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Legal Updates

California Report

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Waiting for *Miller*

Pessimists and disaster voyeurs, they say, watch the Weather Channel. Now, we can wait for the California Supreme Court to decide *Miller v. Bank of America*.

The California Supreme Court agreed on March 21 to review an appeal court decision that overturned a $1.5 billion judgment that Bank of America Corp. was ordered to pay to over a million California class members. A court of appeal in San Francisco last November ruled in the bank's favor, holding that banks may apply credits for Social Security benefits and other public benefit payments directly deposited to their customers' checking accounts, to cover debits for overdrafts and overdraft fees. The appeal court had overruled an earlier San Francisco County Superior Court decision that found such payments to be illegal under California law.

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What's New in 17-Two?

The California courts have been busy this quarter, mostly trying to figure out what the voters meant when they passed Proposition 64, a 2004 initiative that reformed California's much-abused unfair competition law, Cal. Bus. & Prof. Code § 17200.

The big development is reliance. A quiet but unmistakable trend has been developing nationally in which state courts are interpreting their unfair and deceptive practices laws to require reliance. Even plaintiff-friendly states like Massachusetts have been saying nyet to lawsuits based on theoretical or technical infractions that harmed nobody and that no one but class counsel cared about.

Do plaintiffs have to show they relied on the allegedly offensive representation or omission and lost money or property "as a result"? Two new cases construing California's Proposition 64 say yes.

In *Meyer v. Sprint Spectrum L.P.*, ___ Cal. App. 4th ___, 2007 WL 1430343 (May 16, 2007) the court of appeal held that a mobile phone subscriber who complains about various unconscionable provisions in his subscriber agreement (arbitration, excessive termination fee, etc.) that have never been enforced again him cannot sue under Section 17200. Fear-of-enforcement doesn't confer standing to sue. And in *Cattie v. Wal-Mart Stores, Inc.*,___ F. Supp. 2d ___, 2007 WL 935582 (S.D. Cal. March 21, 2007), the district court tossed a Section 17200 case due to plaintiffs' failure to allege reliance on defendant's statements about thread count in bed linens requires.

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Fireside Chat

Can a trial court in a class action case rule on the substantive merits before deciding that a class can be certified? The answer, according to the California Supreme Court's recent decision in

Fireside Bank v. Superior Court, 40 Cal. 4th 1069 (2007), is no. This is the issue of "one way intervention," a concept the rest of the country has known for decades but California has just figured out. If the motion to dismiss or for summary judgment is brought pre-certification and is directed, say, to the named plaintiff's standing or "adequacy," then the timing doesn't matter. But if the issue goes to the merits and if the resolution would affect the entire still-uncertified class, timing matters a great deal.

Had *Fireside Bank* gone the other way, financial institutions could be subject to an onslaught of small claims, win ten in a row (for example) and, if they lost so much as one, face having a class certified in that single lost case. Score one for common sense.

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