

CALIFORNIA CLASS ACTIONS

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Preface to the 2026-2027 edition

California’s state and federal courts enter a third decade sharing class action practice and procedure after enactment of the Class Action Fairness Act (CAFA) 28 USC 1332 in 2005. The law’s passage marked a seismic change in California class action practice. Procedural ambiguities were presented by jurisdictional provisions including removal and remand procedure. Much not addressed in the original law is clarified by decades of federal appellate decisions. These continuing judicial interpretations have resulted in most significant putative class actions, as a general rule, being filed in or removed to California federal district courts.

Procedural differences between state and federal civil procedure may lead to contrasting outcomes, particularly with respect to standing to sue. Federal courts adhere to the constitutional requirements of Article III standing, which generally require actual harm or injury as a part of a “case or controversy.” California state laws, by contrasts, often provide statutory standing without requiring allegations of actual harm. This update provides recent examples.

Fifteen years ago, the United States Supreme Court’s preemptive interpretation of the Federal Arbitration Act (9 U.S.C. §§ 1 to 16) (FAA) in *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011) (*Concepcion*), provided another inflection point in California class action practice. As businesses and employers now routinely require consumer and employment arbitration agreements containing class action waivers, an early analysis of the enforceability of such arbitration agreements is essential, as they may pose an existential threat to class-wide relief. California principles of contract law generally determine enforceability.

On the horizon is an important interpretation of California’s Private Attorney General Act (PAGA), Labor Code 2992 et seq., by the California Supreme Court concerning the status of the representative claim of a PAGA action following arbitration of the individual claim of the “aggrieved employee” —the so-called “Headless PAGA” issue.

Arbitration Update

Cases interpreting and applying the FAA continue to be decided each year, providing additional context and meaning to its provisions. The FAA’s exemption for workers “engaged in foreign or interstate commerce” was addressed in *Flowers Foods, Inc. v. Brock* (2026) ___U.S.___ [146 S.Ct. 1358, ___L.Ed.2d___].

The case extends the reach of the FAA’s interstate-commerce exemption by treating an intrastate delivery driver—commonly referred to as a “last-mile” driver—as engaged in interstate commerce for purposes of the exemption.

A detailed trial court evidentiary record determined a “rail car repairman” employed by a contractor was not a “railroad employee” exempt under the provisions of the FAA. *Vela v. Harbor Rail Services of California, Inc.* (2026) 120 Cal.App.5th 353.

Jules v. Andre Balazs Props. (2026) ___ U.S. ___ [146 S.Ct. 1209, 224 L.Ed.2d 708] holds that a federal court retains jurisdiction, after staying claims in a pending action, to confirm or vacate an arbitration award.

In *O’Dell v. Aya Healthcare Servs.* (9th Cir. 2026) 171 F.4th 1173, the Ninth Circuit reversed a district court’s denial of a motion to compel arbitration, finding that the court had improperly applied the doctrine of “non-mutual offensive collateral estoppel” to preclude enforcement of 255 arbitration agreements based solely on two prior arbitral awards that found similar agreements unconscionable, while disregarding two other arbitral awards that upheld the agreements.

The California Supreme Court relaxed California’s strict deadline to post arbitration fees in *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310 [335 Cal.Rptr.3d 532, 573 P.3d 944], finding that a late payment may be excusable unless it is willful, fraudulent, or the result of gross negligence. Shortly thereafter, the court in *Wilson v. TAP Worldwide, LLC* (2025) 114 Cal.App.5th 1077 [337 Cal.Rptr.3d 765], expressly followed this decision.

An employer’s attempt to enforce arbitration based on a prior temporary employment agency agreement was denied, with the court finding that the employer was not a party to the arbitration agreement between the worker and the employment agency. *Toothman v. Redwood Toxicology Laboratory, Inc.* (2026) 120 Cal.App.5th 412.

Multiple, sometimes conflicting, arbitration agreements relating to the same parties and subject matter are to be construed together in a manner that gives effect to the parties’ mutual intent, with a preference for enforcing arbitration. *Santana v. Studebaker Health Care Center, LLC* (2026) 120 Cal.App.5th 1.

The court held that no enforceable arbitration agreement was formed between the consumer and the seller in connection with online purchases because the website failed to provide reasonably conspicuous notice that, by clicking the order submission button, the consumer was assenting to an arbitration provision contained in the website’s Terms of Use. *Cruz v. Tapestry, Inc.* (2025) 113 Cal.App.5th 943, 335 Cal.Rptr.3d 906.

See discussion in Chapters Federal Arbitration Act 1:17 & Class Arbitrations /Arbitration Agreements 3:10

California Class Action Practice and Procedure

California Rules of Court, rule 3.764(c), now provides revised deadlines for filing and for the length of moving and opposition papers.

The Supreme Court, in *Trump v. CASA, Inc.* (2025) 606 U.S. 831 [145 S.Ct. 2540, 222 L.Ed.2d 930], addressed the issue of “universal injunctions” issued by several district courts that enjoined enforcement of a presidential executive order concerning birthright citizenship. The decision was grounded in a detailed analysis of court powers of equity and procedural powers, which determined that such universal injunctions were not authorized by either the Judiciary Act of 1789, nor by traditional common law or equity. Upon remand, the relief requested by plaintiffs was restyled as a Rule 23 class action.

A class of university researchers who lost grant funding due to federal agency terminations suffered a concrete injury — specifically, the loss of multi-year research grants. The court addressed the merits of their claims, including granting a preliminary injunction for the class whose grants were terminated based on viewpoint discrimination, which further indicates that Article III standing was established. *Thakur v. Trump* (9th Cir. May 26, 2026, No. 25-4249) 2026 LX 270059.) The Court in *Satanic Temple v. Labrador* (9th Cir. 2025) 149 F.4th 1047 denied associational standing to Plaintiff for its failure to establish that any individual members would have standing to sue in their own right.

The Ninth Circuit reversed the district court’s grant of summary judgment based on circumstantial evidence of mismatched class members’ Social Security numbers and records. *Healy v. Milliman, Inc.* (9th Cir. 2026) 164 F.4th 701.

Askins v. CRST Expedited, Inc. 120 Cal. App. 5th 1190, 345 Cal. Rptr. 3d 130 (1st Dist. 2026) reversed a trial court’s grant of decertification for lack of “concrete injury” under Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), contrary to *Limon v. Circle K Stores Inc.* (2022) 84 Cal.App.5th 671 [300 Cal.Rptr.3d 572], which held a plaintiff must allege a concrete injury for standing under the FCRA in California courts. *Askins* now holds that no concrete injury under the FCRA is required in California.

In *Kashanian v. National Enterprise Systems, Inc.* (2025) 114 Cal.App.5th 1037 [337 Cal.Rptr.3d 18], summary judgment for lack of individual standing was reversed; the court determined that the deficient type size used on a Consumer Debt Notice sent to plaintiff, even without other actual injury, constituted a statu-

tory violation sufficient to confer standing on a consumer.

Standing and potential recovery of statutory damages under the Investigative Consumer Reporting Agencies Act require only a statutory violation—some invasion of the plaintiff’s legally protected interests—and not concrete injury. *Parsonage v. Wal-Mart Associates, Inc.* (2026) 118 Cal.App.5th 399 [341 Cal.Rptr.3d 447].

A complaint alleging violations of privacy by recording personally identifiable information after visits to a website requires an allegation of concrete harm to satisfy Article III constitutional standing. A proposed class of website visitors did not allege the type of private information historically protected; instead, the class must allege concrete injury that bears a close relationship to a harm traditionally recognized at common law, thus the case was dismissed for lack of subject matter jurisdiction. *Popa v. Microsoft Corp.* (9th Cir. 2025) 153 F.4th 784.

Notably, a class action alleging violations of the California Invasion of Privacy Act (CIPA), Cal. Penal Code § 630 et seq., based on stored information collected via a tracking Pixel after visiting a website survived a motion to dismiss for lack of Article III and statutory standing. The Court found that a violation of privacy rights under CIPA is an injury in itself, and no additional harm beyond the invasion of the private right conferred by the statute is required for standing. *Camplisson v. Adidas Am., Inc.* (S.D.Cal. 2025) 809 F. Supp. 3d 1095.

With a class certification motion pending, an employer entered into settlement agreements and made payments to hundreds of individuals who signed individual settlement agreements. The Court found these settlement agreements were voidable and ordered curative notice be sent to affected employees, informing them of their rights to void the settlement agreements and rejoin the pending class, explaining that under California rescission statutes, the settlement payments could be treated as an offset against any recovery, and that the issue of repayment would be addressed at the time of judgment. *The Merchant of Tennis, Inc. v. Superior Court* (2026) 117 Cal.App.5th 1141 [340 Cal.Rptr.3d 873].

The denial of class certification was reversed on the basis that a common determination of liability is feasible and appropriate over individual issues of liability. *Cobos v. National General Ins. Co.* (2025) 112 Cal.App.5th 1272 [335 Cal.Rptr.3d 90].

A trial verdict based in part on a masters findings after a nonconsensual judicial reference required reversal of the judgment in favor of the certified class. Absent the parties’ consent, such delegation to a master is strictly circumscribed by the Cali-

California Constitution and Code of Civil Procedure. *Cortina v. North American Title Co.* 120 Cal. App. 5th 1030, 345 Cal. Rptr. 3d 361 (5th Dist. 2026).

Federal Jurisdiction

The Supreme Court of the United States, in *Enbridge Energy, LP v. Nessel* (2026) ___ U.S. ___ [146 S.Ct. 1074, 224 L.Ed.2d 587], held that equitable tolling does not apply to the 30-day deadline for remand to state court.

Amendment to the Class Action Complaint after removal to eliminate the class action allegations—which had provided the sole basis for federal jurisdiction under the Class Action Fairness Act (CAFA)—resulted in the loss of subject matter jurisdiction and the remand of the case to state court. *Faulk v. Jeld-Wen, Inc.* (9th Cir. 2025) 159 F.4th 618. Remand was granted after the State of California narrowed its claims to non-federal matters. *California v. Express Scripts, Inc.* (9th Cir. 2025) 154 F.4th 1069.

An overly broad protective order was reversed in *Cordero v. Stemilt AG Servs., LLC* (9th Cir. 2025) 142 F.4th 1201, as plaintiff counsel, a legal services nonprofit, is “aggrieved” and has Article 111 standing.

PAGA

Under California’s Private Attorney General Act, Labor Code 2698 et seq. (PAGA), every claim has two components: an individual claim the employee personally suffered and a representative claim on behalf of other aggrieved employees. The California Supreme Court has agreed to resolve a major dispute over “headless” PAGA claims—representative-only Private Attorneys General Act actions that omit any individual component—in *Leeper v. Shipt, Inc.* (S289305).

MISCELLANEOUS

As of January 1, 2026, under Cal. Bus. & Prof. Code § 6156, California lawyers are subject to additional state bar rules on litigation funding, preventing fee sharing with an out-of-state “alternative business structure.”

Remote hearings are among the significant changes to legal practice that emerged during the pandemic. According to the Judicial Council of California, California’s 58 superior courts conducted nearly 1.75 million remote proceedings between September 2024 and August of 2025.

In addition to these practical advantages, practitioners now benefit from the expanding body of intellectual research available through various artificial intelligence resources. The Judicial

Council's Task Force on Generative Artificial Intelligence has, among other initiatives, proposed a Rule of Court governing GenAI Model Use Policies as well as a new Standard of Judicial Administration.

I gratefully acknowledge the contributions of my colleague, paralegal Matthew Atlas, whose annual efforts in organizing and updating this work are invaluable. I also extend my appreciation to the attorneys of Cohelan Khoury & Singer for their thoughtful insights and recommendations that strengthen each yearly revision.

Now, in my fifth decade of law practice—and marking the 30th anniversary of this publication—we remain committed to supporting practitioners as they navigate the rapidly evolving landscape of California class action practice.

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About the Author

Timothy D. Cohelan was admitted to practice in 1974 and is the founding partner of Cohelan Khoury & Singer, a civil litigation firm specializing in class and representative actions, including cases on behalf of urban homeless entitled to emergency shelter; victims of a national health insurance fraud scheme; retirees entitled to pension benefits; defrauded investors; victims of discrimination; workers entitled to back wages; and consumers injured by antitrust violations. Cohelan Khoury & Singer are AV-rated by Martindale-Hubbell.

Mr. Cohelan served as Chairman of the San Diego Coast Regional Commission from 1978 to 1981. For over 20 years, he served the San Diego Superior Court as a Judge Pro Tem, hearing and ruling on hundreds of matters during his service. He is a 1974 graduate of California Western School of Law, where he served as an editor of Law Review. He served as an officer in the U.S. Navy from 1968 to 1971 and received a B.A. from the University of Arizona in 1967. His previous education was received from the public schools of Washington, D.C.; Leeds, England; and Berkeley, California. Mr. Cohelan and the firm have been recognized for community service and the prosecution of numerous high profile class action cases. Cohelan Khoury & Singer has attorneys admitted in California, the District of Columbia, Illinois, and Colorado. The firm concentrates on class actions on behalf of California class members in California's state and federal courts.

For further information about the author or the firm, visit www.ckslaw.com.

Foreword

From the Nineteenth Century to World War II

During the period when California was shifting from Spanish rule to Mexican, the English political movement that culminated in the Reform Bill of 1832 influenced the development of the representation concept in class-action settings. The political debate of that era refined fundamental ideas such as the role of consent by absent parties. In 1837, Frederick Calver published an influential treatise on the law respecting parties to suits in equity, and he proposed equitable rules concerning representation. J. Story's *Commentaries on Equity Pleading* (1838), a work that strongly influenced American law, articulated a central dilemma of modern class action theory. Is the function of the class action to consolidate suits that would otherwise be brought individually—and thus make the judiciary more efficient? Or is it to make it easier to bring suits that, because the stakes are too small, would not be brought individually—and thus serve substantive goals?

In the United States, the debate in New York over the so-called Field Code for state procedure developed by the brothers and legal reformers David Dudley Field and Stephen Johnson Field coincided with the Mexican War. Both events influenced California's class action law. The New York Field Code Amendment of 1849 created the first state statute on class actions. The law codified two types of representative suits at equity: cases of common or general interest when one sues for the benefit of all, and cases involving parties united by a common interest yet so numerous they cannot practically be brought before the court. That same year, gold fever brought waves of Americans—and their legal problems—into California, which had become a United States territory on March 10, 1848, by Senate ratification of the Treaty of Guadalupe Hidalgo, ending the Mexican War. The following year, California was admitted into the Union as the 31st free state by the Compromise of 1850. Stephen Johnson Field, who subsequently was a justice of the United States Supreme Court, served as a member of the California Legislature in the 1850s.

Soon after California was admitted to the Union, the state's first class action case, *Von Schmidt v. Huntington*, 1 Cal. 55

(1850), was decided. The California Supreme Court allowed a bill to be brought by a few shareholders on behalf of themselves and other shareholders for the return of forfeited stock. The court reasoned that an attempt to unite all shareholders in any other fashion would be inconvenient, inefficient, and unjust to those already before the court. The court noted the constant flux of people in and out of the California gold fields created a situation requiring legal adjustment to the facts. Quoting the English jurist Lord Cottenham on defects in parties, the court said that, in order to enforce rights, it needed to fit procedure to social reality, not to strict norms created under quite different circumstances. (*Von Schmidt v. Huntington*, 1 Cal. 55, 68 (1850).) The court further stated that the 48th Rule of the Supreme Court of the United States, adopted in 1842, was the correct rule for the government in cases of this nature. The rule provided that when the parties on either side were very numerous and could not all appear in court, selected representatives of the parties might prosecute the action on behalf of all. (*Von Schmidt v. Huntington*, 1 Cal. 55, 67 (1850).)

From 1850 to 1872, California relied on common law equitable principles for class treatment. In 1872 the state adopted Code of Civil Procedure § 382, which allows class action cases, along with other Field Code provisions duplicating the New York reforms of 1849. As adopted in 1872, Code of Civil Procedure § 382 provides that suits may be brought by one on behalf of all when parties are numerous, the question is of general or common interest, and bringing all the parties before the court is impracticable.

In *Carey v. Brown*, 58 Cal. 180 (1881), defendants claimed an individual interest in an undivided seven-eighths of a 30,000-acre tract held by the plaintiff. The Plaintiff stated that he brought the action on behalf of himself and all other persons similarly situated who would in time come to court for relief and contribute to the expense of the litigation. After the plaintiff received judgment in his favor, the would-be class members presented themselves. The court, however, held that no class existed because the plaintiff's interest in the land was not united as one entity with the interests of the others. The court construed Code of Civil Procedure § 382 as permitting one to sue or defend for the benefit of many persons only in cases where they are so united in interest as to make them necessary parties. The court also pointed out that if the other would-be plaintiffs wished to intervene, they should have done so before the final judgment, which determined only the plaintiff's rights against the defendants and not the rights of any other persons. Would the result have been different if the court was forced to rule on a common question of law other than adverse possession to all of those who

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took title? The court stated that the only issue before the court was the plaintiff's effort to quiet title to his land and that no one else had any interest.

In *Noroian v. Bennett*, 179 Cal. 806, 179 P. 158 (1919), a group of farmer plaintiffs alleged that they were fraudulently induced to execute a series of promissory notes on a variety of occasions. The court denied class treatment because the transactions were legally separate and distinct. There was no single fact or act whose determination would fix the rights of all of the plaintiffs. This result stands in fascinating contrast to the *Vasquez* decision rendered 52 years later, which will be discussed below.

Federal Equity Rule 48 incorporated a res judicata effect on nonparty class members and operated in the federal courts from 1842 to 1912. Equity Rule 38 replaced rule 48 between 1912 and 1938, when the original Federal Rules of Civil Procedure Rule 23 was adopted. Commentators have stated that rule 23 was a "bold and well-intentioned attempt to encourage the more frequent use of class actions." (*Wright, Miller & Kane*, Vol. 7, & 1752.) This important change in federal class action procedural practice made class relief acceptable and justifiable, but a quarter-century of experience clarified the rule's serious defects and showed it to be in need of revision.

Postwar Cases in the Shadow of Federal Rule 23

The United States Supreme Court's 1938 adoption of the Federal Rules of Civil Procedure codified all common law and equity procedural aspects. It included a formalized provision for class actions in federal courts that clarified the general American concepts of class action law. The 1938 codification organized class actions according to the substantive character of the right asserted. The "true" class action concerned joint, common, derivative, or secondary rights. The "hybrid" class action consisted of an adjudication of specific property claims. The "spurious" class action was really a permissive joinder device.

Seven states now have class action statutes modeled on what is called the original federal rule 23 model. That provision states that, if a class is so numerous that bringing its members before the court is impracticable, one or more adequate representatives may prosecute the matter provided that the right to be enforced is one of three types: (1) joint, common, or secondary, in that the owner of a primary right refuses to enforce it, and the class becomes entitled to enforcement; (2) several, and the action concerns specific property; and (3) several, and the questions of law or fact are common.

Within 10 years of the adoption of original federal rule 23, the California Supreme Court defined the limits of a community of interest in an important and oft-cited case. *Weaver v. Pasadena*

Tournament of Roses, 32 Cal.2d 833, 198 P.2d 514 (1948), centered on the public sale of tickets to the 1947 Rose Bowl. Advertising for the heavily publicized sale said 7,500 tickets would be available, and a large crowd appeared. Would-be ticketholders were given numbered identification stubs, but only 1,500 were allowed to buy tickets. The class action suit was brought on behalf of those denied tickets. The ruling denied class certification. The court established that a defined community of interest in questions of law and fact must exist between those bringing the suit and those to be represented, and that the suit should be brought on behalf of a definite ascertained or ascertainable group. Reviewing and summarizing California cases in which a class suit had been held proper, the court noted that they involved a trust fund, a common fund of some sort, or a common property interest uniting all the parties in interest. In the *Weaver* case, however, the alleged wrongful conduct required judicial inquiry into the myriad reasons why individuals were refused Rose Bowl admittance. The court noted that the case involved no one simultaneous set of acts or series of acts that created or conferred rights or interests and thereby established a common interest in all members of the group. The *Weaver* case assisted subsequent California courts in determining when to allow class certification.

Hefferman v. Bennett & Armour, 110 Cal.App.2d 564, 243 P.2d 846 (1st Dist.1952), involved the successful prosecution of a fraudulent conveyance or a transfer action with the intent to defraud creditors. The court found it was a valid representative class brought both for the benefit of the plaintiff and all the rest of the defendant's creditors. The common issue was whether the questionable transfers were made with the intent to defraud. Since the issue was determined in favor of the plaintiff and the other creditors, the court found that he represented other creditors.

Two years later, in *Barber v. California Employment Stabilization Commission*, 130 Cal.App.2d 7, 278 P.2d 762 (1st Dist. 1954), a California appellate court refused class certification to a group of unemployed sailors seeking unemployment benefits. Since the sailors were not on strike and since they were unemployed for a variety of specific reasons, determining eligibility required individual threshold eligibility criteria that diluted the community of interest. Each class member's facts applied only to the individual, and no class existed.

Three years later, *Fanucchi v. Coberly-West Co.*, 151 Cal.App.2d 72, 311 P.2d 33 (4th Dist. 1957) involved a defendant cotton-ginning company that over a period of years wrongfully retained overcharges belonging to the plaintiff growers. The trial court sustained the defendant's demurrer to the class allegations because they alleged misconduct as the product of numerous

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transactions. The growers, who said that individual lawsuits were too costly to be justified, prevailed on appeal. They argued that proof of a common set of facts was required only on the real issue - the overage the growers had been denied. This proof established the existence of a fund and set each grower's pro rata share. Although created by separate commercial transactions, the misconduct still supported a community of interest and class certification. (*Fanucchi v. Coberty-West Co.*, 151 Cal.App.2d 72, 83, 311 P.2d 33 (4th Dist. 1957).)

Chance v. Superior Court, 58 Cal.2d 275, 23 Cal.Rptr. 761, 373 P.2d 849 (1962), went further. The court stated that a class action could be certified without a common fund or common property. Separate parcels of property with separate deeds of trust were sold in the same overall transaction, with the same paperwork, provisions, and conditions. The only difference was the face amounts of the notes. Accordingly, a class action was appropriate.

Class Action Practice: 1966 to 2005

Federal Rules of Civil Procedure Rule 23 was refined in 1966 to its present form, setting the procedural path for certification issues in federal court followed to this day. The courts have since defined most of the practical and important cases dealing with procedural class action issues according to the 1966 Federal Rule of Civil Procedure amendments and the California Supreme Court's ruling in *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967). These cases can be misleading on procedural issues, however, since a number of them have subsequently been overruled or modified. Factual settings of cases prior to 1966 may compare to a present controversy, and all judges, of course, like to see a previous case on "all fours."

Although the amended form of Rule 23 did not greatly affect California's statutory law, with the minor exception of the Consumer Legal Remedies Act, it extensively influenced the development of case law. The California Supreme Court followed the revision with a series of benchmark cases encouraging class actions.

The seminal modern California case is *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 698, 63 Cal.Rptr. 724, 433 P.2d 732 (1967). This case represented a major departure from the postwar rules regarding common funds and property and extended existing California law. The proposed class comprised people who had used Yellow Cab within the past four years and paid cash. Although class members were unidentified, the lack of identification did not preclude a complete determination of the issues affecting the class. Yellow Cab had agreed in writing with the City of Los Angeles that rates would be set by a commission, yet the

actual rates charged to the class were higher by a uniform percentage known to the defendant. The community of interest in the case required neither a common fund nor a common recovery to support certification of the class. In its opinion, the California Supreme Court cited the noteworthy changes to Rule 23 applicable to state class actions and substantially consistent with Code of Civil Procedure § 382 (*Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 709, 63 Cal.Rptr. 724, 433 P.2d 732 (1967).)

Vasquez v. Superior Court, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971), is often taken together with *Daar* as constituting judicial adoption of Rule 23 in California. In *Vasquez*, the court stated, among other things, that where California law is silent, Rule 23 prescribes procedural devices trial courts might find useful. (*Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971).) The court also held to *Daar*'s notion of community of interest. The case concerned retail installment sales contracts sold to residents of San Joaquin and Stanislaus counties. Alleged misrepresentations were made in the contracts themselves and the prepared sales pitch. As in *Daar*, the transactions were separate, yet this fact was not controlling. Instead, the memorized statement delivered by salespeople and the standardized terms of the written contracts created the community of interest. The court also extended an inference of reliance and encouraged trial courts to use pragmatic procedural devices, taking the courts one step closer to Rule 23 yet not limiting them to those procedures. By 1973, the Los Angeles Superior Court, for instance, had adopted a series of *Vasquez*-motivated trial court procedures that, after review by the appellate courts in a series of cases, began to set pretrial standards for class actions.

A case that came between *Daar* and *Vasquez*, *Gerhard v. Stephens*, 68 Cal.2d 864, 69 Cal.Rptr. 612, 442 P.2d 692 (1968), somewhat limited the community of interest notion. The facts of the case involved an alleged ownership of undivided mineral interests, but each claim presented important individual issues of title requiring individual litigation to determine the right to recovery. The interested parties were numerous, but they could bring individual actions. It also appeared to the court that a large number had actual knowledge of the case. A class action in the situation was ruled inappropriate.

La Sala v. American Sav. & Loan Ass'n, 5 Cal.3d 864, 97 Cal.Rptr. 849, 489 P.2d 1113 (1971), defined the class representative's responsibilities. Defendants sought to stop the action through the procedural ploy of mooted the representative plaintiff's claim. At the same time, some plaintiffs tried to benefit at the expense of absent class members by settling and dropping class allegations. The attempt was deterred by requiring judicial review of class allegation dismissal to ensure that settlement

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supports the fiduciary responsibility to the class.

Collins v. Rocha, 7 Cal.3d 232, 102 Cal.Rptr. 1, 497 P.2d 225 (1972), further expanded the rules regarding certification and served to expand the factual setting for the community of interest beyond Vasquez. The case turned on oral misrepresentations of available work the defendant made knowingly to farm workers. As a result of the misrepresentations, the workers were brought into a setting where they were defrauded and abused. Although there was no common fund and communications were oral, not written, the court held a community of interest did exist, and the class was certified.

The opinion in *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701 (1974), which was written by Justice Clark for the California Supreme Court's majority, clearly circumscribed the bounds of earlier expansive class action cases. This case has become a mandatory and prominent citation in all opposition briefs by defendants in California class actions. The matter arose from real property condemnation and nuisance cases. The unique characteristics of each piece of real estate created individual questions, and the nuisance allegations likewise involved individual reactions to smoke and noise, thereby preventing a class action.

Home Sav. and Loan Ass'n v. Superior Court, Los Angeles County, 42 Cal.App.3d 1006, 117 Cal.Rptr. 485 (2d Dist.1974) concerned a class action in which Home Savings and Loan was sued for damages and declaratory relief arising from late charges on loans. Before the class was certified or notice given to the class, the trial court allowed bifurcation under Code of Civil Procedure § 1048, subdivision (b), ordering a separate trial of liability issues. The appellate court ruled on this error. It stated that the primary question in a class action is certification of the class. Until the class is certified, no binding judgment may be rendered. The court noted the pragmatic devices mentioned in Vasquez for postponing certification and dispensing with notice to members of the class fail to protect the defendant's right to a fair trial and due process of law. They fail equally in protecting the rights of absent class members.

In *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), the court restated the requirement for class determination as soon as practicable and before any other action.

Cartt v. Superior Court of Los Angeles County, 50 Cal.App.3d 960, 124 Cal.Rptr. 376 (2d Dist.1975), further circumscribed and defined procedure for notice. The court had certified the matter as a class action and ordered the named plaintiff to mail notice to

the 700,000 persons who owned credit cards issued by the defendant. The cost was nearly \$70,000, well out of reach for the plaintiff, a schoolteacher who earned less than \$15,000 a year. The trial court apparently felt its hands were tied by *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The appellate court reversed. In doing so, it allowed the trial court the flexibility to balance the economic feasibility of notice against the desire for res judicata and decide what notice is realistic and required. The court stated that notice protects the integrity of the class action process and prevents burdening the courts with multiple claims where one will do. (*La Sala v. American Sav. & Loan Ass'n*, 5 Cal.3d 864, 97 Cal.Rptr. 849, 489 P.2d 1113 (1971).)

In 1976, two notable cases were decided. In the first, *Occidental Land, Inc. v. Superior Court of Orange County*, 18 Cal.3d 355, 134 Cal.Rptr. 388, 556 P.2d 750 (1976), the Supreme Court reviewed and approved a class certification order for 155 homeowners suffering partial oral and written misrepresentation. The court reconfirmed the subsequently discredited trial court procedure of successively applying for class certification, as Federal Rule of Civil Procedure 23 contemplates. It also found that moving to decertify a class within eighteen months was not a delay. The opinion in the second case, *Blue Chip Stamps v. Superior Court of Los Angeles*, 18 Cal.3d 381, 134 Cal.Rptr. 393, 556 P.2d 755 (1976), was rendered by the court on the same day as *Occidental Land*. It provides a clue to the judicial view of smaller and apparently less worthy claims.

Richmond v. Dart Industries, Inc., 29 Cal.3d 462, 174 Cal.Rptr. 515, 629 P.2d 23 (1981), strengthened the concept of community of interest created by written misrepresentations. It also set out rules tolerating some conflicts within the class and described the legal criteria for both ascertainable class and community of interest.

Green v. Obledo, 29 Cal.3d 126, 172 Cal.Rptr. 206, 624 P.2d 256 (1981), held that circumstances must have changed to decertify a class. Absent such changes, it was an error to decertify.

McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 33 Cal.3d 816, 191 Cal.Rptr. 458, 662 P.2d 916 (1983), held that the procedural failure to request findings of fact and conclusions of law when the trial court denied class certification made significant review of any error on the court's part impossible. Now counsel must request findings and conclusions to protect the record and provide for a meaningful analysis on appeal.

California clarified rules on the tolling of the statute of limitations for absent class members in *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 245 Cal.Rptr. 658, 751 P.2d 923 (1988). This signifi-

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cant ruling sets forth the policy criteria that determine tolling in cases where defendants are on notice as to the approximate identity of the proposed class and as to either the nature and substance of the claims for relief or the causes of action.

California courts have used the tripartite analysis of Federal Rules of Civil Procedure Rule 23, subdivision (b), to determine whether notice to class members about the pending action is required. The courts have taken this language to heart and acknowledged that the notice requirements of Rule 23 do not bind California courts. (*Cartt v. Superior Court of Los Angeles County*, 50 Cal.App.3d 960, 124 Cal.Rptr. 376 (2d Dist. 1975).) *Bell v. American Title Ins. Co.*, 226 Cal.App.3d 1589, 277 Cal. Rptr. 583 (1st Dist.1991), was the first discussion by a California appellate court on opt-outs. The Federal Rules of Civil Procedure determine no right to opt out in classes certified under Rule 23, subdivisions (b)(1) or (b)(2). Rule 23, subdivision (b)(1), weighs the risk of separate actions or cases that would otherwise impair a uniform remedial pattern of conduct by a defendant. Rule 23, subdivision (b)(2), deals with declaratory relief or final injunctive relief on grounds that are generally appealable to the class. By contrast, Code of Civil Procedure § 382 does not say when the trial court should afford a right to opt out. The trial court ruling had precluded opt-outs in *Bell v. American Title Ins. Co.*, a decision the appellate court agreed with. The court confirmed that California courts have the discretion to determine whether the requirements of Federal Rule of Civil Procedure Rule 23, subdivision (b)(1) or (b)(2), apply. This case also allows the court to determine whether the primary or predominant relief is injunctive and whether any corresponding monetary relief is subordinate.

In *Stephen v. Enterprise Rent-A-Car*, 235 Cal.App.3d 806, 1 Cal. Rptr.2d 130 (1st Dist.1991), California settled its different approach from that of the federal courts on appeal of a denial of class certification. California does not allow successive motions to attempt certification, but only successive motions to attempt decertification. If a plaintiff fails to certify the class unsuccessfully and there is no partial certification, the plaintiff must appeal since the denial is a final order terminating the action for absent class members.

In *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 97 Cal.Rptr.2d 179, 2 P.3d 27 (2000), the California Supreme Court clarified the role of a merits analysis in class certification. The trial court had denied certification of this proposed class action involving cash and credit card prices. The court concluded that customers were free to choose the form of payment and therefore could not establish a community of interest as a matter of law. The Supreme Court found that this certification criteria was improper. The

court held that the question of certification is essentially a procedural one that does not ask whether the action is legally or factually meritorious. The proper place for such analysis is at the pleading (demurrer) or motion for judgment on the pleadings, summary judgment, or summary adjudication “that affords proper notice and employs clear standards.” The court held, “Were we to condone merit-based challenges as part and parcel of the certification process similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims.” (23 Cal.4th at 441.)

The role of the Unfair Competition Law (UCL) (Cal. Bus. Prof. Code, § 17200) as a tool to provide classwide restitution was clarified in two California Supreme Court cases issued on the same day. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 96 Cal.Rptr.2d 518, 999 P.2d 706 (2000), and *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 96 Cal.Rptr.2d 485, 999 P.2d 718 (2000).

Wilner v. Sunset Life Insurance Co., 78 Cal.App.4th 952, 93 Cal. Rptr.2d 413 (2d Dist.2000), appears to provide substantial support for those causes of action in which the primary class action defense is “reliance” upon misrepresentations of a defendant.

The court held misrepresentation allegations were sufficient to establish an ascertainable class in a proper class action with allegations that the defendant “engaged in a common course of conduct designed to induce thousands of its existing and prospective policyholders to purchase life insurance policies.” This case moves into the no man’s land of individual reliance issues that can undermine commonality. In *Wilner*, however, the court found proper reliance from the circumstances attending the transaction. The court based its decision in part on the reasoning of *Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971).

Finally, *Washington Mutual Bank v. Superior Court of Orange County*, 24 Cal.4th 906, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001), provided additional guidance on the question of the proper analysis to be applied to a national class in a California court. This somewhat complicated conflict of law analysis was reviewed in a prior California ruling in *Nedlloyd Lines B. V. v. Superior Court*, 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992), and was cited favorably as a method of applying the choice of law when a proposed class potentially involves a multi-state legal analysis concerning the claims for relief.

On November 2, 2004, the California electorate approved an initiative, Proposition 64, that amended unfair competition and false advertising law to require “injury in fact” to money or property and further require representative actions to comply with it.

The Contemporary Period: 2005 to The Present

On February 18, 2005, the United States Congress passed the Class Action Fairness Act of 2005, substantially expanding federal diversity jurisdiction with a new 28 U.S.C. section 1332(d) section conferring federal jurisdiction over certain interstate class actions depending upon the “citizenship” of the defendant. There are important exceptions for single-state cases; however, complete diversity is no longer required, and jurisdiction is implicated when there is any diversity between a member of the plaintiff class and any defendant.

Hypertouch, Inc. v. Superior Court, 128 Cal. App. 4th 1527, 27 Cal. Rptr. 3d 839 (1st Dist. 2005), confirmed that California’s class action procedure required reasonable notice and an opportunity to “opt out” of the class action pursuant to due process. A trial court order with an “opt-in” requirement was in direct conflict with applicable rules of court, undermining the purpose of class actions.

In *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861, 155 P.3d 268 (2007), the California Supreme Court confirmed a “largely settled feature of state and federal procedure” that class action proceedings should first consider certification and class notice before ruling on the merits.

In *Arias v. Superior Court*, 63 Cal. Rptr. 3d 272 (Cal. App. 3d Dist. 2007), the nature of a legislatively enacted private enforcement exception to California’s class action requirements was confirmed. Labor Code Section 2699(a) expressly allows a plaintiff (an aggrieved employee) to bring an action on behalf of others. This statute, known as “PAGA,” allows an aggrieved employee to act as a private attorney general to collect penalties from employers who violate labor laws.

The United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), held arbitration agreements enforceable in a consumer transaction that proscribed class or collective action, as preempted by the Federal Arbitration Act (FAA) 9 U.S.C., which declares arbitration clauses are “valid, irrevocable, and enforceable.”

In 2012, the California Supreme Court addressed issues of significance to class action practice generally in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012). The case held in part that the trial courts need only resolve threshold disputes over claim elements when necessarily “dispositive.”

In 2014, in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), while reversing the judgment in favor of the class, the court addressed a trial plan relying on statistical sampling, holding it must be developed with expert input, afford the defendant

an opportunity to impeach the model, and permit the litigation of relevant affirmative defenses.

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