will be seen that the decision might make it easier for out-of-state plaintiffs to file cases in California and have the beneficial laws of other states, where the tortious conduct occurred, applied in California courts. California, with its antiquated and unfair law extinguishing the pain and suffering damages of victims upon their death, is hardly a "plaintiff-friendly" jurisdiction. But your newspaper regularly glosses over such facts when covering asbestos litigation.

Your article quotes Mr. Behrens' lament that the Court "did not use this as an opportunity to make sweeping announcements about the state of asbestos litigation in California." But the Court was simply writing on a choice-of-law doctrine, and rightly did not treat the case as a vehicle for policy changes sought by insurance companies. And though you quoted Mr. Behrens, who did not represent any party to the appeal, Paul Cook of my firm, who represented the McCann family, was not quoted at all despite being reached for comment. Apparently Mr. Behrens can always count on the *Daily Journal* to print his stock refrain, but lawyers for actual human beings involved in the case being described can forget about it. This is what passes for objective reporting at the *Daily Journal* these days.

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