

*Key Litigation
and
Employment
Developments
2007*

Presented to:



*December 13,
2006*



Overview

Paul Hastings

- New FRCP and e-Discovery
- Selective Waiver and Attorney-Client Privilege
- Arbitration and Class Action Waivers
- Class Action Developments / Section 17200
- Securities Litigation

New FRCP and e-Discovery

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- What is “Electronically Stored Information” (“ESI”)?
- Rule 26(a)(1): Initial Disclosures/Planning for Discovery
 - Parties Must Locate & Review ESI Early in the Case
 - What This Means for Counsel
 - Rule 26(f) Conference
 - Rule 16(b) Scheduling Conference & Order
- Rule 26(b)(2) & 45(d)(1)(c): Two-Tiered Discovery
 - What is “Reasonably Accessible” ESI?
- Rules 34 & 45: Form of Production
 - Turns on the Document Request or Subpoena
 - Format of Production: Hard Copies & Electronic

New FRCP and e-Discovery

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- Must Metadata be Produced?
 - What is Metadata & Who Must Pay for Production?
 - Proposed Model Rules for 9th Circuit
- Deleted Data
- Rules 26(f)(4), 26(b)(5)(B) & Proposed Rule of Evidence 502: Privilege, Waiver & Inadvertent Production
- Dangers of E-Discovery
 - Procedures for Addressing Inadvertent Disclosure
- Rule 37(f): Discovery Sanctions & Safe Harbor for Inadvertent Destruction
- Best Practices & Practical Suggestions

Selective Waiver and ACP

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- The “Selective Waiver” Doctrine
 - What it Means for Privileged Documents Produced to Government Agencies
 - Split in Circuits
- On November 13, 2006, Supreme Court Declined Review of *Qwest*
 - Implications of *Qwest* or Why the Plaintiffs’ Bar is Pleaded
 - Confidentiality Agreements Cannot Protect Privileged Documents
- Congressional Reform?
 - “Thompson Memorandum”
 - “The Attorney-Client Privilege Protection Act of 2006”

Selective Waiver and ACP

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- What Can Companies Do?
 - Organizing a Successful Corporate Internal Investigation
 - Approaching an Internal Investigation
 - Process Issues
 - Developing a Work Plan
 - Imperative Steps to Investigative Success

General Policy on Arbitration

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- Federal Arbitration Act, 9 U.S.C. § 1 et. seq., establishes a “federal policy favoring arbitration” and requires federal courts to “rigorously enforce agreements to arbitrate.” See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)

- *Discover Bank v. Superior Ct.*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76 (2005)
 - Plaintiff alleged Discover Bank breached its cardholder agreement by charging a \$29 late fee on payments received on the due date, but after Discover’s “undisclosed” 1:00 cutoff time. The credit card agreement contained an arbitration clause which precluded both sides from participating in a class wide arbitration, consolidating claims, or arbitrating claims in a representative or private attorney general capacity.
 - The California Supreme Court held that class action waivers are unconscionable in situations where “the party with the superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money.”
 - Practical note: The court recognized that its decision was the minority rule. Most courts have upheld such waivers.

Scope of Discover Bank Ruling

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■ How It Has Been Applied:

➤ *Discover Bank v. Superior Court*, 134 Cal.App.4th 886 (2005)

- Following remand, Court of Appeal held that Delaware choice of law provision was valid to enforce arbitration provision with class action waiver where there was no claim under California consumer protection statutes, waiver was contained in agreement, and plaintiff wanted to use California as a platform for a nationwide class.

➤ *Klusman v. Cross Country Bank*, 134 Cal.App.4th 1283 (2005)

- Choice of law provision inapplicable to effectuate arbitration agreement and class action waiver for California class action alleging violation of California consumer protection statutes

Yet to be Decided

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- Enforceability in non-consumer context
- Enforceability for non-binding arbitration agreement with class waiver
 - *Walsey Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208-09 (9th Cir. 1998)
 - Holding that non-binding arbitration agreements are enforceable under FAA.
 - *Provencher v. Dell, Inc.*, 409 F.Supp.2d 1196, 1203-04 (C.D. Cal. 2006)
 - Holding that under California law, a class action waiver is still enforceable where it does not exempt a defendant from the consequences of its alleged wrongdoing and only limits the means by which the plaintiff can enforce rights.

Class Action Developments

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■ Overall Trends

- The Ability For Plaintiffs To Maintain Consumer Class Actions Against Defendants Has Been Substantially Impacted by:
 - The “Proposition 64” Amendment to Business & Professions Code Sections 17200 and 17500
 - The Class Action Fairness Act

Proposition 64

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- Proposition 64 Has Significantly Curtailed The Reach Of California’s Unfair Competition Law (the “UCL”):
 - The UCL has been considered one of the “toughest” and “most sweeping” consumer protection statutes in the country.
 - Any business act that is “fraudulent,” “unfair” or “unlawful” is a violation of the UCL
 - Prior to the enactment of Proposition 64:
 - No Standing Requirements: Any person could maintain an action under the UCL even if the person did not suffer any injury
 - Quasi-Class Action: Person could maintain action as a representative of all citizens in California without satisfying class requirements

Proposition 64

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- Proposition 64 Has Imposed Traditional Standing and Class Action Requirements On UCL Plaintiffs:
 - Private plaintiffs suing under the UCL must now show they have suffered an “injury in fact” and “lost money or property” as a result of the alleged wrongful business act.
 - Private plaintiffs seeking to assert a “representative” action must now meet the requirements of California’s class action statute.

Proposition 64

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■ Important New UCL Cases

- *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal.4th 223 (2006):
 - Proposition 64 Applies Retroactively To Cases Filed Before It Was Enacted In November 2004
- *Daugherty v. American Honda Motor Co., Inc.* --- Cal.Rptr.3d ----, 2006 WL 3073017 (2006)
 - A failure to disclose a fact one has no affirmative duty to disclose is not “likely to deceive” anyone within the meaning of the UCL or the Consumer Legal Remedies Act (the “CLRA”)

Proposition 64

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- *Pfizer Inc. v. Sup. Ct.* (Review Granted)
 - Held that every UCL Plaintiff and Proposed Class Member will need to plead and prove actual deception, reliance and damages to establish “fraudulent” act
 - Historically, unlike common law fraud, a violation of the UCL could be shown even without allegations of actual deception, reasonable reliance and damage.
 - This would be significant victory for defendants because fraud class actions are difficult to maintain due to individual issues of reliance unless there were uniform representations (presumed reliance – *Mirkin*)
 - Federal Courts Have Reached Same Conclusion (*Laster v. T-Mobile USA, Inc.*, 407 F.Supp.2d 1181, 1194 (S.D.Cal.2005)).

The Class Action Fairness Act

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- The Purpose of the Class Action Fairness Act Was To Curtail Abuse of Class Action Procedures:
 - Enacted on February 18, 2005
 - Substantially Enlarged Jurisdiction of Federal Courts Over Class Actions and Relaxed Removal Requirements
 - Created “Consumer Class Action Bill of Rights” Designed To Deter:
 - Coupon Settlements
 - Class Counsel “Selling Out” Class By Entering Into Settlements With High Attorneys Fees
 - Imposed New Notification Requirements
 - Exceptions – Generally Does Not Apply To Security Class Actions

The Class Action Fairness Act

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- It Is Too Early To Determine Long-Term Impact of CAFA
- Effectiveness Of CAFA Will Largely Depend Upon The Federal Courts
 - CAFA Essentially “Pushes” Large Class Actions to Federal Court Instead of State Court
 - This Has Had The Unintended Affect Of Ensuring That Class Actions Are Maintained By Experienced Class Counsel (Making Defense More Difficult)
 - CAFA’s Notification Requirements Will Have Minimal Impact
 - CAFA Requires Notice of Class Actions and Settlements To Regulating Government Bodies
 - Cases Will Likely Get Lost In Stack of Paperwork
 - Will Federal Courts Do A Better Job Of Preventing Unfair Settlements or High Requests for Attorneys Fees?
- Early CAFA Decisions Have Focused On Removal Issues

Class Action Developments

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■ Federal Jurisdiction Under CAFA

➤ Subject to Certain Exceptions, CAFA Grants Federal Courts Original Jurisdiction Over Cases In Which:

- The number of members of the class or mass action is 100 or more;
- The amount in controversy exceeds \$5 million (after aggregating all class members claims); and
- There is diversity of citizenship between any one member of the plaintiff class and any defendant (complete diversity is no longer required).

Class Action Developments

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- CAFA Requires Federal Courts To Decline Jurisdiction Where
 1. 2/3rds or more of the class members and all primary defendants are citizens of state where action was filed; or
 2. 2/3rds or more of the class members and one defendant are citizens of state where action was filed and the lawsuit involves a “local controversy”

Class Action Developments

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■ Removal Under CAFA

- *Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006)
 - All Defendants Do Not Need To Consent To Removal
 - A Defendant Can Remove Even If Citizen Of Forum State
 - One Year Time Limit For Removal Based On Diversity Not Applicable
 - Defendant Still Bears Burden Of Establishing That Removal Is Proper.
 - Although District Court Can Allow Discovery Regarding Amount In Controversy Before Remanding, Such Discovery Is Not Required.

Class Action Developments

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- CAFA Does Not Apply To Actions Filed Before Feb. 18, 2005
 1. Possible Exception – Amended Complaint With New Defendant(s)
 2. Possible Exception – Amended Complaint With Substantially New Claims
 3. Possible Exception – Amended Complaint With New Class Definition

Stock Options Backdating

- What is Backdating?
 - Grants “in the money”
 - Pure Backdating
 - Mis-Dating
 - Springloading
 - Bullet Dodging
- What are Consequences of Backdating?
 - Accounting Consequences
 - Tax Consequences
 - Investigations
 - Litigation

Securities Litigation

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- Size of the Scandal
 - More than 80 Companies Have Announced Investigations
 - All Companies Will be Expected to Review Grant Practices
- Practical Lessons to be Learned: Board Duties in a Crisis
 - Duties of Loyalty & Care
 - Process is Key
- Practical Lessons to be Learned: What to Do About Stock Options Going Forward
- Practical Lessons to be Learned: How to Approach Other Issues

*Labor And
Employment Law
Section
Employment Law
Update*



Significant Legislative Developments

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■ Bills That Were Enacted

➤ Minimum wage – AB 1835

- Probably the most significant bill in 2006
- Increases minimum wage in California
 - To \$7.50 per hour effective January 1, 2007
 - To \$8.00 per hour effective January 1, 2008

Significant Legislative Developments (cont'd) Paul Hastings

- Sexual harassment training – AB 2095
 - Clarifies certain uncertainties
 - All employees that an employer employs, not just those in California, are counted in determining whether the 50 employee threshold is met
 - Only those supervisors who work in California must be trained
- New changes to training regulations
 - On October 2, Fair Employment and Housing Commission adopted new Section 7288 as its final proposed regulations

Significant Legislative Developments (cont'd) Paul Hastings

- Regulations provide guidance in the following areas:
 - Tracking of training
 - Individual tracking, measured by date last completed for the supervisor
 - Training year tracking – employer may designate a training year in which some or all of its supervisors are trained, and thereafter must again retrain all of these supervisors by end of the next training year, two years later
 - Documentation of training must be kept, including name of employee trained, date of training, type of training, and name of provider, and retain records for at least two years

Significant Legislative Developments (cont'd) Paul Hastings

- Training of new supervisors
 - If supervisor has received training from some other employer in last two years, need only be given copy of employer's harassment policy and acknowledge has read and received
- Duration of training
 - Two hours need not be consecutive
 - Minimum sessions of at least one-half hour

Significant Legislative Developments (cont'd) Paul Hastings

- Qualifications of trainers
 - Have to be “subject matter experts”
 - Qualified to train about
 - » What constitutes harassment and discrimination
 - » Steps to take when harassment occurs
 - » How to report harassment
 - » How to respond to complaint of harassment
 - » Employer’s obligation to investigate
 - » Retaliation
 - » Essential components of anti-harassment policy
 - » Effect of harassment on victim, co-workers, harasser, and employer
- Methods of training
 - Must include hypotheticals, questions and answers, and quizzes

Significant Legislative Developments (cont'd)

Paul Hastings

- Required content
 - » Definitions of harassment
 - » Cases and statutes regarding harassment
 - » Types of conduct that constitute harassment
 - » Remedies
 - » Strategies for prevention
 - » Practical examples of harassment, e.g., from case law, news, hypotheticals
 - » Limited confidentiality of the complaint process
 - » Employer's obligation to investigate
 - » What to do if the supervisor himself or herself is accused
 - » Elements of anti-harassment policy

**Each supervisor has to sign that they have received and read the policy*

Significant Legislative Developments (cont'd) Paul Hastings

- Pay stubs regarding overtime pay – AB 2095
 - PAG Act and violations of Labor Code Section 226
 - Prior anomaly
 - Overtime can be paid in arrears, on next pay day after the pay period in which worked
 - Before, hours worked themselves had to be in the current pay stub, but not the pay
 - Changed so that hours worked and pay can be in the paycheck for the pay period after the hours are worked

Significant Legislative Developments (cont'd) Paul Hastings

- Work Place Violence – AB 2695
 - C.C.P. Section 527.8 has allowed employers for some time to seek injunctive relief against person who has threatened to commit violence to employee in the work place
 - Problem: employee does not want to do anything, yet other employees fear that the person making the threats will involve others in the violent behavior
 - AB 2695 closes the loop; broadens the employer's ability to seek relief on behalf of employees other than the one directly threatened
 - May expand employer's obligation to act in such circumstances
- Payment of Wages to Terminating Employees in the Motion Picture Industry – AB 3051
- Attorneys' fees under the Uniform Trade Secrets Act – SB 1636

Significant Legislative Developments (cont'd) Paul Hastings

■ Bills that Were Vetoed

- Acupuncture and workers' compensation benefits – AB 2287
 - Would have enacted a set of medical treatment guidelines for acupuncture treatment
- Meal period requirements in transportation industry – AB 2593
- Special requirements for patient lifting in hospitals – SB 1204
- Discrimination against victims of domestic violence – 1745
- Health care costs – SB 1414
- Unemployment insurance benefits for locked out workers – AB 1884

Significant Decisions

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■ Stress Leaves and Reinstatement

- Neisendorf v. Levi Strauss & Co., 2006 DJDAR 13215 (August 29, 2006)

■ Retaliation

- Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)
 - “Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because [plaintiff's] memo falls into this category, his allegation of unconstitutional retaliation must fail.”

Significant Decisions (cont'd)

Paul Hastings

■ Retaliation (cont'd)

- Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006)
 - The Court found that such laws prohibit an action that “a reasonable employee would have found . . . materially adverse, which . . . well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”
- McCrae v. Department of Corrections, 127 Cal.App.4th 779 (2006)
 - Held: Employee must demonstrate that he or she has been subjected to an adverse employment action that materially affects terms, conditions, or privileges of employment, rather than simply having been subjected to an adverse action that might deter an employee from engaging in protected activity.

Significant Decisions (Cont'd)

Paul Hastings

■ Sexual Harassment

- Lyle v. Warner Brothers Television, 38 Cal.4th 264 (2006)
 - “[I]t is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim”
 - “A hostile work environment sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general”
 - “[A]nnoying or merely offensive comments in the workplace are not actionable”
- Gober v. Ralphs Grocery Co., 137 Cal.App.4th 204 (2006)

Significant Decisions (Cont'd)

Paul Hastings

■ Disability Discrimination

- Gelfo v. Lockheed Martin Corp., 140 Cal.App.4th 34 (2006)
 - “The focus of the interactive process centers on employee-employer relationships so that capable employees can remain employed if their medical problems can be accommodated, rather than sounding a clarion call to legal troops to opine on whether the employee’s impairment is an actual disability within the legal nuances of the [statute].”
- Raine v. City of Burbank, 135 Cal.App.4th 1215 (2006)
 - “[A]n employer has no duty . . . to accommodate a disabled employee by making a temporary accommodation permanent if doing so would require the employer to create a new position just for the employee.”

Significant Decisions (Cont'd)

Paul Hastings

■ Sex Discrimination

- Jespersen v. Harrah's Operating Co., 444 F. 3d 1104 (9th Cir. 2006)
 - “Not every differentiation between the sexes in a grooming and appearance policy creates a significantly greater burden of compliance.”
 - “Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.”

■ Religious Discrimination

- Berry v. Dept. of Social Services, 447 F.3d 642 (9th Cir. 2006)

Significant Decisions (Cont'd)

Paul Hastings

■ Race Discrimination

➤ Ash v. Tyson Foods, 126 S. Ct. 1195 (2006)

- Plaintiffs were two African American supervisors who applied for and were denied promotions that went to Caucasians that plaintiffs argued were inferior to theirs
- U. S. Supreme Court decides that the use of the word “boy” by the decision maker towards African American supervisors by their boss might just be evidence of race discrimination
- Also rejects the 11th Circuit pretext test of “slap you in the face” for when evidence of superior qualifications establishes pretext in terms of McDonnell Douglas v. Green analysis.

Significant Decisions (Cont'd)

Paul Hastings

■ Settlement and Release Agreements

- Butler v. The Vons Co., Inc., 140 Cal.App.4th 943 (2006)
- Edwards v. Arthur Andersen LLP, 142 Cal.App.4th 603 (2006)
 - Unlawful to release “any and all claims” because this impliedly released non-waivable protections. (Rev. granted)
- Syverson v. IBM, 2006 U.S. App. LEXIS 22504 (2006)

■ Wage Hour Developments

- Individual liability for wage hour violations
 - Jones v. Gregory, 137 Cal.App.4th 798 (2006)
 - “[U]nder common law agency principles long ago codified, a corporate officer or agent does not employ employees—the corporation does”

Significant Decisions (Cont'd)

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■ Wage Hour Developments (cont'd)

➤ Meal and rest period issues

- Bearden v. U.S. Borax, Inc., 138 Cal.App.4th 429 (2006).
- Mills v. Superior Court (Bed, Bath & Beyond), 38 Cal.Rptr. 3d 497 (2006).
- National Steel & Shipbuilding Co. v. Superior Court (Godinez), 135 Cal.App.4th 1072 (2006)

➤ PAG Act and exhaustion of administrative remedies

- Dunlap v. Superior Ct., 142 Cal.App.4th 330 (2006)

SIGNIFICANT DECISIONS (cont'd)

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➤ Class actions

- Dunbar v. Albertson's, Inc., 141 Cal.App.4th 1422 (2006)
- Tien v. Superior Court, 139 Cal.App.4th 528 (2006)
- “[T]he privacy rights of the class members who contacted plaintiffs’ counsel outweigh any interest [Defendant] may have in learning their identity. [Defendant] offers no compelling need to learn the identities of the class members who contacted plaintiffs’ counsel.”

➤ Payment due on termination

- Smith v. The Superior Court of Los Angeles County, 39 Cal.4th 77 (2006)