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California Report

March 2007

Related Practices:

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California Privacy

January brought two important privacy cases for California class actions. First, the California Supreme Court held that potential class member customers' privacy rights do not require their affirmative consent before a class action defendant can be ordered to produce contact information as to unnamed class members. *Pioneer Elecs. (USA), Inc. v. Super. Ct.*, 40 Cal. 4th 360 (2007). The court held that the customers' privacy right would be adequately protected by notice and an opportunity to opt out of disclosure. Although the California Constitution protects an individual's "reasonable expectation of privacy against a serious invasion," an "opt-out" procedure strikes the proper balance between the plaintiff's need to know and the complaining customers' privacy rights. In reaching this result, the court reaffirmed the approach it took over thirty years ago in *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652 (1975), in which the court balanced the need for discovery with the consumers' right to privacy in their financial affairs.

Second, on the same day that *Pioneer Electronics* was decided, an intermediate appellate court held that a plaintiff who was never a member of the putative class in the first place cannot conduct discovery in order to identify a proper plaintiff with standing. *First Am. Title Ins. Co. v. Super. Ct.*, 146 Cal. App. 4th 1564 (2007). In evaluating requests for pre-certification discovery of the identity of class members, courts "weigh the danger of possible abuses of the class action procedure against the rights of the parties under the circumstances. While *Pioneer Electronics* authorizes discovery of identifying information of complaining putative class members, *First Title* rejects fishing expeditions by plaintiff's counsel hoping to find a named plaintiff.

Practice Tip:*First American* is an important case, particularly in the post-Proposition 64 world in which lawyers can no longer sue in the name of unaffected plaintiffs. If *First American* had gone the other way, lawyers could continue to sue on behalf of spurious plaintiffs, then use discovery to force defendants to cough up the names of potentially genuine class representatives.

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What's New in 17-Two

As we reported in our last issue, the California Supreme Court granted review in *In re Tobacco II Cases*, which will decide whether Proposition 64 accomplished anything. In particular, the issue is whether a plaintiff bringing a claim under California's unfair competition law (Bus. & Prof. Code § 17200) must allege and prove reliance. The appellate court thought so, and, for the most part, so have the lower courts. Briefing was expedited and closed in February. However, the case was not designated for expedited disposition, so it is unlikely we will have a decision in 2007. (Note: The Firm is filing an amicus brief on behalf of the California Chamber of Commerce, Civil Justice Association of California, and California Bankers Association.)

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Proposition 64

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In February, the district court in Sacramento answered what it characterized a question of first impression under Proposition 64: What does it mean that a plaintiff bringing a Section 17200 claim must have lost "money or property"? *Walker v. USAA Cas. Ins. Co.*, ___ F. Supp. 2d ___, 2007 WL 460944 (E.D. Cal. Feb. 12, 2007). The *Walker* court determined that a plaintiff needs to establish that the defendant has taken money that should be restored to the plaintiff. In other words, the new "standing" rule is identical to the pre-Prop 64 rule dictating when a plaintiff is entitled to "restitution."

In *Walker*, plaintiff was an auto body shop who claimed that reimbursement for his hourly labor rates should not have been capped. The court held that Walker was merely disappointed he couldn't charge more for labor and, hence, lost no "money or property" within the meaning of Proposition 64. It dismissed the Section 17200 and Cartwright Act claims with prejudice. Note: The Firm represented USAA.

Practice Tip:*Walker* should be helpful in any case in which a defendant did not take money from the plaintiff as a result of the alleged unlawful conduct. It should also be helpful where any money or property taken was voluntarily restored to the plaintiff before the action was filed.

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