

# Reforming Class Action

By Michael A.S. Newman

It is the ironic fate of many innovators that their achievements, often the result of a daring defiance of orthodoxy, become in time the new orthodoxy, and a bar to later innovation.

Thus, in the mid-19th century, the legal reformer David Dudley Field, upset by the abstruse and opaque nature of the law, drafted a streamlined model code, which, in its tightly packed 70 pages, included sections on civil law, procedure, political law and penal law. His avowed goal was to make the law "accessible to the common man" by paring away the tangled accretion of hundreds of years of common law. Despite the resistance his efforts met among the conservative, his model code, known as the Field Code, was adopted in many states, including, in 1872, California.

And yet, while many of Field's innovations remain used and useful, some are out of date and woefully in need of revision. Such is the case with California's provisions relating to class actions, the entirety of which can be found in the last 42 words of the Code of Civil Procedure, Section 382: "[W]hen the question [in a lawsuit] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." It is upon this small basis that a multimillion-dollar business for trial lawyers, the California class action industry, rests.

Here, what is normally the strength of the Field Code — its brevity — has become, through the accumulation of legal precedent, as confused and unfair as the law Field originally reviled.

For all intents and purposes, the law relating to class actions in California is entirely judge-made, and judicial "interpretations" of Section 382 have dramatically and

unfairly weighted the scales in favor of the class action plaintiffs and against those defending against such actions.

That the class action system unfairly benefits plaintiffs and disadvantages defendants is manifest in the following ways:

- The "death knell" doctrine provides that a plaintiff can immediately appeal if a trial court, early in the case, refuses to certify (that is, judicially recognize and authorize) the class. The theory is that this is justified because the failure to certify sounds the "death knell" of the class action. By contrast, if the court agrees to certify the class, a defendant cannot immediately appeal, but must wait until there is a final judgment. Since most cases settle prior to a final determination of the case, defendants often do not get to utilize their right to appeal. In this respect, plaintiffs have the stronger strategic position.

- Although case law has established certain requirements, California statute provides no distinct criteria for what standards a case must satisfy before it is certified as a class. By contrast, Federal law, under Federal Rules of Civil Procedure, Rule 23, provides distinct criteria that must be met in order for a class to be formed.

- California trial courts are generally not permitted to consider the merits of a case in determining whether to certify it as a class. Even the most specious of cases can be transformed into a class action.
- Defendants are frequently ordered to pay half or all of the cost of giving notice of the class to prospective class members. In this way, defendants are compelled to pay money to put a target on their own backs.

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- California has no specific statute setting guidelines and safeguards for the award of attorneys fees in class action cases.

- Courts have permitted plaintiffs to engage in broad discovery prior to certification, thus allowing plaintiffs go on a "fishing expedition" to justify their suits, and exposing defendants to extensive litigation costs early in the case.

Making California a welcome haven for class actions — and tort lawsuits in general — has come with an enormous price tag for California businesses and consumers.

According to a study published in March 2007 by the Pacific Research Institute, a free market think tank based in San Francisco, the indirect and direct costs of tort litigation in the United States are staggering, draining \$865 billion annually from the U.S. economy, amounting to a yearly "tort tax" of \$9,827 for a family of four.

That California suffers inordinately from this "tort tax" is evident from its unique position as one of the most attractive venues for tort lawsuits — and class actions in particular — in the nation. A recent study determined that the past three years alone

have seen more than 3,400 class actions filed in California's six biggest counties. Not surprisingly, a recent Harris poll ranked California 46th out of the 50 states in the fairness and reasonableness of its treatment of class actions.

Attempts to change this situation have been made, but they have thus far run into a brick wall of opposition from California's very powerful trial bar lobby. In May 2007, the Civil Justice Association of California sponsored Assembly Bill 1505 in an attempt to remedy some of the inequities in the current class action law. Titled the Class Action Fairness Act, AB 1505 would have allowed defendants to immediately appeal the certification of class actions, allowed courts to consider the merits of a case in certifying a class, limited discovery, provided clear guidelines regarding the award of attorney fees and provided specific standards (modeled on Federal Civil Procedure Rule 23) for the certification of classes.

"California has the fifth-worst class action law in the country," said John H. Sullivan, president of the Civil Justice Association of California, at the time AB 1505 was submitted. "It's time for the Legislature to install balance and clarity and make this part of the civil justice system work

for all Californians. Until the Legislature does, consumers will continue to pay for these lawsuits through higher prices of everyday goods and services."

Unfortunately, the Assembly's Judiciary Committee caved in to the pressure of the trial lawyer lobby, allowing the bill to die before it could even come to a vote in the committee. But the Legislature is not the only path to the enactment of a law in California. In 2004, for example, voters enacted Proposition 64, an initiative aimed at curbing "shakedown lawsuits" filed under the cover of California's Unfair Competition Law. Perhaps, if the Legislature refuses to act, advocates of reform will ultimately need to put the Class Action Fairness Act, or a proposal like it, directly on to the California ballot as an initiative. Then California voters will be able to decide whether they want to retain the dubious distinction of having the fifth-worst class action law in the United States.

In the meantime, California lawyers — if few others — will continue to enjoy the bonanza.

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# California Constitution Struck An Early Blow Against Injustices of Slavery

By Elaine Elinson

In 1857, the U.S. Supreme Court ruled in the infamous *Dred Scott* decision that slaves or descendants of slaves could not be U.S. citizens and that blacks "had no rights which the white man was bound to respect." That same year, an 18-year-old black man named Archy Lee made a very different kind of history in California.

Lee had traveled overland from a Mississippi plantation with a man

who claimed to own him, Charles Stovall. The trip was arduous, and when they arrived, Stovall, low on funds and in frail health, hired Lee out for wages. Stovall also opened a private school, and tried to attract pupils with an ad in the local paper.

At the time, California's view on slavery was ambivalent. Though slavery was prohibited, state law allowed slave holders who were "in transit" in California to maintain ownership of their slaves.

Delegates to California's first

Constitutional Convention — after intense debate — unanimously outlawed slavery, and California entered the union as a free state. Many free blacks had come to the state during the Gold Rush, and later settled in San Francisco, Sacramento and Stockton, where they became ministers, proprietors of small businesses or laborers. The Legislature had specifically forbidden "capitalists" to bring slaves to work in the mines, as they did not want them to compete with free labor and independent miners.

The state's 1852 Fugitive Slave Law, which authorized law enforcement to capture slaves brought into the state who tried to escape, was allowed to expire in 1855. But blacks could not vote, went to segregated schools and could not testify in court cases where whites were involved.

The black community began to organize around these injustices and formed the Franchise League, perhaps the first civil rights group in the state, which broadened into the California Colored Convention, in 1855.

When Stovall eventually decided that he preferred life in Mississippi and began planning to return with Lee to the plantation, he met great resistance from the African-American community. Lee was given refuge at Hotel Hackett, a Sacramento rooming house owned by free blacks. Stovall tracked him down and had him jailed. Immediately, one of the hotel proprietors filed a petition for writ of habeas corpus to get Lee released.

The Sacramento courtroom was packed with spectators — both black and white. There were no black lawyers in California, but the community had raised money for Lee's legal representation. One of his financial supporters was Mary Ellen Pleasant, herself a former slave who had amassed a fortune in San Francisco. Judge Robert Robinson granted the writ, but as soon as Lee was released, he was rearrested

and led right back to jail. Stovall had succeeded in getting a new warrant from California Supreme Court Justice David Terry.

Though Lee's supporters were stunned, they eventually determined that going to the state Supreme Court might clarify the state's stance on slavery. The atmosphere was tense. Of the three justices on the California Supreme Court, two

of visitor and his slave is entitled to freedom." The court recognized that Stovall was clearly not a "visitor" to California — he had opened a school and even advertised for pupils in the paper. He had also hired Lee out for pay.

But in a surprising twist that outraged many Californians, Burnett concluded that although Stovall was not entitled to claim Lee as his property under the logic of the court's decision, the court would nonetheless order Lee's return to Stovall because it was "the first case that occurred under the existing law ... and under these circumstances we are not disposed to rigidly enforce the rule for the first time." Lee's bid for freedom in a free state was thwarted.

The men of the Colored Convention were determined not to allow Lee to be forced back into slavery in Mississippi. Word had spread from Sacramento that Stovall was going to spirit Lee from the jail cell and put him on a ship leaving San Francisco Bay. Volunteers from the African-American community kept watch on the wharves, keeping their eye on the Panama-bound *Orizaba*. Stovall had hidden Lee on a small boat anchored off Angel Island, planning to transfer him in the dark of night to the eastbound ship.

But this time, the slave owner was thwarted. The black patrols had sought an appeal and alerted the sheriff of their legal plan. As Stovall's small boat approached the ship, he was served with a warrant for holding a slave illegally. Lee

was also taken into custody. The *Orizaba* sailed toward Panama without them.

Lee's new attorney was the well-known Quaker Edward D. Baker, an abolitionist orator and personal friend of Abraham Lincoln. Before a packed courtroom, Baker told District Court Judge T.W. Freelon, "Judge Burnett said he would set aside the Constitution and the law because Stovall was ignorant of our law. God Almighty sets a premium on knowledge, the Supreme Court offers a reward for ignorance. If a learned, wide and great man had brought Archy into the State, the Judges of the Supreme Court would have shaken the Constitution in his face indignantly, but for Stovall they set that document aside." Curiously, Stovall's lawyer did not object. Freelon overturned the earlier ruling and declared Lee's freedom.

A throng of supporters was waiting to parade Lee through the streets of San Francisco as a free man. But as they were leaving the courtroom, U.S. Marshalls seized Lee and took him back into custody. Stovall, assuming he might not prevail against Lee's prominent lawyer, had brought his claim to U.S. Commissioner George Pen Johnston, a Southerner with a pro-slavery background. But Johnston surprised many when he rejected Stovall's claim that Lee was in violation of the 1850 National Fugitive Slave Law, ruling that "[his] strike for freedom was within California state boundaries; therefore the 1850 National Fugitive Slave Law did not apply."

This time, Lee was really free. The former slave was carried off like a hero. The community held a victory celebration, and found a secure home for Lee at the fashionable boarding house of Mary Ellen Pleasant. The following year, Pleasant helped finance John Brown's raid on Harper's Ferry.

Elaine Elinson, a former public information director at the American Civil Liberties Union of Northern California, is working on a book about the history of civil liberties in California.

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