

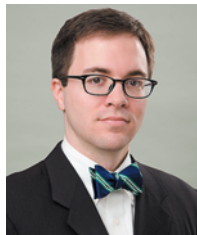
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PREDOMINANCE

CERTIFICATION

The Ninth Circuit's Feb. 3 decision in *Berger v. Home Depot* shows courts are scrutinizing the specific elements of the causes of action for which plaintiffs seek class treatment, attorneys John P. Phillips, Sean D. Unger and Christopher M. Mooney say in this BNA Insight. The authors analyze the Unfair Competition Law case, and contend discrepancies in contract terms will make courts wary of finding the type of "extensive and long-term fraudulent advertising campaign" sufficient to create a rebuttable presumption of classwide reliance.

Class Actions and the Ninth Circuit: Different Consumer Contracts Defeat Predominance



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The past few years have witnessed a string of notable cases that have redefined the "rules" by which parties litigate consumer class actions in California. From the California Supreme Court's decision in *In re Tobacco II* interpreting statutory standing requirements of injury and causation in UCL class actions,¹ to the Ninth Circuit's holding in *Mazza v. American Honda Motor Co.* that certification in a UCL action is properly denied unless a class proponent can show that all class members were actually exposed to the alleged false or misleading advertising,² both state and

¹ *In re Tobacco II Cases*, 46 Cal. 4th 298, 324 (2009).

² *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012).

federal courts in California have spent considerable time lately reconfiguring the landscape for class action litigants.

The Ninth Circuit's Feb. 3 decision in *Berger v. Home Depot USA, Inc.* ("Berger"),³ continues this trend. In *Berger*, the Ninth Circuit affirmed the denial of class certification in a consumer class action brought under Rule 23(b)(3). The court's focus on Rule 23(b)(3)'s "predominance" requirement is notable given that the district court relied on separate grounds—the plaintiff's failure to satisfy the threshold Rule 23(a) requirements—in denying class certification. As the vast majority of consumer class actions in California are brought under Rule 23(b)(3), the court's analysis is insightful and provides important guidance to class action litigants.

Background of Litigation

Berger involved a single plaintiff suing The Home Depot and alleging class claims under California's Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA"). The plaintiff's core allegation was that Home Depot's practice of automatically charging tool rental customers a 10-percent damage waiver, without informing consumers that the waiver charge was optional, was misleading and deceptive.

The plaintiff sought certification under Rule 23(b)(3) of a primary class consisting of all persons in California, who from July 12, 2002, to the present, paid a damage waiver charge to Home Depot while renting tools or equipment. Plaintiff further proposed subdividing his action into three subclasses to reflect the different versions of Home Depot's tool rental agreement in effect during the proposed class period.

What the plaintiff could not show, however, was that all (or even most) customers across the proposed class were similarly misled into purchasing the damage waiver. Indeed, substantial evidence suggested to the contrary: Home Depot trained employees to notify customers that the waiver was optional, signs posted in stores stated the waiver was optional, and the tool rental agreements themselves indicated the waiver was optional.

The district court denied class certification, holding that the proposed class and subclasses were not ascertainable, and that the plaintiff did not meet the commonality, typicality, and adequacy of representation requirements of Rule 23(a). In particular, commonality and typicality could not be satisfied where the purported class included members who received different representations, signed different rental agreements, and may have known that the damage waiver was optional. These individualized differences in customer experiences, the court said, rendered the plaintiff atypical and defeated commonality under Rule 23(a).

Ninth Circuit Targets Requirement of Predominance Under Rule 23(b)(3)

While the district court's order denying certification centered on the plaintiff's failure to meet Rule 23(a) requirements, the Ninth Circuit focused its analysis en-

tirely on the predominance requirement of Rule 23(b)(3). Given the scant attention paid to Rule 23(b)(3) by the district court, this transition to a published decision is notable and suggests that the Ninth Circuit saw *Berger* as a vehicle to guide the plaintiff and defense bars on consumer class actions brought under Rule 23(b)(3).

Much of the Ninth Circuit's analysis relies on the "salient fact" that over the span of the purported class period, Home Depot used five different versions of its tool rental agreement, each of which discussed the damage waiver in a different way.⁴

The court used this "salient fact" to quickly dispose of two of the plaintiff's three proposed subclasses. Because the plaintiff alleged that he took part in only one transaction with Home Depot, in April 2004, he was not a member of subclasses two and three, which covered periods after March 2005. As a matter of standing for class representatives, the sole plaintiff could not represent absent class members who transacted with Home Depot after March 2005 under different rental contracts.⁵

Turning to the merits of the plaintiff's Rule 23(b)(3) arguments, the court again cited the "salient fact" that the contracts used by Home Depot contained different terms as a basis for concluding that common questions of law and fact did not predominate. The court began its analysis explaining that the question of predominance had to be analyzed claim-by-claim and element-by-element.

Looking first to the UCL claim, the court analogized to *Mazza v. American Honda Motor Co.*, where the Ninth Circuit previously reversed class certification on a UCL claim involving alleged deceptive statements about a vehicle's braking system. There, the court observed that Honda's advertising program "[f]ell short of the extensive and long-term fraudulent advertising campaign at issue in *Tobacco II*," and, therefore, it was "unreasonable to presume" that all class members were exposed to Honda's misleading statements.⁶

Applying *Mazza*, the Ninth Circuit explained that the changing Home Depot rental contracts would "require[] an independent legal analysis to determine whether the language and design of [a particular] contract did or did not suffice to alert customers that the damage waiver was an optional purchase, and thereby did or did not expose that group of customers to a potentially misleading or deceptive statement."⁷ Because there were multiple contracts—each requiring an independent analysis—the Ninth Circuit held a class including them all could not be certified.

As for the plaintiff's proposed subclass, whose members all purchased rental tools under Home Depot's first contract, the court determined that individual questions also predominated. Even for the subclass, the plaintiff could not establish that each individual was exposed to the same misrepresentations.

While Home Depot did not dispute that its computers added the damage waiver to a customer's receipt by default, it argued that customers were notified of the optional nature of the waiver both orally by Home Depot employees and visually by posted signs at Home Depot

⁴ *Berger*, 2014 BL 29168, at *3.

⁵ *Id.* at *4.

⁶ *Id.* at *6 (citing *Mazza*, 666 F.3d at 596).

⁷ *Id.* at *6.

³ *Berger v. Home Depot USA, Inc.*, 2014 BL 29168, No. 11-55592, (9th Cir. Feb. 3, 2014).

stores (in addition to language in the sales contracts themselves).⁸

Although the court acknowledged that not all class members would have been informed that the damage waiver was optional through these means, this variance in customer experience itself augers against classwide treatment of consumer claims under the UCL. The court affirmed the district court's dismissal of the UCL claim with respect to the subclass.⁹

The plaintiff fared no better with his CLRA claim, which requires each class member to show actual damage based on an unfair or deceptive business practice.¹⁰ There, the court questioned whether Home Depot's allegedly misleading statements were actually made to consumers in the plaintiff's proposed classes. Because individualized inquiries into which store signs and oral representations particular consumers may have seen or heard was necessary, the Ninth Circuit agreed that the class proponent had not shown that common issues predominate.¹¹

Lessons From *Berger*: Courts More Circumspect in Granting Certification

The *Berger* court showed particular interest in the fact that over the course of the proposed class period—covering over eight years—Home Depot used five different versions of its tool rental agreement. With class members over time exposed to different contracts and different in-store representations, the plaintiff could not

show that the allegedly misleading statements were actually made to all consumers and a class could not be certified. This was true even though the plaintiff alleged a common theory.

By focusing on the claim's elements as opposed to the plaintiff's theory, individual inquiries became both more evident and more important. Without proof of identical misrepresentations or nondisclosures on a classwide basis, reliance could not be presumed under the UCL, and actual injury to class members could not be established under the CLRA.

The *Berger* decision confirms that courts will cast a discerning eye on the specific elements of the underlying causes of action for which plaintiffs seek class treatment. Particularly in the Rule 23(b)(3) consumer class action context where UCL and CLRA claims dominate, courts will closely examine relevant documents and other evidence (contracts, advertisements, brochures, manuals, etc.) to determine whether the alleged wrongful statements stayed consistent over time and were communicated to consumers in a similar manner.

Litigants should focus on what the individual class proponent saw or heard as a way to also narrow the class. Discrepancies in contract terms, the wording of advertisements, or in employee representations will make courts wary of finding the type of "extensive and long-term fraudulent advertising campaign" sufficient to create a rebuttable presumption of classwide reliance.¹² The longer the class period and the fewer the number of representative plaintiffs, the more likely courts are to find differences in class members' purchasing experiences. These individualized differences will often mean that common questions do not predominate, and that a class cannot be certified under Rule 23(b)(3).

⁸ *Id.* at *6.

⁹ *Id.* at *7.

¹⁰ See *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009).

¹¹ *Berger*, 2014 BL 29168, at *7.

¹² See *In re Tobacco II Cases*, 46 Cal. 4th at 328.