Katten

Assessing and Responding to Class Action Risk

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Class Actions

- **What is a class action?**
  - — Class actions are lawsuits brought by a single plaintiff or a few plaintiffs on behalf of all others similarly situated.
  - — In federal court, the class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).
    - This crucial concept is often forgotten by judges and plaintiffs' lawyers.
  - — In California state court, there is "a public policy which encourages the use of the class action device." *Sav-On Drug Stores v. Superior Court*, 34 Cal. 4th 319, 340 (2004).

Why Class Actions Matter to You

- Publicity and reputational harm—
  - — the media love to cover class actions
  - — large potential damages always draw attention
  - — implicit presumption that a class action means the company did something wrong
- Follow-on regulatory or litigation risk—
  - — state attorneys general or federal agencies (FDA, FTC, etc.) may piggyback on consumer claims or vice versa
  - — other class actions may be filed in other jurisdictions, driving up litigation costs

Why Class Actions Matter to You

- But the biggest reason is *aggregated liability*
  - — Potential liability is compounded by aggregating it for all consumers of a particular product or service
  - — Multiplying one claim into thousands of claims can turn a small manageable case into a huge, devastating one
  - — If a class is certified, even if the case has little to no merit, the risk of losing class certification can be too great to proceed with defending—as one court put it, class certification may place "hydraulic pressure to settle on defendants." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001).
  - — Courts will not deny class certification merely because damages are staggeringly high when aggregated. *See Bateman v. American Multi-Cinema, Inc.*, 623 F. 3d 708, 723 (9th Cir. 2010) (certifying a class where liability for accidentally printing more than the last five digits of credit card numbers on electronically printed receipts over a two-month period would total $29 million to $290 million).

Prevalence of Class Actions

- More than half of the companies in America were named in a class action lawsuit last year
- The average company was hit with eight class actions in 2018
- Companies spent nearly $2.5 billion defending class actions

Source: Carlton Fields

Demystifying Class Actions

- Federal court class actions are governed by Federal Rule of Civil Procedure 23; many state rules (approximately two-thirds) are modeled on Rule 23
  - — Rule 23(a) sets out four prerequisites to any class action:
    - numerosity,
    - commonality,
    - typicality, and
    - adequacy of the named plaintiff
- A class action is a *procedural* device
  - — Courts cannot "abridge, enlarge or modify any substantive right," any substantive rules of law merely because the case is brought as a class action, *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

Types of Class Actions

- Consumer Class Actions
  - — Fraud
  - — Unfair Practices
- Product Liability Class Actions
- Privacy Class Actions
- Wage & Hour Class and/or Collective Actions
- Securities Class Actions

Class Action Procedure

— Rule 23(b) sets out the three different types of class actions:

- 23(b)(1): usually “limited fund” class actions, where one pot of money is insufficient to satisfy all claims
  - — Also applies when a party might be ordered to engage in irreconcilable conduct by two different courts
- 23(b)(2): usually “injunction only” class actions, where individual damages are not the primary relief sought; aims to change conduct going forward
- 23(b)(3): usually “damages only” class actions
  - — Additional elements: common issues must “predominate” over individual issues and the class action must be “superior” to other methods of adjudicating the controversy
    - Plaintiffs’ counsel typically take a percentage of class damages recovery for their fee, so (b)(3) classes are prevalent

Class Action Procedure

- Additional important procedures:
  - — Rule 23(c) provides for a few interesting subdivisions:
    - 23(c)(1)(A): the court should decide class certification “at an early practicable time”
      - — Many jurisdictions have set time limits within which to bring a motion for class certification
      - — Invoking this rule can impose pressure on unprepared class counsel (or defendants)
    - 23(c)(1)(B): the court must define the class and the class claims (including issues or defenses) in its certification order
      - — This rule forces a court to think practically about how the case will be tried
      - — Can make courts think twice when on the fence
    - 23(c)(4): allows a class action “with respect to particular issues”

Why Are Consumer Class Actions So Prevalent?

- All 50 states have adopted some form of consumer protection statutes
  - — Traditionally, reliance was an obstacle to class treatment because each person might interpret an advertisement or other representation differently
  - — But now, consumer protection statutes eliminate or relax individualized elements of common law fraud, such as reliance
    - California's unfair competition/false advertising law, for instance, requires only that the alleged misrepresentation was "likely to deceive a reasonable consumer," not actual deception
    - Only the named plaintiff must prove actual reliance on the alleged misrepresentation
    - Removing such elements in the states' substantive laws removes obstacles to class treatment

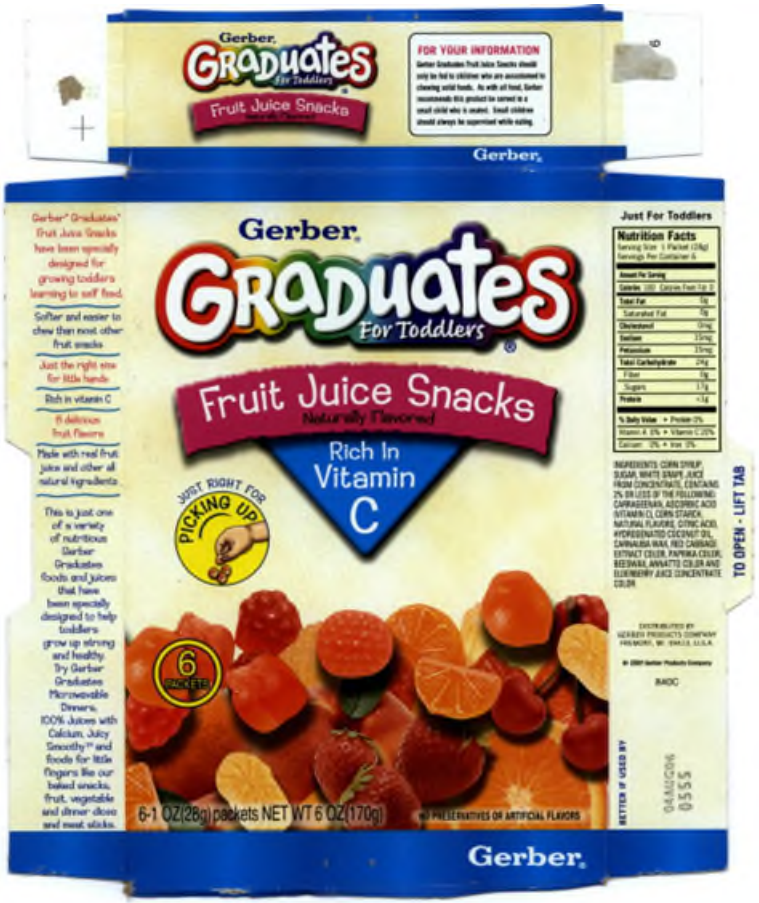
The Best Defense: Arbitration

- In many states including California, class action waivers are "unconscionable" because the are characterized as exculpatory clauses.
- Since the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), however, class action waivers *in arbitration clauses* have been fully enforceable.
  - With few exceptions (California state law claims under PAGA and for a public injunction under the Unfair Competition Law), class actions can be compelled into bilateral arbitration with a proper arbitration clause.
  - Inserting proper arbitration clauses are highly recommended if you don't have them already.
  - However, not all companies use arbitration clauses with class action waivers for business reasons, so still face class action exposure.

The Rise of Labeling Class Actions

- Class actions alleging misrepresentations on a product's label have been an area of explosive growth.
- Why?
  - The legal reason is that: "[L]abels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source." *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 328 (2011).
  - The real practical reason is that there is no contract and therefore **no arbitration clause** between the company and the consumer.
  - The other reason labeling and marketing misrepresentation claims are so popular is that they are so hard to get dismissed.

Williams v Gerber (2008)



This packaging has an accurate ingredients box. But, the Ninth Circuit said it had a number of features that could deceive a reasonable consumer:

- The product is called “fruit juice snacks” and the packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product.
- Saying the product was made with “fruit juice and other all natural ingredients” could easily be interpreted by consumers as a claim that all the ingredients in the product were natural.
- The claim that the product is “just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy” adds to the potential deception.

Since Gerber, the Floodgates Opened

— Pepperidge Farm Goldfish are not all natural because they contain soy and soy derivatives. *Bolerjack v. Pepperidge Farm, Inc.*, No. 12-2918 (D. Colo. 2012).

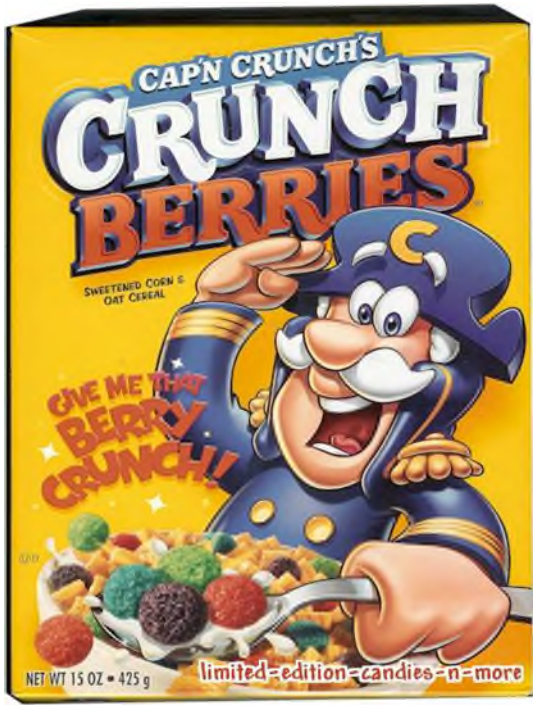
— Nutella is not a heathy breakfast item for family. *In re Ferrero Litig.*, 794 F. Supp. 2d 1107 (S.D. Cal. 2011).

— Dreyer's Ice Cream packaging with terms "original" and "classic" before "drumsticks" purportedly misled consumers to believe the ice cream products were healthy and wholesome when they were not. *Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. 10-1044 (N.D. Cal. 2010).

— Quaker "Wholesome" granola bars were purportedly misleading because of trans fat content. *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1125-26 (N.D. Cal. 2010).

One of Our Favorites

Plaintiff sued when she learned that "Crunch Berries" were not in fact real fruits.



The court wrote:

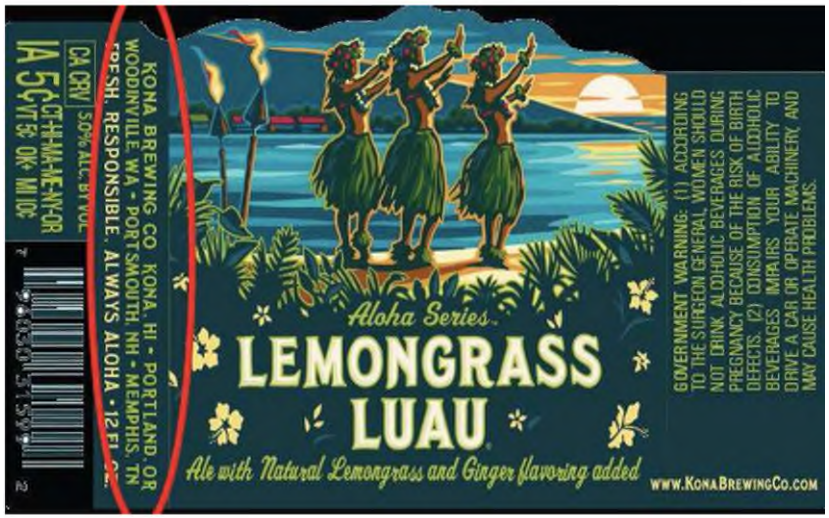
"This Court is not aware of, nor has Plaintiff alleged the existence of, any actual fruit referred to as a 'crunchberry.'"

"So far as this Court has been made aware, there is no such fruit growing in the wild or occurring naturally in any part of the world."

"Thus, a reasonable consumer would not be deceived into believing that the Product in the instant case contained a fruit that does not exist."

What About Disclaimers?

- Plaintiffs claimed they bought Kona Brewing Company beers on the belief the beers were produced exclusively in Hawaii
- Every bottle listed the *five possible locations* where Kona beers were produced:



- ***No matter*, the court held that consumers could still be deceived into thinking the beers were produced only in Hawaii.**

Similar Boozy Cases

- **Beck's Beer Is Not Made in Germany?**

  — Up to $29 million to the class and $3.5 million to the plaintiffs' lawyers.

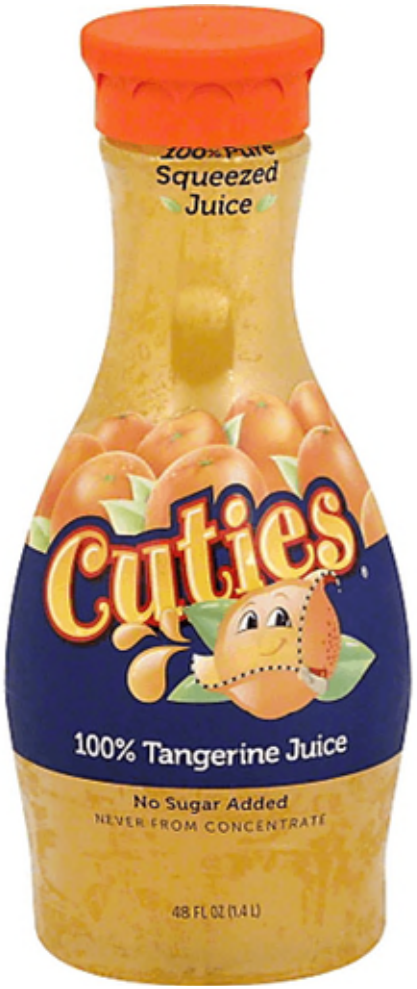
- **Tito's Vodka Is Not Made in an Old-Fashioned Pot Still, but Instead in a Modern Facility?**

  — Motion to dismiss denied, but class certification later denied and case settled on an individual basis.

- **Blue Moon Is Not a "Craft Beer" Even Though It Uses the Registered Trademark "Artfully Crafted" and Is Sold Near Actual Craft Beers?**

  — Motion to dismiss granted after two rounds of briefing.

How Is the Literally True Statement "No Sugar Added" Likely to Deceive a Reasonable Consumer?



According to Plaintiffs, "no sugar added" *implies* that competing brands *do* contain added sugar, making Cuties *different and healthier* than competing brands."

But because competing brands in fact *do not* contain added sugar, the implication – that Plaintiffs made up in the first place – is false, and therefore the 100% true statement is "misleading."

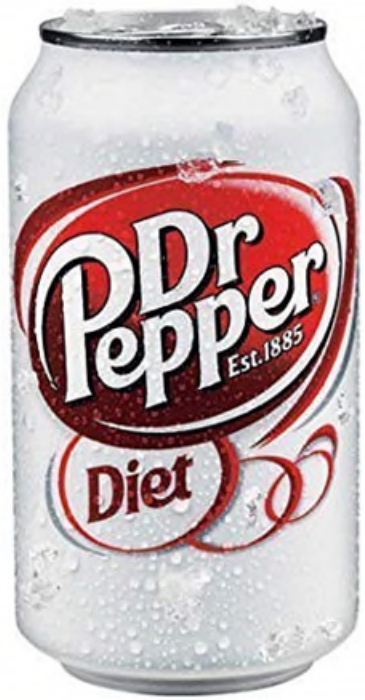
Logic Prevailed in this Case

- About a week ago, the California court of appeal rejected the argument, concluding:
  - — a reasonable consumer is not likely to make the “inferential leaps” outlined above.
  - — The court of appeal also concluded that just because a label may suggest something, it does not necessarily suggest it is superior to its competition.
  - — If an airline ran an ad with the tagline, “No hijackers allowed,” is a reasonable consumer likely to infer that other airlines do allow hijackers and that the new airline is thus the safer choice?

Shaeffer v. Califia Farms, LLC, No. B291085, 2020 WL 581452, at *1 (Cal. Ct. App. Feb. 6, 2020)

A New Hope: Becerra v. Dr Pepper/7Up

- The plaintiff sued Dr Pepper alleging that "Diet Dr Pepper" violated California consumer protection laws by using the word "diet."
- According to the plaintiff, the label "diet" promises consumers that the product would assist in weight loss or at least not promote weight gain.
- Studies came out saying artificial sweeteners like aspartame offer no weight loss benefits and can even cause weight gain.
- Plaintiff used those studies (and letter other interpretive materials) to argue that the "diet" in Diet Dr Pepper was false and misleading.



It Is Not All Packaging and Slogans Though – Is Your Website Accessible?

- Websites are “places of public accommodation” under Title III of the ADA
  - If significant components are not accessible you may be discriminating against persons with disabilities
  - The ADA is a strict liability law which means there are no excuses/defenses for violations
  - No standing requirements; the plaintiff can be a “tester”
  - Hundreds of cases have been filed on behalf of vision or hearing impaired individuals
- No definitive legal standard but courts and the DOJ generally refer to substantial compliance with WCAG 2.0 AA.
- Best practices require, among other things, a web accessibility policy page and an accessibility coordinator.

ADA Website Targets: Everyone

- Williams-Sonoma
- Four Seasons
- Christian Louboutin
- Igloo
- Beyonce
- Domino’s Pizza
- Winn-Dixie
- 1-800-Flowers
- Adult streaming video content providers
- CBD/Cannabis Companies
- Empire State Building Observatory
- Dominique Ansel Bakery

ALPR Readers – A Potential Catastrophe for Anyone Operating a Parking Garage

- California's Automated License Plate Recognition Act ("ALPR Act") was enacted in 2015 and became effective on January 1, 2016. It requires an ALPR operator to: (1) maintain reasonable security procedures and practices; and (2) implement a usage and privacy policy. Cal. Civ. Code § 1798.90.51(a).
- What is an ALPR? It is a searchable computerized database resulting from the operation of one or more mobile or fixed cameras combined with computer algorithms to read and convert images of registration plates and the characters they contain into computer-readable data.
- If you operate one or access one, you must have a detailed and very specific "usage and privacy policy" and that policy "shall be available to the public in writing," and "shall be posted conspicuously on [the operator or user's] Internet Web site."

Who has ALPR's? Many, many garages with security arms.

What Happens If You Do Not Comply with the Law?

- An individual who has been harmed by a violation of this title, including, but not limited to, unauthorized access or use of ALPR information or a breach of security of an ALPR system, may bring a civil action in any court of competent jurisdiction against a person who knowingly caused the harm.
- In such an action, the court may award a combination of any one or more of the following:
  - *Actual damages, but not less than liquidated damages in the amount of two thousand five hundred dollars* ($2,500).
  - Punitive damages upon proof of willful or reckless disregard of the law.
  - Reasonable attorney's fees and other litigation costs reasonably incurred.
  - Other preliminary and equitable relief as the court determines to be appropriate.

  Cal. Civ. Code § 1798.90.54
- If you consider that millions of people go in and out of parking structures per year, the numbers are staggering. If only 100,000 people enter the garage, it's $250 million. If a million people enter the garage, statutory damages are potentially $2.5 *billion.*

Not a Class Action, but Almost as Dangerous

- What if a seemingly small, individual suit could have drastic consequences for your company? And what if your company's consumer arbitration clause could not prevent it?
- This may be possible through an individual seeking a "Public Injunction" remedy pursuant to California's Unfair Competition Law.
  - A public injunction is "relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public."
  - Examples include false advertising, potential privacy violations, other statutory disclosure violations, etc. It could be any public-facing conduct that a court could consider fraudulent, unlawful, or unfair.

McGill v. Citibank, N.A.

- In 2017, the California Supreme Court held:
  - — A single individual litigant has a substantive right to bring an injunction that could bind your company at least with respect to consumers/customers in California.
  - — Any contract provision, including an arbitration provision, that would force an individual to waive that right in any forum is unenforceable.

  McGill v. Citibank, N.A., __ Cal. 4th __ (2017).
- In 2019, the Ninth Circuit followed *McGill*.
  - — *Blair v. Rent-A-Center, Inc*., 928 F.3d 819 (9th Cir. 2019).

What This Means

- For individual lawsuits challenging public-facing practices, companies should pay attention if the plaintiff has brought a UCL claim (they usually do) and seeks “injunctive relief” (they usually do).
- We suggest taking these cases more seriously, as there is the possibility that a limited civil judge may enter a statewide, public injunction.

Strategies for Handling Consumer Class Actions

- Early and thorough case assessment is critical
  - — Investigate the Plaintiff – do they have standing, are they a serial filer
  - — Evaluate their claims; are they viable
  - — Evaluate exposure-damages, reputational and other risk and cost of defense
- Federal Court v. State Court
  - — CAFA removal? Is it more advantageous to be in Federal Court?
- Motion to Dismiss
  - — Pleading arguments and defenses that may work
- Early motion for summary judgment?
  - — Are the named plaintiffs subject to unique defenses?
  - — Can the plaintiff also move for summary judgment?
- Class Certification—can a class be certified?
  - — Using *Wal-Mart v. Dukes* and other recent precedent to your advantage
- Settlement is always a consideration
  - — Class or individual?

Early Case Assessment

- Assess your potential exposure
  - — Viability of claim
  - — Potential risk/loss
- Research named plaintiff/class representative
  - — Is it likely that he/she bought the particular product or products?
  - — Plaintiff in other actions?
  - — Assess relationship with plaintiff's counsel

Settling A Consumer Class Action

- 23(b)(2) Settlements:

  — Potential to settle early without a large monetary settlement, but…

  - There may not be preclusive effect because there are no opt-out rights. *See, e.g., Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) ("Because Brown had no opportunity to opt out of the MDL 633 litigation [in which settlement was reached in a class certified under Rules 23(b)(1) and 23(b)(2)], we hold there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*."); or
  - The potential for collateral estoppel may prevent a court from certifying a class for settlement where there may be a large monetary component that the named plaintiff has not asserted. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("[A]s claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedural safeguards to protect the individual rights of class members increases, thereby making class certification under (b)(2) less appropriate.").

Class Action Settlements

- Monetary "claims made" settlements:
  - A settlement in the food-labeling context will have to be on a claims made basis because the class members are not ascertainable. Claims made rates can be as low as 10-15%.
  - May a 23(b)(3) settlement be reversionary? Cy pres?
    - Reversionary settlements have generally been disfavored; courts and plaintiffs have increasingly relied on cy pres distributions.
    - But many scholars believe and some courts may be ready to hold that cy pres payments violate the Rules Enabling Act. *See Klier v. Elf Atochem North Am., Inc.*, 658 F.3d 468, 481 (2011) (J. Jones concurring) ("Cy pres distributions arguably violate the Rules Enabling Act by using a wholly procedural device—the class-action mechanism as prescribed in Rule 23—to transform substantive law from a compensatory remedial structure to the equivalent of a civil fine.").
    - If claimants are reimbursed in full pursuant to the settlement agreement, the defendant should be entitled to a refund. *Id.* at 482 ("The preferable alternative . . . is to return any excess funds to the defendant.").
- Two-stage process: preliminary and final approval
  - The Northern District of California has created a "Notice Regarding Factors to be Evaluated for any Proposed Class Settlement"; factors include:
    - (1) Explanation for a discount; (2) Class counsel's due diligence; (3) Cost-benefit for absent class members; (4) The scope of the release; (5) Expansion of the class; Reversions; (6) Claim procedure; (7) Attorney's fees; (8) Defendant's financial health; (9) Timing (before or after certification); (10) Type and adequacy of the notice.

What's Next?

- Claims based on advertising aimed at a specifically vulnerable community (i.e., children or the elderly). *See Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 506 (2003) ("Where advertising is aimed at a particularly susceptible audience, such as . . . preschool children . . . , its truthfulness must be measured by the impact it will likely have on members of that group, not others to whom it was not primarily directed.")
- Food addiction claims
- Failure to disclose the effects of ingredient interactions
- Genetically modified organisms (already here)

Mitigating Class Action Risk

1. Proactive risk management.
   - Audit your products, packaging, advertisements and website for class action risk
   - Monitor class action trends – outside counsel will be glad to help
2. Arbitration?
   - Can be a silver bullet
   - Not applicable to off-the-shelf products, but can be used for online sales
3. Dedicate a class action manager.
   - Studies suggest companies that do this spend an average of 10% less than companies that do not

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Andrew Demko helps companies in high-stakes disputes involving their customers. He has litigated hundreds of class and individual actions against financial services providers, banks and companies selling packaged foods and consumer products. His work includes not just class action litigation at the trial level, but also appeals, regulatory matters and government enforcement actions.

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All consumer-facing businesses face an inherent risk of class action litigation. Gregory Korman manages that risk for his clients — and, when push comes to shove, defends them in court. He is one of the nation's leading class action defense attorneys, with more than two decades of class action experience and a particular focus on consumer financial services. He also advises on issues relating to state and federal consumer protection laws.

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For more than 30 years, Stuart Richter has represented financial services firms and other companies in class actions and other complex commercial litigations. He has served as lead counsel in more than 100 class and mass actions and other complex commercial cases in federal and state courts across the country.

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