Class Action Appellate Report

By H. Scott Leviant

RECENT CLASS ACTION AND CLASS-RELATED DECISIONS

Class-Related: UCL

Davis-Miller v. Automobile Club of Southern California (pub. Nov. 22, 2011) 201 Cal.App.4th 106,134 Cal.Rptr.3d 551

Factual Summary: Plaintiffs alleged that the roadside battery program offered by the Auto Club was not truthfully and accurately promoted in Auto Club advertising. Concluding that common issues did not predominate, the trial court denied certification. In particular, the trial court credited evidence showing that most class members needed the batteries they were sold and very few class members were exposed to the alleged false advertising about the roadside assistance program. Thus, concluded the trial court, commonality could not be satisfied. Whether you agree with that conclusion depends, in part, upon where you come down on the issue of classwide reliance in UCL cases.

Significant Holdings: The *Davis-Miller* court embraced the *Cohen v. DIRECTV, Inc*., 178 Cal.App.4th 966 (2009) treatment of *Tobacco II*. But *Cohen* did so in the face of sharp criticism. *Steroid Product Hormone Cases* concluded that *Cohen* appeared to have disregarded *Tobacco II*, saying:

> We agree that *Tobacco II* did not dispense with the commonality requirement for class certification. But to the extent the appellate court's opinion might be understood to hold that plaintiffs must show class members' reliance on the alleged misrepresentations under the UCL, we disagree. As *Tobacco II* made clear, Proposition 64 did not change the substantive law governing UCL claims, other than the standing requirements for the named plaintiffs, and "before Proposition 64, 'California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.'[Citation.]" (*Tobacco II*, *supra*, 46 Cal.4th at p. 326.)

It is not clear how this conflict will be resolved. Literally applying *Tobacco II*, the *Cohen* line of decisions seems inconsistent with the Supreme Court's construction of the UCL to apply any evidence associated with reliance to class claims. If the named plaintiff has standing, that's the end of the inquiry. The "likely to deceive" standard of the fraudulent prong of the UCL has not been repealed or changed. New standing requirements apply only to the named class representative.

Pragmatically, of course, it's a different story. Many courts philosophically disagree with the UCL's amalgamation of strict liability and quasi-fraud theories. Then again, legislation is the prerogative of the Legislature. Until the Legislature or another ballot initiative changes the UCL's scope substantively, it should be applied consistent with its plain language and the construction supplied by the California Supreme Court. Whether that will happen is another story entirely.

Class-related: UCL

Lopez v. Nissan North America, Inc. (Dec. 5, 2011) 201 Cal.App.4th 572

Factual Summary: Plaintiffs alleged that Nissan calibrated odometers to over-register miles driven by at least two percent. Nissan moved for summary judgment, arguing that California law considers an automobile odometer "correct" if it registers the actual mileage within a tolerance of plus or minus four percent (Bus. & Prof. Code § 12500(c)). The trial court granted summary judgment for Nissan, concluding that California's "safe harbor" provision – section 12500(c) – does not protect manufacturers from liability for intentional miscalibration, but that plaintiffs failed to raise a triable issue as to whether Nissan had deliberately designed its odometers to over-register mileage.

Significant Holdings: The Court of Appeal agreed, holding:

> We hold that passenger vehicle odometers are "correct" if they register actual mileage within the four percent tolerance and the designer or manufacturer does not deliberately miscalibrate them to underregister or overregister mileage. This standard is substantially the same as that applied by the trial court in granting summary judgment for Nissan.

(Slip op., at 2.) The court found section 12500(c) to be a "safe harbor" provision, provided that intentional miscalibration was not demonstrated. Explaining itself, the court said:

> Similarly, we conclude that section 12500, subdivision (c) provides a safe harbor against UCL claims complaining about the accuracy of odometers that qualify as "correct" under that provision. (§ 12500, subd. (c); Cel-Tech, supra, 20 Cal.4th at p. 183.) California law specifically permits a slight measure of inaccuracy in odometers because it is uniformly understood that "errorless value or performance of mechanical equipment [including odometers] is unattainable." (NIST Handbook, Appx. A, § 2.1.) Just as "[n]o law generally requires a manufacturer to use the most

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expensive or most durable materials in the manufacture of its products" (*Bardin v. DaimlerChrysler Corp*. (2006) 136 Cal.App.4th 1255, 1273), neither the UCL nor any other law requires Nissan to employ the most accurate possible odometer design. (See *Alvarez*, *supra*, 656 F.3d at p. 935.) With respect to an odometer that qualifies as "correct" even though it may not be 100 percent accurate, the Legislature has implicitly determined that any slight injury to consumers does not outweigh the harm if more stringent requirements for precision were to apply. In deeming qualifying odometers "correct," section 12500, subdivision (c) "clearly permit[s]" their design (*CelTech*, *supra*, 20 Cal.4th at p. 183), and we "may not use the unfair competition law to condemn actions the Legislature permits." (*Id*. at p. 184.)

(Slip op., at 25.)

There are many pages of discussion in the decision about the evidence in the case. Had the plaintiffs established an intentional miscalibration, it would likely have been a different result. But they didn't, at least to any court's satisfaction.

Class-related: Arbitration Agreements

Harris v. Superior Court (Dec. 29, 2011) ___ Cal.4th ___, 2011 WL 6823963

Factual Summary: Harris stems from four coordinated class action lawsuits contending that claims adjusters employed by Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation were erroneously classified as exempt "administrative" employees. The trial court certified a class of "all non-management California employees classified as exempt by Liberty Mutual and Golden Eagle who were employed as claims handlers and/or performed claims-handling activities." Plaintiffs moved for summary adjudication of defendants' affirmative defense that plaintiffs were exempt under IWC wage order No. 4. (Cal. Code Regs., tit. 8, § 11040 (Wage Order 4).) Defendants opposed the motion and moved to decertify the class. The trial court then decertified a portion of the class, depending upon whether the earlier, less specific version of Wage Order 4, or the later, more detailed version of Wage Order 4, applied to the class members.

On appeal, the Court of Appeal majority concluded that, under the terms of that wage order, plaintiffs could not be considered exempt employees, either before or after the amendment to Wage Order 4.

Significant Holdings: the Supreme Court reversed the Court of Appeal majority ruling to the extent it set a bright line rule, holding, instead:

> [I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance, as was the case in *Bell II*, is it appropriate to reach out to other sources.

(Slip op., at 22.) The Supreme Court reached its conclusion after examining the federal regulations incorporated into the current version of Wage Order 4. The regulations incorporated as they existed in 2001 are: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Next, in parsing the regulations, the court's analysis turned on assessing when work is "directly related" to management policies or general business operations. As the court explained:

> Work qualifies as "directly related" if it satisfies two components. First, it must be qualitatively administrative. Second, quantitatively, it must be of substantial importance to the management or operations of the business. Both components must be satisfied before work can be considered "directly related" to management policies or general business operations in order to meet the test of the exemption.

(Slip op., at 10.) The court then explained that the plaintiffs in the trial court below moved for summary adjudication of the affirmative defense of exemption by challenging defendants' ability to show one part of the conjunctive test for "directly related." The plaintiffs argued that the defendants could not show that the work of the adjusters in that case was administrative in nature, the "qualitative" element. The Supreme Court focused its analysis on that argument only, explicitly declining to review the record for triable issues on any other element of the exemption defense, including the "quantitative" element of the "directly related" regulatory language.

Turning to the administrative/production worker dichotomy discussed in *Bell v. Farmers Ins. Exchange*, 87 Cal.App.4th 805 (2001) (*Bell II*) and the other *Bell* decisions, the court explained that the *Bell II* decision was predicated on the older Wage Order 4 that lacked the detailed definitions included in the current version. The court also noted that the *Bell II* based its analysis on an undisputed record that the work of the employees at issues was "routine and unimportant." One key fact from the *Bell II* analysis noted by the Supreme Court here was the limited settlement authorizations provided to the adjusters in that case. It is important to note, however, that the court did not invalidate the administrative/production worker dichotomy. Rather, it stated that the dichotomy could not stand as a dispositive test in lieu of the Wage Order language. Instead, the dichotomy is an analytical tool available when the language of the Wage Order and incorporated federal regulations is insufficient to resolve the classification question.

Applied to the current case, the court criticized the creation of a rigid rule defining any employee carrying out day-to-day business as a production worker. Instead, the court cautioned against examining the duties of employees in one business to determine the correct classification of employees in another. In other words, the administrative exemption is a fact-specific test for which the court offers no guidance in its application.

The court reversed the Court of Appeal but directed it to re-consider the denial of summary adjudication while applying the correct legal standard.

Disclosure: Spiro Moss represented one of the named plaintiffs, though other firms handled the appellate activities.

Class-related: Arbitration Agreements

Wisdom v. Accentcare, Inc. (Jan. 3, 2012) 202 Cal.App.4th 591

Factual Summary: An employer required that, as part of an application package, all applicants had to agree to submit disputes to binding arbitration if hired. The plaintiffs, on-call staffing coordinators, sued, alleging failure to pay wages owed. The employer moved to compel arbitration. The trial court denied the motion, finding procedural and substantive unconscionability.

Significant Holdings: The Court of Appeal agreed. Procedural unconscionability was obvious to the court:

> In this case, the preemployment arbitration agreement is procedurally unconscionable. "[F]ew employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 115.)

(Slip op., at 2.) The court found additional evidence of procedural unconscionability in the agreement "because its language implied there was no opportunity to negotiate, because the rules of any arbitration were not spelled out in the agreement or attached thereto, and because plaintiffs did not understand they were waiving their right to a trial, nor was that fact explained to them."

The court then found substantive unconscionability because of the lack of mutuality:

> The lack of mutuality is made apparent by contrast to a different application form, also employed by AccentCare, which provided that "in exchange for my agreement to arbitrate, AccentCare, Inc. also agrees to submit all claims and disputes it may have with me to final and binding arbitration ...." "[I] n the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." (*Armendariz*, *supra*, 24 Cal.4th at p. 118.)

(Slip op., at 2-3.) Much of the opinion includes a more detailed discussion of the various deficiencies identified by the trial court. Of particular note, though, was the court's mention of an opinion from the Second Appellate District, Division Seven, which reached a different result in similar but not identical circumstances:

> We are aware that Division 7 of the Second Appellate District examined a nearly identical arbitration agreement in *Roman*, *supra*, 172 Cal.App.4th at page 1470-1471, and held that the procedural unfairness was "limited[.]" *Roman* reasoned that there was little evidence of surprise since the arbitration provision was "contained on the last page of a seven-page employment application," and "was set forth in a separate, succinct (four-sentence) paragraph that Roman initialed, affirming she had seen it." (*Id.* at p. 1471.)
>
> Here, however, even though plaintiffs undoubtedly saw the arbitration paragraph when they initialed it, their declarations state they did not know what "binding arbitration" meant, no one explained it to them, and they were unaware they were giving up their right to trial. There was no evidence any of the plaintiffs were sophisticated in legal matters. This, combined with the non-negotiable, take-it-or-leave-it circumstances surrounding the application for employment, result in a strong showing of procedural unconscionability.

(Slip op., at 10-11.) Then, when discussing substantive unconscionability in the form of one-sidedness, the court's criticism of *Roman* is more pointed:

> Defendants rely on *Roman*, *supra*, which held that an agreement containing nearly identical language was bilateral. (172 Cal.App.4th at p. 1473.) But *Roman*, *supra*, did not explain its reasons for concluding that the agreement at issue in that case was bilateral. Instead, the court distinguished *Higgins, supra*, on the ground that the procedural unconscionability in *Higgins* had been "far greater[.]" (*Id*. at pp. 1472-1473.)
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> To the extent *Roman* implies that the agreement in *Higgins* was not substantively unconscionable due to its one-sidedness, it is wrong. *Higgins*, *supra*, discussed at some length the fact that the "I agree" language of the contract indicated that only the siblings had agreed to the arbitration clause, and stated only briefly that "[a]dditional elements of substantive unconscionability" were to be found in the provision barring only the siblings from seeking appellant review of some claims and the provision requiring arbitration in accordance with the rules of the American Arbitration Association. (*Higgins*, *supra*, 140 Cal.App.4th at p. 1254.)

(Slip op., at 14-14.) It is hard to find fault with this court's critique of *Roman*.

U.S. Supreme Court: Class-related: Arbitration Agreements

CompuCredit Corp. v. Greenwood (Jan. 10, 2012) ___ U.S. ___

Factual Summary: Respondents were individuals who applied for and received an Aspire Visa credit card marketed by petitioner CompuCredit Corporation and issued by Columbus Bank and Trust, now a division of petitioner Synovus Bank. Respondents filed a class-action complaint, alleging that the defendants violated the Credit Repair Organizations Act. At issue was whether a sentence in that act, at 15 U. S. C. §1679c(a), which says, "You have a right to sue a credit repair organization that violates the [Act]," preserves the right to sue in court.

Significant Holdings: Because the Credit Repair Organizations Act is silent as to whether claims may be heard in an arbitration forum, the Court held, 8-1, that the arbitration agreement in question should be enforced according to its terms. Justice Ginsburg dissented strongly, and the short concurring opinion by Justices Sotomayor and Kagan stated that the case was a much closer call than the majority opinion suggests, noting good points raised in the dissenting opinion of Ginsburg. In particular there seems to be a strong disagreement about whether congressional intent must be explicitly stated or may be inferred from a consistent set of statements suggesting a specific intent.

Class-related: Arbitration Agreements

Arnold v. Mutual of Omaha Insurance *Company* (Dec. 30, 2011) ___ Cal.App.4th ___, 2011 WL 6849652

Factual Summary: A non-exclusive insurance agent sued the insurance company, alleging that she was improperly classified as an independent contractor. Plaintiff sought unreimbursed expenses pursuant to Labor Code section 2802.

Significant Holdings: On appeal, the plaintiff argued that the trial court erred in applying the common law test for employment that was enunciated in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). Instead, the plaintiff contended that Labor Code section 2750 supplied a statutory definition of employee that is broader than the common law test and controls the definition of employee applicable to section 2802.

The court cited approvingly to *Estrada* for its conclusion that the Labor Code does not define "employee" for purposes of section 2802:

> One reviewing court has recently held the Labor Code does not expressly define "employee" for purposes of Labor

> Code section 2802, and therefore, the common law test of employment applies to that section. (*Estrada v. FedEx Ground Package System, Inc*. (2007) 154 Cal.App.4th 1, 10 (Estrada).) That court went on to cite the "principal" and "additional factors" of the common law test as articulated by the Supreme Court in *Borello*, *supra*, 48 Cal.3d 341, and summarized above. (Estrada, supra, at p. 10.)

(Slip op., at 6-7.) While the court noted that *Estrada* may not have explicitly considered the argument about section 2750, the court went on to hold that the common law test must apply, or section 2750 would conflict with the statutes immediately following 2750.

Having settled on the common law test for employment as the correct test, the court then considered whether the evidence supported the trial court's decision to grant summary judgment. While it is impossible to know what evidence was submitted, the court's summary of key evidence suggests that the defendant had the better of it:

> The salient evidentiary points established Arnold used her own judgment in determining whom she would solicit for applications for Mutual's products, the time, place, and manner in which she would solicit, and the amount of time she spent soliciting for Mutual's products. Her appointment with Mutual was nonexclusive, and she in fact solicited for other insurance companies during her appointment with Mutual. Her assistant general manager at Mutual's Concord office did not evaluate her performance and did not monitor or supervise her work. Training offered by Mutual was voluntary for agents, except as required for compliance with state law. Agents who chose to use the Concord office were required to pay a fee for their workspace and telephone service. Arnold's minimal performance requirement to avoid automatic termination of her appointment was to submit one application for Mutual's products within each 180-day period. Thus, under the principal test for employment under common law principles, Mutual had no significant right to control the manner and means by which Arnold accomplished the results of the services she performed as one of Mutual's soliciting agents.

(Slip op., at 9-10.)

Replacement of class representatives

Pirjada v. Superior Court (Dec. 12, 2011) 201 Cal.App.4th 1074, 134 Cal.Rptr.3d 74

Factual Summary: Plaintiff filed a complaint on behalf of himself and a proposed class of all security guards who had been employed in California by Pacific National Security, Inc. (Pacific National), asserting causes of action for failure to provide meal and rest periods and various other wage-and-hour claims, as well as a claim for unfair business practices. After plaintiff settled his individual claim through direct negotiations with defendant's chief executive officer, the trial court granted plaintiff's counsel leave to amend the complaint to name a new class representative but denied his motion to compel precertification discovery to identify a suitable class representative. Counsel for plaintiff, purportedly on behalf of the client, petitioned for a writ of mandate challenging the order denying discovery.

Significant Holdings: The court began its discussion by restating existing standards. First, class member rights are protected, even pre-certification. Second, court approval is not needed to communicate with putative class members, but when a court's assistance is solicited, a court can consider the potential for abuse. Third, class member contact information is "generally discoverable." Fourth, lead plaintiffs, who are unqualified to serve as a class representative may, "in a proper case," move for discovery to find a new representative. However, the court also noted that precertification discovery is not a matter of absolute right.

Next, citing *La Sala v. American Savings & Loan Assn*., 5 Cal.3d 864 (1971) and *Kagan v. Gibraltar Sav. & Loan Assn*., 35 Cal.3d 582 (1984) (disapproved in part on another ground in *Meyer v. Sprint Spectrum L.P*., 45 Cal.4th 634 (2009)), the court emphasized the trial court's obligation, as also stated in Rule 3.770, to consider carefully any request to dismiss a class action and evaluate whether notice is necessary.

Then, after noting that the standard of review is the abuse of discretion standard, the court explained why the writ must be denied. Petitioner first argued, as a matter of discovery law, that because defendant failed to respond to document requests, it waived any objection. Absent a finding that the failure was the result of mistake, inadvertence or excusable neglect, Petitioner argued that it was an abuse of discretion to deny the motion to compel. Second, as a matter of the procedural law governing class actions, Petitioner argued that the court abused its discretion in declining to authorize notice to potential class members about the need for a substitute representative. The court found the first contention to be incorrect and the second premature.

Interestingly, though the court ultimately rejected the challenge to the discovery order, it was highly critical of defendant's behavior:

> Outside the context of representative and class actions it may well be, as Pacific National observes, "a matter of common knowledge and common sense" that once a plaintiff settles his or her case any discovery responses not yet due no longer need to be served. Because the lawsuit against Pacific National was filed as a class action, however, and the individual settlement with Pirjada was made without the participation or consent of his lawyer, the experienced employment law attorneys representing Pacific National should have either objected to the still-outstanding discovery as moot, moved for a protective order or taken steps to ensure that the settlement agreement between their client and Pirjada included a provision withdrawing any remaining discovery requests.

(Slip op., at 12.) The court then observed that the trial court could have crafted a number of alternative orders designed to locate a suitable representative. Here's where things get interesting. The trial court first considered and denied a motion to give notice to the class. That order was not challenged, though the court telegraphed its opinion of the order:

> Although the court's decision to deny [counsel's] motion for notice to the class was based largely on a distinction between consumer and employee class actions, a distinction we implicitly rejected in *Belaire-West Landscape, Inc. v. Superior Court*, *supra*, 149 Cal.App.4th 554, the propriety of that

ruling is not before us. [Counsel] did not seek writ review of the court's May 26, 2011 order. Instead, it elected to proceed by way of a motion to compel.

(Slip op., at 13.) The court then concluded that the trial court's decision to deny the motion to compel after giving time to find a new representative was not arbitrary or capricious.

As to the second, premature argument, the court also seemed to be hinting that the trial court should proceed with caution:

> Whether or not the superior court's initial decision not to notify potential class members that Pirjada now lacks standing to represent the class was correct, the court will necessarily revisit that question when it hears its order to show cause regarding dismissal. Counsel's declaration in support of the petition for writ of mandate indicates a new class representative cannot be identified by the informal means authorized in *Parris*, *supra*, 109 Cal.App.4th 285, and discussed by the superior court during the May 26, 2011 hearing. Assuming that remains the case, [counsel] will have an opportunity to demonstrate to the court that some form of notice is required to avoid prejudice to absent class members. It would be inappropriate for us to prejudge the outcome of that hearing or to restrict the superior court's discretion by attempting to outline the factors it should weigh in deciding how to comply with the requirements of *La Sala*, *Kagan* and Rule 3.770.

(Slip op., at 14-15.)

So now you know, at a minimum, that when the representative requests dismissal, class counsel needs to walk carefully through the dismissal process so as to seek the best possible methods for locating replacement representatives and/or obtaining notice to the putative class.

Class-related: Wage & Hour

Aleman v. Airtouch Cellular (Dec. 21, 2011) ___ Cal.App.4th ___, ___ Cal. Rptr.3d ____, 2011 WL 6382127

Factual Summary: The plaintiffs worked mostly as retail sales representatives or customer service representatives at AirTouch stores and kiosks. Plaintiffs alleged that AirTouch did not properly pay its nonexempt employees for attending mandatory store meetings. The trial court granted summary judgment to the defendant.

Significant Holdings: On the reporting time claim, the court concluded that the plaintiffs were not entitled to receive "reporting time pay" for attending meetings at work, because all the meetings were scheduled and they worked at least half the scheduled time. This issue stems from the argument that reporting time pay should be based on a two-hour minimum. Thus, goes the argument, if you attend a meeting one day for two hours, you should get two hours of pay, even if the meeting lasts 90 minutes. If a meeting is scheduled, and the meeting lasts at least half the scheduled time, that is good enough according to the court.

On the split shift differential claim, the court concluded, consistent with at least one treatise to examine the issue, that the split shift differential is intended only to protect the minimum wage law. Thus, if pay for the hours worked is enough to satisfy the split shift premium of one extra hour of pay at minimum wage, then no further pay need be supplied.

On a positive note, the court explicitly held that an award of attorney's fees was improper, since both reporting time pay and split shift pay were governed by Labor Code section 1194, governing payment of minimum wages. Since the one-way fee shifting statute controls the claims, defendant could not recover fees.

Class-related: Arbitration Agreements

Collins v. eMachines, Inc. (pub. ord. Dec. 21, 2011) ___ Cal.App.4th ___, ___ Cal. Rptr.3d ____, 2011 WL 5910512

Factual Summary: It was alleged that defendant failed to disclose and actively concealed the disk controller defect from potential purchasers. Despite knowing of the defect and knowing that the defect could result in critical data corruption, executives of eMachines directed the company to continue to sell the defective computers after October 31, 1999. eMachines actively concealed the existence of the defect from purchasers by, among other practices specified in the FAC, continuing to issue the warranty knowing the computers had the defect, and engaging in misleading "customer service" practices that concealed the defect in online "customer support" guides, in customer service diagnoses of computer problems, and at call centers. The case was stayed for four years while cases in other states moved forward.

Significant Holdings: Turning first to the CLRA, the court restated the *LiMandri* circumstances giving rise to actionable deceit. The court recognized the FAC as alleging factor (2), when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff, and factor (3), when the defendant actively conceals a material fact from the plaintiff. The court then agreed that a "reasonable" consumer would certainly find data corruption to be material information in connection with a computer.

Next, the court distinguished *Daugherty*, observing that, in *Daugherty*, the only representation made was the warranty, and the vehicles performed adequately as warranted. The court was similarly dismissive of *Bardin*, in which it was alleged that exhaust manifolds were likely to fail after the warranty period. The court explained that the manifolds in *Bardin* worked they way they were supposed to under the warranty. Contrasting the circumstances, the court said, "Because a floppy disk, at the time of the complaint, was integral to the storage, access, and transport of accurate computer data, the floppy disk was central to the function of a computer as a computer. The exhaust manifolds at issue in *Bardin*, by contrast, were just blowing smoke." Slip op., at 12.

Regarding the UCL, the court relied on its discussion about *Daugherty* and *Bardin* to conclude that a claim under the UCL was easily stated as well. The court agreed that consumers certainly had an expectation about data integrity when they purchased the affected computers.

After also concluding that the allegations supported a claim for common law fraud, the court concluded that legal remedies were adequate, rendering an unjust enrichment claim unnecessary.

Class-related: Wage & Hour - Case to Watch

Brinker Restaurant v. Superior Court (Hohnbaum). Oral argument held November 8, 2011. Amicus briefing was permitting following the argument. ■