

LEGISLATIVE LAW

The Class Action Moratorium Initiative

by L. Tracee Lorens

Tracee Lorens attended San Diego State University and Western State College of Law (now Thomas Jefferson) obtaining her J.D., B.S.L. in 1990 and was admitted to the California State Bar that same year. She served as a Director for CASD for 15 years and was CASD's President in 2003. She received an Outstanding Advocacy Award from CASD in 2004 for her actions on behalf of Rite Aid employees. Ms. Lorens practices primarily in the area of employment law, focusing currently on wage and hour class actions, as well as complex personal injury and insurance bad faith claims. Ms. Lorens is the mother of a beautiful daughter, Alexandra Rose Lorens, and the "significant other" and partner of Wayne Alan Hughes. She may be reached by email at: Tracee@Lorenslaw.com.

On July 13, 2007, the Civil Justice Association of California ("CJAC"), formerly known as The Association for California Tort Reformers, filed an initiative (which they called The California Class Action Fairness Act) which would have effectively banned class actions in the State of California. CJAC's Board of Directors is made up of big PhRMA, insurance companies, big oil, automobile manufacturers, the California Chamber of Commerce, and others.

The class action initiative expressly sought to repeal all previous court decisions on class action laws and replaced that body of law with statutes that made it virtually impossible for consumers to bring class action lawsuits in the State of California. CJAC planned to have the Initiative appear on the June 2008 ballot.

The class action initiative explicitly stated that it sought to abolish the judicial policy in California in favor of class actions. It would have effectively denied class action status if the defendant could show that it had **any** defense that is unique to a single plaintiff's individual injuries. The initiative implied that if the defendant's actions or practices are subject to a state or federal agency's oversight, a class action may not proceed. It required plaintiffs to pay the costs of notifying the class and eliminated the court's discretion to allocate that cost. The measure called for staying all discovery directed solely to the merits of the claims or defenses until after the court had ruled on class certification, while at the same time mandating the court to consider the substantive elements of the plaintiff's case as well as any affirmative defenses. This would have effectively shifted the burden of proof on affirmative defenses to the plaintiffs, while specifically precluding the plaintiffs from obtaining the discovery necessary to address these claims.

At the same time, the measure prohibited discovery of the identity of potential class members (at least until the court ruled the plaintiff had standing to assert the claim) thereby ensuring that only the defendant employers would have the information necessary to properly prepare for class certification or trial. Finally, and maybe most significantly, the measure required the plaintiffs to establish that the claims and defenses were "substantially the same" among all members as to liability **as well as damages**. In my career, I have yet to certify a class action in which the class members' damages are "substantially the same". The distinction between the current rule requiring "similarity" and the

Initiative's language requiring issues of law or fact common to the class be substantially the same cannot be overstated.

Injunctive relief would not be allowable in an action seeking monetary damages. The class action initiative would have permitted automatic appeals of class certification orders. This, of course, would have delayed our cases by years. As we all know, delay only benefits the defendants.

When the class action initiative was filed, CAOC and a group of coalition partners, worked tirelessly gathering data from claims administrators across the nation to establish the initiative would not save the State of California money and in fact would have cost the State hundreds of millions dollars in taxes paid from class action settlements. Similarly, data was gathered to establish the billions of dollars received by non-profit organizations in the State of California via *cy pres* disbursements. I am proud to say that I was the Chairperson of the committee that gathered this fiscal impact data and, although it was a big and time-consuming project, I believe that it was, in part, instrumental in causing CJAC to eventually withdraw the initiative.

At the same time, CAOC drafted and filed two counter-initiatives and two versions of a competing initiative. The counter-initiatives are called "The No Say No Pay Act" and "The Corporate Accountability Act". "The No Say No Pay Act" requires publicly traded corporations to annually report executive compensation and to give shareholders of California corporations the right to approve the compensation of Directors and Executive Officers. "The Corporate Accountability Act" is intended to deter deceptive and fraudulent corporate conduct. In addition to the penalties provided for under any other provision of the law, it creates liability for Executive Officers or Directors which impacts their compensation or financial benefits during the time when legal violations occur. This is intended to protect consumers against corporate fraud like that which led to the collapse of Enron and WorldCom, with any monies being paid to the Victims of Corporate Fraud Compensation Fund. You can access these initiatives at www.caoc.com/classactioninitiative.

On August 24, 2007, a bank account to defeat the class action initiative was opened. Commitments have been made to date which exceed \$1,000,000.00. On August 27, 2007, CJAC and the California Chamber of Commerce withdrew the initiative from the State Attorney General's office. Their explanation was that the timing of the June 2008 election and the State's political climate made passage of the proposal uncertain at best. John Sullivan, President of CJAC, stated, "For us, there was the possibility that what we thought would be a quiet election could be an explosive one."

CJAC and the Chamber of Commerce certainly did not believe that the June Primary would be "an explosive one" when they filed the initiative. Instead, I expect they believed that the June 2008 voter turnout would be a light one due to the fact that California's Presidential Primary will be held in February 2008 and the General Election, of course, in November 2008. Reading between the lines, I presume that what caused this "change of heart" by Corporate America was that they could clearly see that the attorneys, civil rights' groups, and environmental groups, labor, and all of us who support consumers and employees in this State, were intent on ensuring that the June 2008 election would be "an explosive one." Our message was strong, loud, and clear. This was not going to be another Prop. 64 and we were going to do whatever it took to defeat the initiative.

Unfortunately, CJAC is threatening to re-file the initiative for the November 2008 ballot. I believe if we continue to unite with our coalition partners, CJAC will reconsider that threat. CASD's motto "Never Stand Alone" exemplifies the power of this organization, among others, and our ability to protect access to the Civil Justice System for consumers and employees in the State of California.

OTHER LEGISLATION

MICRA Update

CASD Members **Denise Asher** and **Suzie Mindlin**, among others, have been meeting with our local legislators to discuss the serious problems with the MICRA statute. Eliminating MICRA caps continues to be a priority for CASD and CAOC. CAOC has been meeting with attorneys throughout the State who are then meeting with their local legislators to discuss the problems with the MICRA statute.

Court Call

CAOC is pleased to report that **AB 500** sponsored by Assembly Member Ted Lieu (D-Torrance) to provide for more uniformity for the use of telephonic appearances in court, has passed both the Assembly Floor and the Senate Judiciary Committee and is awaiting approval on the Senate Floor. **Don Ernst, Bruce Brusavich, Sharon Arkin** and **Nancy Drabble** participated in two day-long Judicial Council Task Force meetings to reach a resolution on this issue, not to mention the numerous conference calls they participated in. As a result, they produced a consensus bill that is moving on a fast track to Governor Arnold Schwarzenegger. **AB 500** passed the Assembly Floor 70-0 and the Senate Judiciary Committee 5-0.

DOE Defendants

Assembly Member Mike Eng (D-Monterrey Park) sponsored **AB 1264** which will clarify that DOE defendants cannot be severed from cases before the conclusion of introduction of evidence. Current law makes it clear that DOE defendants cannot be dismissed, but some judges have been circumventing the intent of the law by severing them instead. In addition, the Judicial Council has pledged to address other civil procedure issues that were originally raised in **AB 1264** through their rule making process, including unnecessary appearances about the status of service and unnecessary appearances after mediation or settlement.

Elder Abuse Bills Signed Into Law

On July 12, 2007, two bills were signed by the Governor. **SB 183** sponsored by Senator Ellen Corbett (D-San Leandro) deletes the requirement of a petition to the court and provides that, after the death of the elder or dependent adult, the right to commence or maintain an action shall pass to the personal representative of the decedent, or if none, to an intestate heir whose interest may be affected by the action or the decedent's successor in interest or to "an interested person" as defined in Probate Code §48. This bill specifies that an "interested person" does not include a creditor or a person who has a claim against the estate who is not an heir or beneficiary of the decedent's estate.

SB 611 by Senator Daryl Steinberg (D-Sacramento) permits the use of attachment law in cases involving financial abuse against an elder or dependent adult, whether or not other forms of relief are demanded.

