

CASES AND MATERIALS ON
CALIFORNIA CIVIL PROCEDURE

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CALIFORNIA
CIVIL PROCEDURE

Third Edition
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American Casebook Series

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Case law is integral to presenting procedural legal arguments before the court, but only if practitioners can properly rely on it as binding or persuasive authority. Not every opinion rendered by a California court is published and available for citation. For example, unlike the federal system, where selected district court opinions are published, California trial court decisions are not published. They are available primarily only upon request from the Superior Court that issued them. While all California Supreme Court decisions are published, California Rules of Court (CRC) 8.1100–8.1125 contain restrictive criteria governing the publication of opinions from the courts of appeal and the appellate divisions of the superior courts. (Compare the similarities and differences in the publication criteria in Ninth Circuit Rule 36–2.) Only about seven percent of California Court of Appeal opinions are certified for publication. The impact of this statistic is striking, since an unpublished Court of Appeal opinion (or portion of an opinion) cannot be cited or relied upon by California litigants or courts, except in very limited circumstances usually involving the immediate parties.

The following case against the California Supreme Court challenged the enforcement of the California Rules of Court governing publication and citation of appellate opinions:

SCHMIER v. SUPREME COURT OF CALIFORNIA

California Court of Appeal, First District, 2000.
78 Cal.App.4th 703, 93 Cal.Rptr.2d 580,
cert. denied, 531 U.S. 958, 121 S.Ct. 382, 148 L.Ed.2d 294.

HANING, ASSOCIATE JUSTICE.

Michael Schmier (appellant) appeals the dismissal of his complaint for injunctive relief and writ of mandate after the demurrer of respondents, the Supreme Court of California, the Court of Appeal of California and the Judicial Council of California, was sustained without leave to amend. Appellant seeks to enjoin respondents from enforcing the rules governing publication of opinions (California Rules of Court, rules 8.1100–8.1125), contending they are unconstitutional and conflict with statutory law.

BACKGROUND

Rule 8.1105(c)^a provides that no opinion of the Court of Appeal may be published in the Official Reports unless it “(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; [¶] (2) resolves or creates an apparent conflict in the law; [¶] (3) involves a legal issue of continuing public interest; or [¶] (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.” Rule 8.1105(b) provides that a Court of Appeal opinion

a. An April 2007 amendment made substantive changes to CRC 8.1105(c). See Note 3 at p. 12.

Please see the casebook author's socratic questions highlighted after the conclusion of the opinion at pages 12-14, as well as "Teacher's Manual" material at last two pages of this document.

shall not be published unless a majority of the court rendering the opinion certifies that it meets one of the standards of rule 8.1105(c).
* * *

An opinion that is not certified for publication cannot subsequently be cited as legal authority or precedent, except as relevant to the doctrines of law of the case, *res judicata*, or collateral estoppel, or as relevant to a criminal or disciplinary action because the opinion states reasons for a decision that affects the same defendant or respondent in another action. (Rule 8.1115.)

Rule 8.1120 sets forth the procedure for requesting publication of a Court of Appeal opinion not certified for publication by that court. If the Court of Appeal does not honor the request, rule 8.1120 obligates the Supreme Court to then rule on the request. Rule 8.1125 sets forth a similar scheme pertinent to depublication.

Appellant, individually and purportedly on behalf of all persons similarly situated, filed an action for injunctive relief and writ of mandate to compel respondents to publish all Court of Appeal opinions and to permanently enjoin them from enforcing the rules governing publication. He contends the rules violate the federal and state constitutional doctrine of separation of powers and the constitutional rights to petition the government for redress of grievances, freedom of speech, due process and equal protection. He further contends that the rules violate Civil Code section 22.2, which states that the common law of England is the rule of decision of all California state courts unless inconsistent with the federal constitution or the state constitution or statutes and the doctrine of *stare decisis*.

Respondents demurred primarily on the ground the trial court lacked subject matter jurisdiction because the Supreme Court alone is vested with the responsibility to regulate the publication of Court of Appeal opinions.

The trial court sustained the demurrer without leave to amend and ordered the case dismissed.

DISCUSSION

* * *

II

The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. The consistency of a rule is tested against the statutory scheme the rule was intended to implement.

California Constitution, article VI, section 14 requires the Legislature to provide for the prompt publication of such opinions of the Courts of Appeal "as the Supreme Court deems appropriate." Government Code section 68902 states: "Such opinions . . . of the courts of appeal . . . as the Supreme Court may deem expedient shall be published in the official reports [which] shall be published under the general supervision of the Supreme Court." The broad constitutional and legislative authority granting the Supreme Court selective publication discretion manifests a

policy that California's highest court, with its supervisory powers over lower courts, should oversee the orderly development of decisional law, giving due consideration to such factors as (a) "the expense, unfairness to many litigants, and chaos in precedent research," if all Court of Appeal opinions were published, and (b) whether unpublished opinions would have the same precedential value as published opinions. By providing the mechanism for realizing this policy, the rules are consistent with the statutory scheme they were intended to implement.

Contrary to appellant's assertion, the rules do not conflict with Civil Code section 22.2 * * *. As used in this statute, "common law of England" refers to "the whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted." Common law is now largely codified in California, and statutes are presumed to codify common law rules, absent clear language disclosing an intent to depart therefrom.

However, neither the Legislature nor the courts are precluded from modifying or departing from the common law, and frequently do. A well-known departure, for example, is the community property system, whereby the Legislature incorporated Spanish law rather than the English common law rules pertinent to the marital estate. Similarly, the Legislature enacted a system of discovery in civil cases by substantially adopting the federal rules of discovery, which in turn established a pretrial fact-finding mechanism with a breadth not contemplated at common law.

Appellant has not cited and we are unaware, of any common law rule governing the publication or citation of opinions. To the extent appellant suggests that the common law of England requires that all appellate decisions will be published and may be cited as authority, such a rule is inconsistent with the constitution and laws of this state, including the rules of court, which have the force of positive law. "As a rule of conduct, [common law] may be changed at the will of the [L]egislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state's decisional law.

Nor do the rules contravene the doctrine of stare decisis, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. Although the doctrine embodies an important social policy by representing an element of continuity in law and serving the psychological need to satisfy expectations, it is a principle of judicial policy, not a rule of constitutional or statutory dimension. Therefore, the Supreme Court—California's highest court—is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the stare decisis doctrine.

Relying principally on *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481, appellant claims the rules violate the constitutional guarantees of due process and equal protection by creating a system of selective prospectivity that allows courts to create a new rule of law applicable to a single case. As articulated in *Beam*, selective prospectivity occurs when a court expressly overrules a decisional precedent, but applies the new rule only to the case in which the new rule is announced, returning to the old rule with respect to all other cases arising on facts predating the pronouncement of the new rule. *Beam* held that in civil as well as criminal cases, when the court applies a new rule of law to litigants in one case, “it must do so with respect to all others not barred by procedural requirements or *res judicata*.” As *Beam* also observed, opinions that overrule precedent are rare. “In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.”

The rules protect against selective prospectivity by providing a uniform and reasonable procedure to assure that actual changes to existing precedential decisions are applicable to all litigants. They require that *all* opinions of the state’s highest court be published. (Rule 8.1105(a).) They establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published. (Rule 8.1105(c).) They permit any member of the public to request the Court of Appeal to publish an opinion and, if the request is denied, require the Supreme Court to rule thereon. (Rule 8.1120.) In short, the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in *Beam* that most opinions do not change the law. If appellant’s view prevailed, the Supreme Court would be unable to decertify opinions for publication, which would seriously compromise its ability to control the direction of appellate precedent.

* * *

Finally, in closing, we address appellant’s erroneous notion that nonpublication equates with secrecy. It hardly needs mentioning that opinions, rulings and orders of the Court of Appeal are public records, open to all. Indeed, the nonpublished opinions are not only available to the public, but frequently become the subject of media broadcasts and publications. One can now track the progress of cases in the First District through the internet, and the other appellate districts will soon be online as well. The fact that opinions are not published in the Official Reports means nothing more than that they cannot be cited as precedent

by other litigants who are not parties thereto. But they are certainly available to any interested party.

* * *

DISPOSITION

The judgment of dismissal is affirmed.

Notes and Questions

1. The Court of Appeal rejected *Schmier*'s arguments and upheld the validity of the CRC publication rules. Do you think the court's opinion effectively responded to *Schmier*'s concern that enforcement of the state's publication and citation rules removes valuable appellate authority from the public's reach?

2. *Schmier* has subsequently made use of the legal literature and the press to advocate for a change in California law which would permit citation to unpublished opinions. See Kenneth J. *Schmier* and Michael K. *Schmier*, *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 *J.L. & Soc. Challenges* 233 (2005); Kenneth J. *Schmier* and Michael K. *Schmier*, *Justices Carve Exception to the No-Citation Rule*, *San Francisco Recorder* at 4 (Nov. 4, 2005); and Mike *Schmier*, *People Deserve the Right to Cite from Unpublished Decisions*, *San Francisco Daily Journal* at 4 (May 10, 2004). For additional perspectives on California's publication and citation rules, see Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 *Cal.L.Rev.* 514 (1984) (former justice of California Supreme Court); Stephen Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 *J.App.Prac. & Process* 473 (2003); and J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 *Ariz. L.Rev.* 419 (2005).

3. CRC 8.1105 has been amended since *Schmier* to clarify and expand the criteria used by the courts of appeal in deciding whether to certify an opinion for publication. The amended rule, effective as of April 2007, replaces the former presumption against publication with a presumption in favor of publication if the opinion meets one or more of the criteria specified in CRC 8.1105(c). Besides the criteria mentioned in *Schmier*, the revised rule permits a Court of Appeal opinion to be certified for publication on several additional grounds, such as when the opinion "[i]nvoles a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision;" or when it "[a]dvances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule." CRC 8.1105(c). The certifying court may not consider factors such as workload of the court or potential embarrassment in determining whether to order publication. CRC 8.1105(d). What impact do you think the current version of the rule might have on the percentage of Court of Appeal decisions certified for publication?

4. Does (or should) CRC 8.1105—California’s “no-citation” rule—prohibit citation to unpublished federal opinions? See *Harris v. Investor’s Business Daily, Inc.*, 138 Cal.App.4th 28, 41 Cal.Rptr.3d 108 (2006). What about citations to unpublished decisions from other states? See *Lebrilla v. Farmers Group, Inc.*, 119 Cal.App.4th 1070, 16 Cal.Rptr.3d 25 (2004).

5. Federal Rule of Appellate Procedure (FRAP) 32.1 permits citation in all federal circuits of federal opinions, orders, judgments and other written dispositions issued after January 1, 2007, even if they have been designated as unpublished or non-precedential. FRAP 32.1 continues to be the source of controversy among some judges and practitioners (including several within the Ninth Circuit) who believe that unpublished opinions have less substantive value than those decisions selected for publication and therefore should not be citable. Ninth Circuit Rule 36–3 has been revised to achieve consistency with FRAP 32.1 while continuing (with limited exceptions) to prohibit citation of pre-2007 unpublished Ninth Circuit opinions. Several commentators have grappled with the impact of FRAP 32.1 on the federal courts. See, e.g., Bryan Wright, *But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit’s Massive Caseload Post F.R.A.P. 32.1*, 7 Nev.L.J. 239 (2006); and Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and the New Federal Rule of Appellate Procedure 32.1*, 47 B.C.L.Rev. 705 (2006). Which approach to dealing with citation of unpublished opinions—California or federal—do you believe is more sound?

Rules of Court. While the FRCP and FRAP have nationwide application, each state is free to adopt its own set of court rules. See Glenn Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-making Process*, 58 Vanderbilt L.Rev. 1167 (2005). The CRC are California’s statewide rules of court. They work in tandem with the CCP in addressing procedural matters.

The CCP provides the statutory authority for the CRC. CCP § 575 states that the “Judicial Council may promulgate rules governing pre-trial conferences, and the time, manner and nature thereof, in civil cases at issue * * * in the superior courts.” At the appellate level, CCP § 901 provides that the “Judicial Council shall prescribe rules for the practice and procedure on appeal.”

Article VI, section 6 of the California Constitution authorizes the existence and spells out the authority of the Judicial Council. To satisfy its constitutional mandate “[t]o improve the administration of justice,” the Judicial Council is authorized to “adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.” Under

this authority, the Judicial Council drafts and frequently amends the CRC.

The 29-member Judicial Council, chaired by the Chief Justice of the California Supreme Court, includes 14 trial and appellate judges appointed by the Chief Justice, two legislators, four attorneys appointed by the State Bar, and eight advisory members from the California Judges Association and state court administrative agencies. The work of the Judicial Council and its administrative organ is described in CRC 10.1–10.101.

The role of the Judicial Council is similar to that of the various federal rules committees and the Judicial Conference of the United States. These institutions make new procedural rules and amend the old ones, after an opportunity for public comment. As you may have studied in your first civil procedure course, the Standing Committee on Rules of Practice and Procedure proposes amendments to the FRCP and the other federal rules to the Judicial Conference. These proposals are published for comment from practitioners, judges and professors. The final version of a new FRCP is ultimately submitted to the United States Supreme Court for its approval. Amendments to the FRCP become valid several months after the Court forwards the proposed rules to the Congress for legislative acquiescence or rejection. See FRCP 86; 28 USC § 2074. For example, the United States Judicial Conference and the Supreme Court approved extensive stylistic changes to the FRCP, effective December 2007, for the purpose of improving clarity and consistency. The process of amending the FRCP is discussed in Richard L. Marcus, *Reform Through Rulemaking?*, 80 Wash.U.L.Q. 901 (2002).

California's statewide court rules are divided into ten titles: (1) Rules Applicable to All Courts; (2) Trial Court Rules; (3) Civil Rules; (4) Criminal Rules; (5) Family and Juvenile Rules; (6) Reserved (for future use); (7) Probate Rules; (8) Appellate Rules; (9) Rules on Law Practice, Attorneys, and Judges; and (10) Judicial Administration Rules. Additional CRC provisions contain Standards of Judicial Administration and a Code of Judicial Ethics.

The principal purpose of the CRC is to clarify and augment the more general provisions of the Code of Civil Procedure and other California codes. For example, CCP § 284 authorizes a court to order that the attorney in an action or special proceeding may be changed at any time. Attorneys rely on this rule to terminate the attorney-client relationship for a variety of reasons, including conflicts of interest. The CCP is silent, however, about the specific procedural requirements. CRC 3.1362 provides important details, such as to whom to direct the motion, upon whom notice must be served, and how to state the attorney's reasons for seeking a substitution.

California's constitutional mandate that the California Rules of Court not be inconsistent with statute has been the source of some confusion. The following case illustrates how one rule of court ran afoul of the constitutional requirement:

From the Teacher's Manual which accompanies

Cases and Materials on California Civil Procedure, 3d (American Casebook Series) Thompson West; David I. Levine, William R. Slomanson, Rochelle J. Shapell (2008)

* * *

SCHMIER v. SUPREME COURT OF CALIFORNIA, p. 8

Schmier focuses on an issue of concern to many practitioners and legal scholars: whether all decisions of the California courts of appeal should be published and available for citation. In Schmier, the Court of Appeal examined various California Rules of Court (CRC) that permit Court of Appeal decisions to be withheld from publication if they do not satisfy the criteria stated in CRC 8.1105(c). An unpublished appellate opinion cannot be cited as precedent except under limited circumstances. CRC 8.1115.

The authority of the Judicial Council of California to enact and enforce the CRC is frequently the subject of controversy because some court rules are perceived to improperly conflict with constitutional or statutory authority. (See *Trans-Action*, *infra*.) Students might wish to explore whether the publication rules in the CRC are inconsistent with the legislative authority given to the California Supreme Court to exercise selective publication discretion.

The publication rules place significant power and discretion in the hands of the California Supreme Court. For example, CRC 8.1105(d)(1) permits the Supreme Court to order nonpublication even if a majority of the Court of Appeal panel rendering the opinion has certified that it meets the standards of CRC 8.1105(c). The rules do not require the Supreme Court to state the reasons for its nonpublication order.

The Schmier court addressed a number of arguments made by the appellant and others in favor of wider publication, but it ultimately concluded that the publication rules are valid. The court believed that the rules serve important purposes by authorizing reliance on only those cases with adequate precedential value and reducing the number of cases with little relevance outside the interests of the parties involved in the case. The court also refuted the appellant's argument that the nonpublication of some appellate decisions creates secrecy; the court asserted that all Court of Appeal decisions are largely available through online and other sources, to be read and digested by anyone who finds them useful.

There are strong feelings on both sides of this issue among attorneys and judges in state and federal courts. Students should be encouraged to explore all perspectives in the debate.

Notes and Questions, p. 12

Note 1. Mr. Schmier advocates for complete publication and citeability of all Court of Appeal decisions, and he opposes the more restrictive approach envisioned by the CRC (and approved of in Schmier).

Note 2. In addition to the articles written by Kenneth and Michael Schmier, Kenneth Schmier has established a website to advocate for changes to the California rules governing publication and citation. It can be found at < www.NonPublication.com >.

Note 3. Students should be encouraged to discuss the soundness of the policies underlying the no-publication/no-citation rules, the power given to the California Supreme Court to determine which Court of Appeal decisions will be published, the implications of allowing or prohibiting citation to unpublished cases (some of which might be of great use in a litigant's proceeding), the impact of the wide availability of unpublished cases on the Internet, and the comparison of California's "no-citation" rule to the recently amended federal version (FRAP 32.1) (see Note 5, below).

The April 2007 amendment of Rule 8.1105 removed the previous presumption of non-publication and adopted a presumption of publication. Students should discuss whether this is a distinction without a difference, or whether the presumption of publication might instead serve to increase the number of Court of Appeal opinions that are ultimately certified for publication.

Note 4. Harris states that CRC 8.1115 (formerly CRC 977) does not apply to citation of unpublished federal cases. Lebrilla confirms that unpublished out-of-state opinions "can be cited without regard to their publication status."

Note 5. FRAP 32.1 clears up the ambiguity surrounding whether unpublished federal opinions are citable in the federal courts. But its reach is limited. It is a citation rule. It permits citation of opinions and dispositions issued after January 1, 2007, that have been designated as unpublished or non-precedential. The rule does not address what criteria a court should use in designating an opinion as unpublished or non-precedential, and it does not instruct on how to determine the weight or precedential value to be given to an unpublished opinion. Ninth Circuit Rule 36-3 prohibits citation to the courts of the Ninth Circuit of all unpublished dispositions "of this Court" issued before January 1, 2007. In contrast to FRAP 32.1, which does not address whether unpublished opinions have precedential value, Ninth Circuit Rule 36-3(a) specifically states that unpublished dispositions are not precedent.

In California, if the certification criteria listed in CRC 8.1105(c) apply to an opinion, it becomes citable precedent under CRC 8.1115 by virtue of its certification for publication. "The publication decision should be based solely on the value of an opinion as legal precedent." California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Report and Recommendations, Nov. 2006.

Students may wish to debate whether the FRAP or CRC would permit more liberal citation to unpublished opinions. They may also wish to speculate on the impact on the California courts if California adopted a citation rule like FRAP 32.1.

* * *

138 Cal.App.4th 28, 41 Cal.Rptr.3d 108, 06 Cal. Daily Op. Serv. 2685, 2006 Daily Journal D.A.R. 3775
(Cite as: 138 Cal.App.4th 28, 41 Cal.Rptr.3d 108)

Court of Appeal, Second District, Division 4, California.
Toby HARRIS et al., Plaintiffs and Appellants,
v.
INVESTOR'S BUSINESS DAILY, INC., et al., Defendants and Respondents.
No. B178428.

March 29, 2006.

As Modified on Denial of Rehearing April 24, 2006.
Review Denied June 28, 2006.

Background: Telemarketing employees who sold newspaper subscriptions brought wage-and-hour class action lawsuit against employer, alleging violations of federal and state labor laws. The Superior Court, Los Angeles County, No. BC269313, Rodney E. Nelson, J., sustained employer's demurrer to unfair competition cause of action, and granted employer summary adjudication as to other causes of action. Employees appealed.

Holdings: The Court of Appeal, Epstein, P.J., held that:

- (1) cause of action alleging violations of the Fair Labor Standards Act (FLSA) under state unfair competition statute was not preempted by FLSA opt-in requirement;
- (2) fact issue remained whether employees were subject to commission exemption from overtime; and
- (3) fact issue remained whether employer's charge-back plan violated statute.

Reversed and remanded.

West Headnotes

[1] Antitrust and Trade Regulation 29T 132

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk132 k. Preemption. Most Cited Cases
(Formerly 382k401 Trade Regulation)

States 360 18.84

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.83 Trade Regulation; Monopolies
360k18.84 k. In General. Most Cited

Cases

Telemarketing employees' state law unfair competition class action against employer, predicated on alleged violations of federal overtime laws of Fair Labor Standards Act (FLSA), was not preempted by FLSA opt-in provision requiring potential class members to affirmatively join action, notwithstanding traditional opt-out class actions available under state law; intent of opt-in provision was to protect employers from payments of windfall liquidated damages to employees, and these concerns were absent from state law action limited to restitution. Fair Labor Standards Act of 1938, §§ 7, 16, 29 U.S.C.A. §§ 207, 216; West's Ann.Cal.Bus. & Prof.Code § 17200.

[2] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

Appeal and Error 30 917(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k917 Demurrers
30k917(1) k. In General. Most Cited

Cases

On appeal from an order sustaining a demurrer without leave to amend, the Court of Appeal gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded.

[3] Antitrust and Trade Regulation 29T 125

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk125 k. In General. Most Cited Cases

(Formerly 382k403 Trade Regulation)

An action based on unfair competition statute borrows violations of other laws when committed pursuant to business activity. West's Ann.Cal.Bus. & Prof.Code § 17200.

[4] States 360 18.13

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.13 k. State Police Power. Most

Cited Cases

Supremacy Clause requires courts to find federal preemption of state law where it is clear that Congress, in exercising its constitutional power, intended to eclipse the historic police powers of the state. U.S.C.A. Const. Art. 6, cl. 2.

[5] States 360 18.3

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.3 k. Preemption in General. Most

Cited Cases

There are three generally recognized types of federal preemption of state law: "express preemption" occurs where Congress expressly defines extent to which federal provision preempts state law, preemption also occurs when area is so broad and pervasive that it appears Congress intended federal law to occupy the field, and "conflict preemption" occurs where it is impossible for private party to comply with both state and federal requirement or state law stands as obstacle to accomplishment of congressional objectives.

[6] States 360 18.11

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.11 k. Congressional Intent. Most Cited Cases

To determine whether federal law preempts state law, courts look to the express or implicit intent of Congress.

[7] Courts 106 97(5)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k97 Decisions of United States Courts as Authority in State Courts

106k97(5) k. Construction of Federal Constitution, Statutes, and Treaties. Most Cited Cases

Courts 106 107

106 Courts

106II Establishment, Organization, and Procedure

106II(K) Opinions

106k107 k. Operation and Effect in General. Most Cited Cases

Court of Appeal may consider the opinions of federal courts when construing federal statutes, and even unpublished federal opinions have persuasive value, as they are not subject to state court rule that bars citation of unpublished California opinions. Cal.Rules of Court, Rule 977.

[8] Judgment 228 185.3(13)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(13) k. Labor and Employment. Most Cited Cases

Fact issue remained, precluding summary adjudication for employer as to telemarketing employees' cause of action for unpaid overtime, whether employees were subject to exemption from overtime protection for employees whose earnings exceeded one and one-half minimum wage if more than half their compensation represented commissions; points employees earned for newspaper subscriptions sold were not commissions, and thus employer failed to

138 Cal.App.4th 28, 41 Cal.Rptr.3d 108, 06 Cal. Daily Op. Serv. 2685, 2006 Daily Journal D.A.R. 3775
(Cite as: 138 Cal.App.4th 28, 41 Cal.Rptr.3d 108)

show either that employees received more than half of their compensation through commissions and, in light of absence of payroll evidence, that they received more than one and one-half times minimum wage. West's Ann.Cal.Labor Code §§ 204.1, 510(a); 8 CCR § 11040.

See 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, §§ 360, 361, 382, 398; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2005) ¶ 11:415 et seq. (CAEMPL Ch. 11-D); Cal. Jur. 3d, Labor, § 108; Cal. Civil Practice (Thomson/West 2003) Employment Litigation, § 420 et seq.

[9] Labor and Employment 231H ↪2269

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)3 Exemptions

231Hk2269 k. Retail or Service Establishments. Most Cited Cases

Employer's payments to telemarketing employees for newspaper subscriptions sold, under point system based on type of subscription sold rather than percentage of price, did not constitute "commissions" for commissions exemption from overtime pay requirements. West's Ann.Cal.Labor Code §§ 204.1, 510(a); 8 CCR § 11040.

[10] Judgment 228 ↪185.3(13)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(13) k. Labor and Employment. Most Cited Cases

Fact issue remained whether employer's chargeback plan, in which telemarketing employees were charged back points they had earned when customers cancelled purchased newspaper subscriptions within 16 weeks, violated statute preventing employer from taking back any wages from employee after they were earned, thereby precluding summary adjudication for employer as to employees' causes of action alleging plan was unlawful and unconscionable; employer's statement of plan did not clearly state that payment of points were advanced payment of commission that would not be earned until 16 weeks sub-

scription elapsed. West's Ann.Cal.Labor Code §§ 200, 221.

[11] Labor and Employment 231H ↪2187

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2186 Deduction and Forfeiture

231Hk2187 k. In General. Most Cited Cases

The statute preventing an employer from taking back any wages from an employee after they are earned illustrates California's strong public policy favoring the protection of employees' wages. West's Ann.Cal.Labor Code § 221.

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Law Office of Marjorie G. Fuller, Marjorie G. Fuller, Fullerton, Vicki Marolt Buchanan; Silver & Freedman, Belle C. Mason, Los Angeles, and Stephen M. Bernardo, for Defendant and Respondent.

EPSTEIN, P.J.

***31** In this wage-and-hour class action lawsuit, telemarketers who sold newspaper subscriptions alleged violations of federal and state labor laws. The principal issues on appeal are: (1) whether a federal Fair Labor Standards Act ^{FN1} (FLSA) claim may serve as the predicate act for a California Business and Professions Code section 17200 (section 17200) cause of action; (2) whether the employees qualified for the commission exemption from California overtime laws; and (3) whether the employer lawfully deducted points employees had earned from a sale if the customer later cancelled the subscription. Finding the FLSA does not preempt the section 17200 claim, we conclude the trial court improperly sustained the demurrer to that cause of action. We find triable issues of material fact exist as to the remaining claims and reverse the judgment as to those causes of action.

FN1. Title 29 United States Code section 207(a)(1).

FACTUAL AND PROCEDURAL SUMMARY

Appellants Toby Harris, Kevin O'Connor, Michael Sandercock, Alex Lane, and Michael Bey were employed as telemarketers to sell subscriptions to a financial newspaper, Investor's Business Daily, Inc. (IBD). IBD sold subscriptions through Direct Marketing Specialists, Inc. (DMSI).

Appellants were compensated on the basis of a point system which rewarded them for selling longer subscriptions, winning daily contests, and meeting weekly sales goals. Appellants were subject to a "chargeback"—a deduction from points earned on a sale if the customer cancelled the subscription within 16 weeks. The compensation plan provided that employees would be paid the greater of commissions earned on paid subscription sales or the prevailing minimum wage for hours worked.

In March 2002, appellants filed a class action lawsuit against IBD, DMSI, Data Analysis, Inc., and William O'Neil & Co., Incorporated alleging claims under the California Labor Code for overtime pay, unlawful commission deductions, and waiting penalties, and for unfair competition pursuant to section 17200. Harris sought individual damages for wrongful termination. The complaint requested certification of two classes—one for the chargebacks and one for overtime violations. A class was certified for the chargeback claim in September 2003.

Respondents moved for summary judgment or summary adjudication as to all causes of action except Harris's individual claim. Appellants filed a second amended complaint, adding a new claim under section 17200, alleging *32 violations of the FLSA. Respondents demurred and moved to strike the new claim. The trial court sustained the demurrer to the new section 17200 claim without leave to amend, dismissed without prejudice the seventh cause of action alleging violations of California's Private Attorneys General Act, ^{FN2} severed Harris's individual claim, and **111 granted summary adjudication on all other causes of action.

FN2. Labor Code sections 2698-2699.

Appellants filed a timely appeal.

DISCUSSION

I

[1] Appellants argue that the trial court erred in sustaining respondents' demurrer on the unfair competition cause of action, which alleged violation of federal overtime laws. They assert that an FLSA violation may serve as the predicate act for a section 17200 claim. Respondents argue that the claim is preempted by the FLSA because traditional opt-out class actions are available under the California law, while, under FLSA, class members must opt in.

[2] On appeal from an order sustaining a demurrer without leave to amend, we give the complaint a reasonable interpretation, and treat the demurrer as admitting all material facts properly pleaded. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, 119 Cal.Rptr.2d 709, 45 P.3d 1171.)

The cause of action at issue is a claim for unpaid federal overtime pursuant to 29 United States Code section 207. This section requires potential class members to affirmatively join the action: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." (29 U.S.C. § 216(b).) The FLSA establishes a floor for wage-and-hour requirements, but expressly contemplates that other laws may increase those minimum requirements. A "savings clause" provides that nothing in the FLSA "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter." (29 U.S.C. § 218(a).)

[3] Appellants' eighth cause of action was based on section 17200, which allows recovery for "any unlawful, unfair or fraudulent business act or practice...." An action based on this state statute "borrows" violations of *33 other laws when committed pursuant to business activity. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730.)

At the time this case was filed, section 17200 permitted representative actions. The statute was amended

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in November 2004 by Proposition 64. It now requires that relief may be sought only by persons who have themselves suffered injury, and a representative claim requires class certification under the Code of Civil Procedure section 382. (Bus. & Prof.Code, § 17203.) The retroactivity of Proposition 64 is currently pending before the Supreme Court in *Branick v. Downey Savings & Loan Assn.* (2005) 24 Cal.Rptr.3d 406, review granted April 27, 2005, S132433. [See 39 Cal.4th 235, 46 Cal.Rptr.3d 66, 138 P.3d 214]. The issue was not before the trial court and was discussed only in a footnote in the argument before us. Assuming but not deciding that Proposition 64 does not affect the present controversy, we proceed to the merits.

[4][5][6] The supremacy clause of the United States Constitution requires courts to find federal preemption of state law where it is clear that Congress, in exercising its constitutional power, intended to eclipse the historic police powers of the state. (U.S. Const., art. VI, cl. 2; *Gibbons v. Ogden* (1824) 22 U.S.(9 Wheat) 1, 9, 6 L.Ed. 23; *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352.) There are three generally recognized types of preemption. Express preemption occurs where Congress expressly defines the extent to which a federal provision preempts state law. (See *Crosby v. National Foreign Trade Council*, *supra*, at p. 372, 120 S.Ct. 2288.) Courts also find preemption **112 when federal regulation of an area is so broad and pervasive that it appears Congress intended federal law to occupy the field. (*United States v. Locke* (2000) 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69.) Finally, conflict preemption occurs: (1) where it is impossible for a private party to comply with both a state and federal requirement, or (2) the state law stands as an obstacle to the accomplishment of the congressional objectives. (*Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385.) To determine whether federal law preempts state law, we look to the express or implicit intent of Congress. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567, 59 Cal.Rptr.2d 186, 927 P.2d 296.)

[7] Respondents assert that conflict preemption is applicable here, since it is impossible to comply with both the opt-in provision of FLSA and the opt-out requirement of section 17200. We disagree.^{FN3} Congress amended the FLSA to prohibit any employee

from pursuing an FLSA claim “unless he *34 gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” (29 U.S.C. § 216(b).) The legislative history clearly indicates that the purpose of the amendment was to protect employers from facing “financial ruin” and prevent employees from receiving “windfall payments, including liquidated damages.” (29 U.S.C. § 251(a); see also *Hoffmann-La Roche Inc. v. Sperling* (1989) 493 U.S. 165, 173, 110 S.Ct. 482, 107 L.Ed.2d 480 [congressional intent behind FLSA opt-in procedure was to limit private plaintiffs due to an influx of litigation].) These concerns, however, are absent in a section 17200 action limited to restitution. We have found no federal opinion questioning this rationale. In fact, the weight of federal authority supports appellants' contention that the section 17200 claim is not preempted by FLSA. We may consider the opinions of federal courts when construing federal statutes (*Flynt v. California Gambling Control Com.* (2002) 104 Cal.App.4th 1125, 1132, 129 Cal.Rptr.2d 167, and even unpublished federal opinions have persuasive value in this court, as they are not subject to California Rules of Court, rule 977, which bars citation of unpublished California opinions. (*City of Hawthorne ex rel. Wohlner v. H & C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1678, 1 Cal.Rptr.3d 312.)

FN3. The court requested letter briefs on whether preemption is applicable to the named plaintiffs. Since we have decided that preemption does not apply, we need not specifically address that further issue.

Appellants rely on an apparently unreported recent case, *Bahramipour v. Citigroup Global Markets, Inc.* (N.D.Cal. Feb. 22, 2006, No. C 04-4440 CW) 2006 WL 449132, which is expressly on point. A former securities broker filed a claim against her employer under section 17200 based upon violations of the FLSA. She sought restitutionary damages for wage-and-hour violations. The court rejected the employer's argument that the opt-out class certification procedure sought by the plaintiff in her section 17200 claim was preempted by the FLSA opt-in requirements. It reasoned that the section 17200 opt-out procedure does not conflict with the congressional purpose in enacting the FLSA, as amended by the Portal-to-Portal Act, because legislative concerns about liquidated damages and large payments are obviated in

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a section 17200 suit limited to restitution. (*Bahramipour v. Citigroup Global Markets, Inc.*, *supra*, 2006 WL 449132 at pp. *4-5.)

****113** Appellants also rely on *Barnett v. Washington Mutual Bank* (N.D.Cal. Sept. 9, 2004, No. C 03-00753 CRB) 2004 WL 2011462, another unreported district court decision. In that case, bank personnel who sold home mortgage loans over the telephone claimed violations of section 17200 predicated on state and FLSA labor regulations. On the preemption issue, the court held that, to the extent it was based on violations of the FLSA, the claim was not preempted “in light of the [FLSA’s] savings clause and in the absence of a clear indication from Congress to the contrary.” (*Barnett v. Washington Mutual Bank*, *supra*, 2004 WL 2011462 at p. *6.) The court reasoned that the FLSA is not an exclusive remedy for claims “duplicated by or equivalent of rights” covered by the FLSA. (*Ibid.*) The court also noted that the claim could be characterized as a state wage claim and hence fall within the FLSA’s savings clause.

***35** *Stokes v. Saga Int’l. Holidays, Ltd.* (D.Mass.2003) 218 F.R.D. 6, dealt only with the constitutionality of section 17200. Employees alleged violations of the FLSA, California Labor Code provisions, and section 17200, the California unfair competition law. The defendants claimed that a representative action pursuant to section 17200 offends due process because it fails to provide notice to the unnamed plaintiffs. The court rejected this claim, holding that the court may resolve any due process concerns by implementing protections on a case-by-case basis. (*Stokes*, *supra*, at pp. 11-12.)

In *Kelley v. SBC* (N.D.Cal.1998) 5 Wage & Hour Cas.2d (BNA) 16, the plaintiffs brought two causes of action for overtime violations—one under the FLSA and another under the Labor Code. They also alleged a violation of section 17200. The court dismissed the unfair competition cause of action because, at that time, section 17200 authorized only restitution or injunctive relief, not damages for unpaid wages. In granting the plaintiffs’ request for class certification on the pendent state law claims (under the Labor Code), the court rejected the defendants’ argument that Federal Rules of Civil Procedure, rule 23 is inapplicable to actions under the FLSA because that rule contains opt-out provisions while the FLSA specifies an opt-in provision. The court reasoned that

because the two causes of action were similar, the classes would not “alter the substance of the litigation nor unduly complicate the process.” (*Kelley*, *supra*, at p. 38.) The result was that two separate classes coexisted in one lawsuit, one asserting federal claims and one asserting state claims.

Similarly, in *Aguayo v. Oldenkamp* (E.D.Cal. Oct. 3, 2005, No. CV F 04-6279 ASI LJO) 2005 WL 2436477, the court allowed the certification of two classes, one for FLSA claims and one for unfair competition claims. The court rejected defendant’s preemption argument, holding that section 17200 did not stand as an obstacle to accomplishment of congressional objectives. The court explained that section 17200 promotes the FLSA’s purpose to protect workers from labor violations. *Tomlinson v. Indymac Bank, F.S.B.* (C.D.Cal.2005) 359 F.Supp.2d 898, 900-902, presents similar facts and reasoning. There, the district court held that an FLSA claim under section 17200 was not barred by the opt-in procedural requirement because the section 17200 remedy was limited to restitution, and therefore did not frustrate the legislative purpose behind the opt-in requirement—to prevent financial ruin for employers and windfall payments to employees. The court found no legislative intent to forbid states from permitting claims for overtime wages by employees who have not opted into a representative class.

****114** Federal courts are split as to whether to extend supplemental jurisdiction in the context of class action lawsuits involving a federal opt-in class and a state opt-out class. Appellants point to cases extending jurisdiction over an entire state law class, regardless of whether each individual member has opted into ***36** the FLSA class. (*See, e.g., Ansoumana v. Gristede’s Operating Corp.* (S.D.N.Y.2001) 201 F.R.D. 81 [court exercised supplemental jurisdiction over federal FLSA claims and state minimum wage claims]; *Ramirez v. NutraSweet Co.* (N.D.Ill. Sept. 11, 1996, No. 95 C 130) 1996 WL 529413 [court certified class on breach of contract claim where other claims were under FLSA and state minimum wage act]; *Krueger v. New York Telephone Co.* (S.D.N.Y.1995) 163 F.R.D. 433, rejected by *Bayles v. American Medical Response of Colorado* (D.Colo.1996) 950 F.Supp. 1053 [court authorized collective action for FLSA claims and certified second class for other state and federal claims]; *Leyva v. Buley* (E.D.Wash.1989) 125 F.R.D. 512 [same].)

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Appellants cite additional cases in their reply brief. In *Bureerong v. Uvawas* (C.D.Cal.1996) 922 F.Supp. 1450, 1477-1478, the court held that the FLSA does not preempt a claim for unfair business practices under section 17200, where the claim included violations of federal and state labor laws. The court referenced the savings clause in support of its decision. Appellants also rely on several employment contract cases: *Avery v. City of Talladega, Ala.* (11th Cir.1994) 24 F.3d 1337, 1348 [state law contract claim not preempted by FLSA because the contract incorporated FLSA and therefore provided no greater rights]; *Hammond v. Lowe's Home Centers, Inc.* (D.Kan.2004) 316 F.Supp.2d 975 [breach of contract claim not preempted by FLSA where employer agreed to provide more protection than FLSA requires, as the statute of limitations for a contract claim is longer than for an FLSA claim].

In light of the federal authority discussed above, we hold that a single cause of action alleging violations of the FLSA under section 17200 is not preempted by the FLSA opt-in requirement. Therefore, we shall reverse the order dismissing this cause of action.

II

[8] Appellants argue the trial court erred in granting summary adjudication on the overtime cause of action because they raised a material issue of fact as to whether they were subject to the commission exemption from California overtime protections.

We review an appeal from a grant of summary adjudication de novo. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 38 Cal.Rptr.3d 36.) The moving party bears the burden of showing that there is no triable issue of material fact and that he or she is entitled to judgment as a matter of law. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 38 Cal.Rptr.3d 653.) We view the evidence and reasonable inferences from the evidence in the light most favorable to the opposing party. (*Ibid.*)

*37 The California law mandates that all employees who work in excess of eight hours in one workday or in excess of 40 hours in one workweek receive overtime pay. (Lab.Code, § 510, subd. (a).) This provision does not apply to any employee “whose earnings

exceed one and one-half ... the minimum wage if more than half of that employee's compensation represents commissions.” (Cal.Code Regs, tit. 8, § 11040, subd. 3(D), italics added.) A commission is compensation paid for services rendered in the sale of property and services, and “based proportionately upon ****115** the amount or value thereof.” (Lab.Code, § 204.1.) In *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 803-804, 85 Cal.Rptr.2d 844, 978 P.2d 2(*Ramirez*), the Supreme Court defined two essential requirements for finding that a compensation scheme involves commissions: (1) that the employees are involved in selling a product or service, and (2) that the amount of compensation is “a percent of the price of the product or service.” “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption.” (*Id.* at pp. 794-795, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

There is no dispute that appellants sold a product-subscriptions to IBD. Whether all or part of their compensation may be characterized as a commission depends on whether they were paid on the basis of a percentage of the price of subscriptions sold. The employees were paid on a point system based on the number of points earned. Employees received a certain number of points for each type of subscription sold. For example, an employee received 0.25 points for a 13-week subscription. Employees also received points for winning sales contests, called “spiffs,” and were eligible for fixed monetary bonuses if they sold a specified number of points at certain levels. As employees earned more points, the value of the points increased. Employees were paid \$15.80 per point for the first 9.99 points earned, \$22.30 for the next 10 to 16.99 points, and so on. The point values were not tied to the price of the subscription sold.

Appellants presented the declaration of an expert, Dean S. Barron, to demonstrate that the point system was not a commission compensation scheme. Based on a random sample of 280 out of approximately 18,000 time cards, Barron concluded that the employees were paid “on [a] combination of sales points, incentive points (‘SPIFF’), adjustment points, an apparent qualitative point adjustment (‘(Less) Points Ovr 25%’), 40/80 commission, daily graphs, adjustment amount, bonus, charge-backs, carried over deductions, and other factors.” He also stated

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that “[a] true commission basis would characteristically feature a commission amount that is directly related to the dollar amount of the product or services sold.”

Objections were made to the declaration in the trial court based on Barron's qualifications and methodology. None is raised on appeal, and we consider Barron's declaration and assume he presented a sufficient foundation for his opinions. (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty *38 Co.* (2005) 133 Cal.App.4th 1197, 1217, 35 Cal.Rptr.3d 411; and see Code Civ. Proc., § 437(c), subs. (b) & (c); *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, 91 Cal.Rptr.2d 35, 989 P.2d 121, disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

Respondents challenge whether compensation must be a percent of the product price to qualify as a commission payment. They argue that commission compensation may be based on “value,” a term that goes beyond price to include “worth, merit and importance.” As has been discussed, our Supreme Court has interpreted the statute to mean that the amount of compensation “must be a percent of the price of the product or service.” (*Ramirez, supra*, 20 Cal.4th at p. 804, 85 Cal.Rptr.2d 844, 978 P.2d 2.) We decline respondents' invitation to expand the meaning of the term. In any event, “value” is too vague a standard. The term encompasses a broad range of meanings. Respondents point to its dictionary definition of “worth, merit ****116** and importance.” A term this broad is not useful in establishing a universal standard governing commission exemptions.

[9] Respondents also argue that whether the points constitute commission payments is a question of law because the facts describing the point system are undisputed. They contend that the only contested issue is the interpretation of Labor Code section 204.1. We agree with respondents that if the facts are undisputed, the conclusion is a question of law. Respondents presented a chart showing that points are based on the type of subscriptions sold. There was no showing that the points are tied to a particular price. A six-month subscription may result in more points than a one-year subscription, but there is no evidence that all subscriptions for the same period are sold at the same price. As we have seen, Barron's declaration

demonstrated that points received from bonuses, subscriptions, and sales contests were not based on the price of the subscriptions. Further, a DMSI sales manager testified that he did not know of any IBD commission schedule that awarded points based on the price of the subscription.

Applying de novo review, we conclude that the payments received by the employees did not constitute commissions. Our adjudication is, of course, determinative that, based on the materials before the court on summary judgment, the commission exemption does not apply in this case. (See *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 18-19, 28 Cal.Rptr.3d 112 see also *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309-313, 126 Cal.Rptr.2d 516 cf. *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108, 115 Cal.Rptr.2d 285.)

Even if the point system as described in the summary judgment papers did constitute commissions, respondents would still fail on summary judgment because they did not demonstrate, as a matter of law, that more than half of ***39** the employees' compensation was from commissions. (*Ramirez, supra*, 20 Cal.4th at p. 794, 85 Cal.Rptr.2d 844, 978 P.2d 2.) Respondents concede that compensation for weekly bonuses and sales contests are not commissions, but argue that it was impossible for an employee to earn more than half of the weekly salary from those incentive systems. The reason, respondents argue, is that the bonuses and spiffs were calculated as a percentage of the points earned from subscriptions and were thus necessarily lower than the dollar amounts earned from points. Appellants demonstrated a triable issue of fact on the point by presenting evidence that none of the compensation constituted commission.

Nor were respondents able to demonstrate, as a matter of law, that the employees' total compensation was more than one and one-half times the minimum wage. (Cal.Code Regs., tit. 8, § 11040, subd. 3(D).) Respondents claim that they “presented substantial evidence the telemarketers admitted they always received minimum payments.” The record does not support this claim.

Respondents first cite to the declarations of their own sales manager and a former telemarketing supervisor. Both stated that “Plaintiffs who worked more than 40 hours in a week or more than 8 hours in a day, regu-

larly earned commissions in excess of one-and-one-half times the minimum wage.” They also cite to depositions of three of the named plaintiffs. The first citation refers to O'Connor's deposition, where he was asked, “And you're paid on a weekly basis the greater that dollar amount or the minimum wage; is that correct?” He answered, “Yes.” In his deposition, Bey stated that he was paid “[e]ither the greater of my points or my hourly wage.” Sandercock stated that the amount of commission he earned always exceeded the minimum wage, and that he earned approximately \$6,260 per month in the year 2000-2001.

Only Sandercock discussed his exact earnings. He did not admit or even mention**117 that his earnings comprised more than 150 percent of the minimum wage. He admitted only that he earned more than the minimum wage-not how much more. Respondents presented no employee time card evidence to determine whether employees' compensation met the threshold for the commission exemption. Nor did they present other evidence sufficient to demonstrate that appellants qualified for the exemption. Appellants raised a triable issue of fact on this issue with Barron's declaration, which stated that “several Plaintiffs[] did not receive the minimum wage for all hour[s] worked.”

Respondents failed to show that appellants received more than half of their compensation through commissions and that they received more than one and *40 one-half times the minimum wage. We conclude that the grant of summary adjudication on the first cause of action must be reversed.

III

[10] Appellants argue that the trial court erred in granting summary adjudication on the second and third causes of action alleging that IBD's chargeback policy was unlawful and unconscionable. Under that policy, employees were “charged back” the points earned from a sale if the customer cancelled within 16 weeks. The chargeback included any bonuses earned by reason of the employee being at a high earning level. Appellants assert the policy unjustly enriched IBD, since IBD retained a portion of the subscription price, while the employees received nothing.

Respondents argue the chargebacks were a lawful

recovery of an advance. They reason that the commission was not earned until the subscriber had been a customer for 16 weeks, and money paid to the employee in the meantime is merely an advance on commissions that may be earned. Respondents also argue that appellants were aware of and agreed to the policy.

Respondents' statement of general personnel policy, dated January 1999, describes the policy: “Any subscription which is canceled within 16 calendar weeks from the start, or restart, date of the subscription will be charged back to the week sold. The unit amount earned, as well as the associated dollar value of the unit amount earned, will be deducted in full.... If the department is unable to prevent cancellation, the unit value will be charged back in full.” Appellants point out that this policy was changed in November 2001, after appellants' complaint was filed in this case. The revised policy states that commissions will be “*advanced* to Associates based on the date in which payment is authorized and posted to the account. If a customer cancels a subscription within the first 16 weeks no commission is earned. The unit amount *advanced* as well as associated dollar value of the unit amount advanced will be deducted in full from the Associates weekly paycheck.” (Italics added.) Appellants contend that the 1999 policy indicates that the commission was earned at the time of sale. “If the commission is earned at the point of sale,” they argue, “then the money paid for commissions is wages, not an advance.”

[11] Labor Code section 221 prevents an employer from taking back any wages from an employee after they are earned. The statute provides: “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.” Wages are defined broadly to include “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.” (Lab.Code, § 200.) The statute illustrates California's strong public policy favoring *41 the protection of employees' wages. (*Ralphs Grocery Co. v. Superior Court* (2003) 112 Cal.App.4th**118 1090, 1096-1097, 5 Cal.Rptr.3d 687.)

Respondents cite *Steinhebel v. Los Angeles Times Communications* (2005) 126 Cal.App.4th 696, 24

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Cal.Rptr.3d 351, to support their position. *Steinhebel* is distinguishable. There, the court upheld a chargeback system based on facts similar to those in this case, but with a critical difference—the employment agreement clearly identified the commission as an advance: “The Times will pay you two weeks in advance for the order. Beginning on the second pay period after your start date, you will receive an *advance* against your commissions.” (*Id.* at p. 702, 24 Cal.Rptr.3d 351, italics added.) The court reasoned that, because a condition to the employee’s right to the commission had yet to occur, an advance was not a wage within the meaning of section 221. (*Id.* at p. 705, 24 Cal.Rptr.3d 351.)

Respondents also point to *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 41 Cal.Rptr.2d 46, which held that Neiman Marcus’s commission program violated section 221 because it unlawfully deducted “a pro rata share of commissions previously paid for ‘unidentified returns’ from the wages of all sales associates in the section of the store where the merchandise is returned.” (*Id.* at p. 1117, 41 Cal.Rptr.2d 46.) Respondents note that the court “found nothing wrong with chargebacks for rescinded sales attributable to a specific sales associate.” That case is not directly on point, as it analyzes the legality of commission deductions attributable to “unidentified returns” in a situation where employees were penalized for the misconduct of other employees.

Unlike the employees in *Steinhebel* and *Hudgins*, appellants did not expressly agree to the chargeback policy in writing. Even if they knew about the policy, IBD’s materials suggested that the points were earned at the time of the sale, not at some designated point in the future. IBD’s position differs from that of Neiman Marcus, in that IBD retained the payment received for the portion of time during which the customer received the newspaper, while Neiman Marcus retained nothing after the merchandise was returned.

The trial court erred in granting summary adjudication on the unlawful wage deduction claim. Respondents failed to demonstrate that they were entitled to judgment as a matter of law. A triable issue of fact exists as to whether the chargeback plan in effect during appellants’ employment violates Labor Code section 221. The cause of action for unjust enrichment and unconscionability is dependent upon the

outcome of the unlawful deduction claim at trial; we decline to reach it here.

*42 DISPOSITION

The judgment is reversed. We reverse the order following the sustaining of the demurrer to the section 17200 cause of action. We reverse the grant of summary adjudication on the first, second, and third causes of action, alleging violations of California labor laws. The case is remanded to the superior court for proceedings consistent with this opinion. Appellants are to recover their costs on appeal.

CURRY and HASTINGS, JJ.^{FN*}, concur.

FN* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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Court of Appeal, Fourth District, Division 3, California.
Remigio LEBRILLA et al., Plaintiffs and Appellants,
v.
FARMERS GROUP, INC., et al., Defendants and Respondents.
No. G031069.

June 25, 2004.
As Modified on Denial of Rehearing July 19, 2004.
Review Denied Sept. 29, 2004.^{FN*}

FN* George, C.J., did not participate.

Background: Policyholders brought action against automobile insurer alleging that insurer had company-wide practice of using inferior automobile crash parts not manufactured by original equipment manufacturer (OEM). The Superior Court, Orange County, No. 00CC07185, Ronald L. Bauer, J., denied policyholders' motion for class certification. Policyholders appealed.

Holdings: The Court of Appeal, O'Leary, J., held that:

- (1) as matter of first impression, class could establish predominant common questions of fact and law that imitation crash parts were uniformly not of like kind and quality as OEM parts;
- (2) regulation did not impliedly determine that crash parts were not inferior;
- (3) allowing class certification would benefit parties and court; and
- (4) policyholders did not breach their duty to class members by seeking certification of some, but not all, causes of action.

Reversed and remanded with directions.

West Headnotes

[1] Parties 287 ¶35.1

287 Parties
287III Representative and Class Actions
287III(A) In General

287k35.1 k. In General. Most Cited Cases
Class actions are important as a means to prevent a failure of justice; by establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress. West's Ann.Cal.C.C.P. § 382.

[2] Parties 287 ¶35.5

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.5 k. Factors, Grounds, Objections, and Considerations in General. Most Cited Cases
Generally, a class suit is appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer. West's Ann.Cal.C.C.P. § 382.

[3] Parties 287 ¶35.5

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.5 k. Factors, Grounds, Objections, and Considerations in General. Most Cited Cases
Because class action has the potential to create injustice, trial courts, in determining propriety of class actions, are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and courts. West's Ann.Cal.C.C.P. § 382.

[4] Parties 287 ¶35.17

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.17 k. Community of Interest; Commonality. Most Cited Cases

Parties 287 ¶35.41

(Cite as: 119 Cal.App.4th 1070, 16 Cal.Rptr.3d 25)

287 Parties

287III Representative and Class Actions

287III(B) Proceedings

287k35.41 k. Identification of Class; Sub-classes. Most Cited Cases

To obtain certification, a party must establish existence of both an ascertainable class and a well-defined community of interest among class members. West's Ann.Cal.C.C.P. § 382.

[5] Parties 287 ⚡35.13

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.13 k. Representation of Class; Typicality. Most Cited Cases

Parties 287 ⚡35.17

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.17 k. Community of Interest; Commonality. Most Cited Cases

The community of interest required for class certification involves three factors: (1) predominant common questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. West's Ann.Cal.C.C.P. § 382.

[6] Parties 287 ⚡35.5

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.5 k. Factors, Grounds, Objections, and Considerations in General. Most Cited Cases

Among the relevant considerations for determining propriety of class certification are the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery, and whether the class approach would actually serve to deter and redress alleged wrongdoing. West's Ann.Cal.C.C.P. § 382.

[7] Parties 287 ⚡35.9

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.9 k. Discretion of Court. Most Cited Cases

Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. West's Ann.Cal.C.C.P. § 382.

[8] Appeal and Error 30 ⚡95

30 Appeal and Error

30III Decisions Reviewable

30III(E) Nature, Scope, and Effect of Decision

30k95 k. Relating to Parties or Process. Most Cited Cases

Appeal and Error 30 ⚡1024.1

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings

30k1024.1 k. In General. Most Cited Cases

The denial of certification to an entire class is an appealable order, but in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed unless (1) improper criteria were used, or (2) erroneous legal assumptions were made. West's Ann.Cal.C.C.P. § 382.

[9] Appeal and Error 30 ⚡1036(1)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)3 Parties

30k1036 Parties
30k1036(1) k. In General. Most Cited Cases

An order denying class certification, based upon improper criteria or incorrect assumptions, calls for reversal even though there may be substantial evidence to support the court's order. West's Ann.Cal.C.C.P. § 382.

[10] Appeal and Error 30 854(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k851 Theory and Grounds of Decision of Lower Court

30k854 Reasons for Decision

30k854(1) k. In General. Most Cited

Cases

On review of order denying class certification, the Court of Appeal must examine the trial court's reasons for denying class certification; any valid pertinent reason stated will be sufficient to uphold the order. West's Ann.Cal.C.C.P. § 382.

[11] Parties 287 35.73

287 Parties

287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.73 k. Insurance Claimants. Most Cited Cases

Class of automobile policyholders, in action against automobile insurer that allegedly used inferior automobile crash parts rather than original equipment manufacturer (OEM) parts, could establish that imitation crash parts were uniformly not of "like kind and quality" as OEM parts as specified in policies, notwithstanding unique factual issues relating to each policyholder; age and use of individual class member's OEM parts was not pertinent, but, rather, "like kind and quality" determination centered on original parts' OEM status alone, and thus damages and their value could be established on class-wide basis. West's Ann.Cal.C.C.P. § 382.

See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 256 et seq.; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 14:11 et seq. (CACIVP Ch. 14-B); Cal. Civil Practice (Thomson/West 2003) Procedure, § 32:1 et seq.

[12] Courts 106 107

106 Courts

106II Establishment, Organization, and Procedure

106II(K) Opinions

106k107 k. Operation and Effect in General. Most Cited Cases

Rule that unpublished opinion may not be cited or

relied upon applies only to opinions originating in California; opinions from other jurisdictions can be cited without regard to their publication status. Cal.Rules of Court, Rule 977.

[13] Courts 106 95(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k95 Decisions of Courts of Other State

106k95(1) k. In General. Most Cited

Cases

Decisions of courts of other states are only regarded as persuasive depending on point involved.

[14] Parties 287 35.37

287 Parties

287III Representative and Class Actions

287III(B) Proceedings

287k35.37 k. Consideration of Merits. Most Cited Cases

Courts view the question of class certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious. West's Ann.Cal.C.C.P. § 382.

[15] Insurance 217 2719(2)

217 Insurance

217XXII Coverage--Automobile Insurance

217XXII(B) Property Coverage

217k2717 Amounts Payable; Extent of Damage or Loss

217k2719 Total or Partial Loss

217k2719(2) k. Repair or Replacement. Most Cited Cases

Regulation providing that no insurers shall require the use of nonoriginal equipment manufacture (non-OEM) replacement crash parts in the repair of an automobile does not impliedly determine that crash parts are not inferior. 10 CCR § 2695.8 (2002).

[16] Parties 287 35.73

287 Parties

(Cite as: 119 Cal.App.4th 1070, 16 Cal.Rptr.3d 25)


287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.73 k. Insurance Claimants. Most

Cited Cases

Conducting action against automobile insurer, for alleged practice of using inferior automobile crash parts not manufactured by original equipment manufacturer (OEM), as class action benefited parties and court; issue involved uniform interpretation of policies, class action was in harmony with procedures under unfair competition law (UCL), multiple individual actions were impractical, and insurer could achieve finality of matter. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.; West's Ann.Cal.C.C.P. § 382.

[17] Parties 287  35.67

287 Parties


287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.67 k. Antitrust or Trade Regulation

Cases. Most Cited Cases

Although a claim under the unfair competition law (UCL) is procedurally distinct from a class action and the two have different purposes, under proper circumstances, certifying a UCL claim as a class action furthers the purposes and goals underlying both of these actions. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.; West's Ann.Cal.C.C.P. § 382.

[18] Parties 287  35.73

287 Parties


287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.73 k. Insurance Claimants. Most

Cited Cases

Individual policyholders did not breach their duty to class members by seeking class certification of some, but not all, causes of action against automobile insurer that allegedly used inferior automobile crash parts not manufactured by original equipment manufacturer (OEM); class causes of action sought full restitution, and dissatisfied class members could opt out. West's Ann.Cal.C.C.P. § 382.

[19] Parties 287  35.13

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.13 k. Representation of Class;

Typicality. Most Cited Cases

To maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class. West's Ann.Cal.C.C.P. § 382.

****27 *1072** Milberg Weiss Bershad Hynes & Lerach, John J. Stoia, Jr., William S. Dato, Timothy G. Blood, and Kevin K. Green, San Diego, for Plaintiffs and Appellants.

Skadden, Arps, Slate, Meagher & Flom, Raoul D. Kennedy, Sheryl C. Medeiros, San Francisco, and Janet Dhillon, Washington, D.C., for Defendants and Respondents.

OPINION

O'LEARY, J.

Remigio and Lina Lebrilla, and Karen and Paul Balfour (collectively the Lebrillas) sought statewide class certification in their suit against Farmers Group, Inc., dba Farmers Underwriters Association, ****28** and Farmers Insurance Exchange (collectively Farmers), regarding Farmers' car repair practices. The trial court denied the Lebrillas' motion seeking class certification, ruling the lawsuit did not involve predominant common questions of law or fact. On appeal, the Lebrillas argue the court's ruling is based on a premature assessment of the lawsuit's underlying merits. We conclude the matter must be reversed because the court applied the wrong legal criteria.

I

Farmers provides automobile insurance to California consumers. Under the terms of its standardized insurance policy, Farmers limits their liability as follows: "Our limits of liability for loss shall not exceed: (1) The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation."

According to the Lebrillas, Farmers has a "company wide policy to use parts not manufactured by the original equipment manufacturer [OEM], but knock-

offs or imitations of the OEM parts made by manufacturers who do ***1073** not have the material or dimensional and manufacturing specifications of the original equipment manufacturer. These knock-offs are commonly called aftermarket parts, non-OEM parts, or imitation parts. Farmers specifies these imitation parts because they are cheaper than OEM parts.”

This case involves a narrow subset of non-OEM parts, known as “crash parts” or mass-produced “sheet-metal” parts such as hoods and fenders.^{FN1} The Lebrillas assert these crash parts are “inferior to OEM parts in terms of structural integrity, corrosion resistance, finish and appearance, fit, material composition, durability, and dent resistance; and therefore are not of like kind and quality to OEM parts as required by Farmers' insurance policy.”

FN1. This case concerns 14 specific crash parts: “bumper reinforcements and absorbers, hoods, fenders, door shells, quarter panels, rear outer panels, deck and trunk lids, truck beds and box sides, body side panels, tailgates and lift gates.”

The Lebrillas filed a lawsuit on behalf of themselves, and others similarly situated, challenging Farmers' “practice of installing imitation crash parts on its insureds' vehicles or paying its insureds' money based on the cost of imitation crash parts.”^{FN2} The Lebrillas assert, “As a result of Farmers' deceptive and fraudulent actions, plaintiffs and the class received substandard repair work which failed to restore their damaged vehicles to pre-loss condition and received imitation crash parts on their vehicles or received payments that were insufficient because they were based on cheaper, inferior parts and omitted repairs.”

FN2. Specifically, the proposed class was defined as: “All persons who, from June 15, 1996 to present, (1) were insured by a private passenger automobile insurance policy issued in California by Farmers, (2) made a first party claim for vehicle repairs pursuant to their policy, and (3) either had one or more of the following imitation parts installed on their vehicle or were paid cash by Farmers where the amount of payment was based in part on the cost of such parts: [list of 14 crash parts discussed *supra* fn. 1].”

They sought statewide class certification of three causes of action: declaratory and injunctive relieve; violation of the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200, et seq.); and violation of the Consumers Legal Remedies Act (CLRA) (Civ.Code, § 1750, et seq.).^{FN3} The ****29** complaint framed several potential remedies available to the court, including an injunction directing Farmers to comply with the “like kind and quality standard” and restitution measured by the amount Farmers has saved since June 1996 (the class period) using inferior cheaper parts.

FN3. The Lebrillas' complaint also states causes of action for breach of contract, false and misleading advertising, deceit, insurance bad faith, and fraudulent concealment.

The trial court denied the motion seeking class certification stating, “The number of unique factual issues relating to each class member strikes me as being dominant and as destroying any benefit that we could possibly get from ***1074** class treatment. I cannot in my mind ... conclude that this is an appropriate case for class treatment on a class that you have identified for this action. [¶] The reasons are, I think, well stated in some of the opposition.... [¶] ... I cannot conceive, in my analysis of the situation, of grouping all of these claims for class treatment when my impression is they will almost, of necessity, require individualized analysis. Each part, each claim, each car, and probably each discussion, each agreement between repair agent and customer and claims rep[resentative], leaves, to me, too many issues that are unique and individual to permit class treatment.”

II

GENERAL LAW REGARDING CLASS CERTIFICATION

[1][2][3] “Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. [Citations.] ‘By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress ’ [Citation.] Generally, a class suit is appropriate ‘when numerous parties suf-

fer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.’ [Citations.] But because group action also has the potential to create injustice, trial courts are required to ‘ “carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.” ’ [Citations.]” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434-435, 97 Cal.Rptr.2d 179, 2 P.3d 27(*Linder*).)

[4][5][6] Code of Civil Procedure section 382 authorizes class suits in California when “ ‘the question 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.’ To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. [Citation.] The community of interest requirement involves three factors: ‘(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’ [Citation.] Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]” (*Linder, supra*, 23 Cal.4th at p. 435, 97 Cal.Rptr.2d 179, 2 P.3d 27.)

[7][8][9][10] *1075 We are mindful that “[b]ecause trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. The denial of certification to an entire class is an appealable **30 order [citations], but in the absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed ‘unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].’ [Citation.] Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal ‘ “even though there may be substantial evidence to support the court’s order. [Citations.] Accordingly, we must examine the trial court’s reasons for denying class certification. ‘Any valid pertinent reason stated will be sufficient to up-

hold the order.’ [Citation.]” ’ (*Linder, supra*, 23 Cal.4th at pp. 435-436, 97 Cal.Rptr.2d 179, 2 P.3d 27.)

CLASS CAN ESTABLISH PREDOMINANT COMMON QUESTIONS OF FACT AND LAW

[11] In this case, the trial court concluded the claims could not be grouped for class treatment because there were a “number of unique factual issues relating to each class member.” In other words, the court was convinced there were no predominant questions of fact and law, and the class members’ claims were not susceptible to common proof.

In their motion, the Lebrillas claimed the following common questions of law and fact make their claims “ideally suited for class treatment ...”: (1) Each of the California insurance policies is identical and, therefore, a declaration of the insureds’ rights under the policy presents a common classwide issue; (2) Whether Farmers’ common practice of specifying imitation crash parts meets the “like kind and quality” standard in the policy presents a common classwide issue; (3) Each class member’s vehicle was repaired using imitation parts or each member was paid cash by Farmers based in part on the cost of such parts; and (4) “[T]he injunction sought-requiring Farmers to retrospectively and prospectively comply with its coverage obligations-is the very type of classwide injunction that is ideal for certification.”

The Lebrillas discussed the common evidence they have gathered to prove the class claims. For example, they asserted the fact Farmers’ “imitation parts are categorically inferior to OEM parts” could be proved on a classwide basis since they all suffer from the same design, manufacturing, and testing defects.

As explained by the Lebrillas’ expert, Paul Griglio, “Crash parts are produced through a manufacturing process. They are not handmade individual items, rather they are uniformly produced through the use of particular tools, *1076 processes, specifications, and materials. Analysis of each part is not necessary to determine the relative quality of a part Modern automotive manufacturing, first introduced by Henry Ford, has obviated the need for individual assessment of the quality of any one individual part.” He concluded, “[N]o vehicle that has OEM crash parts replaced with non-OEM crash parts is restored to its

pre-loss condition and no individual evaluation or assessment of the vehicle would be necessary in order to make this determination.” (Emphasis omitted.)

The Lebrillas' expert cited three critical and consistent distinctions between OEM and non-OEM parts. Griglio explained all OEM parts are made to specifications both in terms of materials and in terms of dimensions. These specifications are proprietary and not available to non-OEM manufacturers. He opined that without this information, manufacturers cannot produce a part identical to an OEM part. Second, Griglio noted all OEM manufacturers engage in large-scale production of parts, which ensures uniform characteristics. He stated, the small production runs used by manufacturers of non-OEM parts lack the safeguards inherent in large-scale ****31** production, such as specialized machinery and precise dies, molds, and stampings. Finally, Griglio focused on the fact all OEM parts are crash and durability tested. He stated that because OEM manufacturing standards result in the production of virtually identical parts consumers can be assured that the performance of replacement OEM parts will be equal to the performance of original OEM parts. He opined that no similar assurances can be made by non-OEM manufacturers. For these reasons, the Lebrillas contend common proof can show non-OEM parts are *universally* inferior to OEM parts.

Farmers presented nine reasons why the proposed class claims do not present common questions of law and fact.^{FN4} Most of the arguments are premised on Farmers' different interpretation of “like kind and quality.” It maintained the phrase is tied to the preaccident condition (age, use and condition) of each class member's car and, therefore, not subject to common proof.

FN4. In its opposition, Farmers argued: (1) a majority of courts across the country have refused to certify non-OEM parts cases finding the claims not susceptible to common proof; (2) Farmers does not have a common practice regarding non-OEM parts but rather relies on the skill and experience of body shops; (3) plaintiffs' theory that all non-OEM parts are inferior is legally untenable; (4) any recovery would require a de facto repeal of Business and Professions Code section 9875, subdivision (b); (5) plaintiffs'

expert does not provide competent support for the theory all non-OEM part are inferior; (6) the limited authority supporting class certification is an aberration; (7) the class cannot state a common cause of action under the Unfair Practices Act or CLRA; (8) the issue of damages is difficult to calculate and is not common; and (9) an injunction may only issue to prevent future harm and not remedy past wrongs.

As noted by both parties on appeal, interpretation of “like kind and quality” is by no means settled. Class actions challenging the use of ***1077** non-OEM crash parts have been popping up all over the United States, and from this body of litigation two different interpretations have emerged. Contrary to the Lebrillas' contention, interpretation of the policy language at this stage of the proceedings is not premature. As aptly stated by Farmers, “While the trial court *may not* determine whether or not the claim has merit, it *must* determine the applicable legal standard, in order to analyze whether appellants can demonstrate an ability to satisfy that legal standard by common proof.”

THE NATIONWIDE DEBATE

The question of whether a class can establish imitation crash parts are *uniformly* not of like kind and quality as OEM parts has been examined by nearly one dozen out-of-state courts, but is an issue of first impression in California. When the trial court considered the issue, Farmers argued in its opposition, “This is at least the eleventh court, in the seventh state, that has been asked to certify a class in a non-OEM parts case. All but two of these courts-both in Illinois-have refused to grant certification.”

[12][13] Much of the out-of-state authority relied on by the parties is unpublished. In California an unpublished opinion may not be cited or relied upon. (Cal. Rules of Court, rule 977(a); *People v. Webster* (1991) 54 Cal.3d 411, fn. 4, 285 Cal.Rptr. 31, 814 P.2d 1273.) However this rule applies only to opinions originating in California. Opinions from other jurisdictions can be cited without regard to their publication status. Decisions of the courts of other states are only regarded as “persuasive ... depending on the point involved” (9 Witkin, California Procedure (4th ed. 1997) Appeal, § 940, p. 980), and some ****32**

states have different publication criteria than California.

At the time the motion was argued before the trial court, the Illinois appellate court had published its decision. (*Avery v. State Farm Mutual Automobile Ins. Co.* (2001) 321 Ill.App.3d 269, 254 Ill.Dec. 194, 746 N.E.2d 1242(*Avery*) [depublished].) Farmers argued the opinion was an “aberration” and urged the trial court to consider the unpublished opinions from six other states—Florida, Tennessee, Alabama, Washington, Maryland, and Texas. Since then, four more states have weighed in on the debate, and Florida has switched sides,^{FN5} forming an alliance with Illinois, Pennsylvania, and Mississippi. Massachusetts and Ohio joined the group denying class certification.

FN5. The Florida District Court of Appeal reversed the trial court's decision in *Thames v. United Services Automobile Assn.* (Fla. Cir. Ct., June 9, 2001) No. 98-01324 CA DIV. CV-B ([unpub. opn.]). The analysis of *Thames* was emulated in the unpublished opinions from Tennessee, Washington, and Maryland.

***1078** We start our discussion with the highly persuasive body of case authority authorizing class certification. Although the Illinois *Avery* opinion was ultimately depublished, two other states (Missouri and Florida) have published comparable opinions on the matter. (*State ex rel. American Family Mutual Ins. Co. v. Clark* (Mo. 2003) 106 S.W.3d 483 (*Clark*); *Sweeney v. Integon General Insurance Corp.* (Fla.App.4th Dist.2002) 806 So.2d 605 (*Sweeney*); *United Services Automobile Assn. v. Modregon* (Fla.App.2d Dist.2002) 818 So.2d 562(*Modregon*). And, the Pennsylvania court prepared an extremely detailed analysis of the issue in *Foultz v. Erie Ins. Exchange* (Pa.Com.Pl. Mar. 13, 2002 No. 3053) 2002 WL 452115(*Foultz*).^{FN6}

FN6. There is also one unpublished case from the Pennsylvania Court of Common Pleas permitting joinder of the non-OEM manufacturers to the *Foultz* class action. (*Greiner v. Erie Insurance Exchange* (2001) 57 Pa. D & C.4th 312, 2001 WL 1807642 (Pa.Com.Pl.))

We note the Illinois Supreme Court did

not reverse the appellate court's decision in *Avery*. The jury verdict entered against the insurance company remains intact.

In *Clark*, the plaintiffs sued their car insurance company for breach of contract on behalf of themselves and similarly situated plaintiffs nationwide. (*Clark, supra*, 106 S.W.3d at p. 484.) The Supreme Court of Missouri determined the laws of 14 states applicable to the proposed class action were too varied to support a nationwide class action. It reasoned Missouri had no interest in applying the “kaleidoscope of rules” and insurance laws found in the other states to Missouri citizens and thus concluded the trial court “abused its discretion in certification of the class with respect to insureds whose contracts were subject to laws of states other than Missouri.” (*Id.* at p. 487.)

However, the *Clark* court upheld the court's certification of a class action for insureds whose policies are subject to Missouri law. (*Clark, supra*, 106 S.W.3d at pp. 488-489.) Like Farmers, the insurance company in *Clark* argued individual inquiries were necessary to decide whether (1) the damaged parts at issue for all class members were OEM parts in good condition, and (2) all the non-OEM crash parts used for repair were inferior to OEM crash parts. The court disagreed stating, “Under plaintiffs' theory, [the insurance company] breached its contract with each prospective class members when it made payments on policyholders' claims based upon estimates either specifying the use of non-OEM crash parts or omitting particular**33 repairs. This common issue is the predominant issue. If it is established at trial that [the insurance company] did not breach its contracts ... then the claims of all the prospective class members fail without further factual analysis. If it is determined that [the insurance company actions constitute a breach of contract] ... for some or all of the prospective class members, then the trial court can proceed in the most expeditious and efficient way possible relative to any individual circumstances or issues that may exist. The predominance *1079 of the common issue is not defeated simply because ‘individual questions may remain after interpretation of the contract-questions of damages or possible defenses to individual claims.’ [Citations.]” (*Ibid.*)

The *Clark* court acknowledged that other state courts faced with similar facts have reached contrary conclusions. It gave as an example an unpublished Ohio

case, *Augustus v. Progressive Corp.* (Ohio App., 8 Dist., No. 81308), 2003 WL 155267, in which the court affirmed the lower court's decision to deny class certification. The *Clark* court reasoned, "While the court in *Augustus* found that 'it would be inconceivable to reason that an automobile is not returned to its "pre-loss condition" because a non-OEM part is utilized in making a repair,' we leave the determination of that predominant issue in this case to the trier of fact." (*Clark, supra*, 106 S.W.3d at p. 489, fn. 7.) It reiterated, "[T]he trial court can resolve individual questions, particularly those relating to damages and defenses, after making a determination on the predominant issue." (*Ibid.*)

Two Florida appellate courts have published opinions supporting class certification, and like the Missouri court, found the predominant issue in the case subject to common proof. For example, in *Sweeney*, the complaint was filed as a class action seeking damages for breach of contract based on the insurance company's policy of authorizing non-OEM crash parts to be used in vehicle repairs. (*Sweeney, supra*, 806 So.2d at p. 605.) The court reversed the trial court's dismissal of the action, explaining, the trial court ruled the plaintiff could not " 'possibly establish' the truth of its allegation that non-OEM parts uniformly are not of like kind and quality to OEM parts. Although superficially a reasonable assumption, the court is impermissibly assuming a lack of proof as to the merits of the claims. [Citation.] In reviewing a motion to dismiss a complaint, however, the trial court is limited to considering questions of law. The court is not free to rely on its assumptions as to what may, or may not, ultimately be proved." (*Id.* at p. 606.)

The *Modregon* case involved a class action filed against a different car insurance company but raised similar allegations as the *Sweeney* class action. (*Modregon, supra*, 818 So.2d 562.) In *Modregon*, the court, from a different district, upheld the trial court's denial of the insurer's motion to dismiss and motion to compel an appraisal. (*Ibid.*) In a very short opinion, the court reasoned, "The trial court denied the motion [to compel an appraisal], holding that 'the gravamen of [the] complaint challenges a policy decision by Defendant to use non-OEM parts, not the relative value of the damage to Plaintiff's vehicle' and that '[w]hether non-OEM parts are parts of 'like kind and quality' is not an appropriate issue for an

appraiser to determine.' We have reviewed the class action complaint and agree that it states more than a disagreement over the amount of loss for the Modregons' vehicle." (*Id.* at *1080 p. 562.) Implicit in this ruling is the acknowledgment the class will have to establish the crash parts are uniformly**34 not of "like kind and quality" as OEM parts. (*Ibid.*)

The Pennsylvania court's opinion offers a detailed analysis of the issue. (*Foultz, supra*, 2002 WL 452115.) The facts of the *Foultz* case are remarkably similar to ours. The *Foultz* plaintiff obtained car insurance with Erie Insurance Exchange (Erie), who imposed a similar limitation of liability to parts of "like kind and quality." (*Id.* at p. 1) The class action was limited to persons with cars repaired or valued by the replacement non-OEM crash parts. The class action suit alleged breach of the policy, violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), and insurance bad faith. (*Ibid.*) The case differs from ours only in that the *Foultz* class dismissed its claim for declaratory relief or a permanent injunction. (*Ibid.*)

As aptly noted by the *Foultz* court, "The question as to whether the quality of non-OEM parts can be addressed on a class-wide level shapes up as a battle of decisions of out-of-state courts." (*Foultz, supra*, 2002 WL 452115 at p. 4.) After discussing the current status of the debate, the court sided with those courts authorizing class certification. It reasoned, "While reserving judgment as to whether the Plaintiff's claims can be corroborated, the Court is inclined to agree with the Plaintiff that the question of OEM parts and the Contested Crash Parts' uniformity does not preclude class certification. For the Court to involve itself at this stage in determining which Party's experts are correct would be to improperly address the merits of the Plaintiff's claim, at least in part. [Citation.] Moreover, the Plaintiff's expert's declaration presents a logical argument as to why non-OEM parts may be addressed in a blanket fashion. As such, the Plaintiff's claim that she can establish the value of OEM parts in relation to the value of the corresponding Contested Crash Parts on a class-wide scale supports certification." (*Id.* at p. 5.)

The *Foultz* court next stated, "As an aside, it is worth noting what the Court believes the Plaintiff would be *unable* to show at trial. It is implausible that the Plaintiff could show the value of each pre-repair

OEM part in Class Members' vehicles or the difference in value between such parts and the Contested Crash Parts on a class-wide basis. To establish either the value or the related difference in value would appear to require an examination of the individual parts in each Class Member's vehicle and would be a substantial obstacle to showing common questions of law and fact. Although this conclusion has no impact on whether the Plaintiff can establish generalized values of Contested Crash Parts and OEM parts, which the Court has concluded is plausible, it has potential implications for the Plaintiff's ability to show damages on a class-wide basis, as seen *infra*." (Foultz, *supra*, 2002 WL 452115 at p. 5.)

1081** The *Foultz* court considered what values are necessary to establish damages on a classwide basis and particularly whether a classwide difference in kind and quality can be shown. It reasoned, "As discussed *supra*, value generalizations involving the Contested Crash Parts and OEM parts are possible, while value generalizations involving used OEM parts are not. Thus, if 'like kind and quality' includes distinctions based on the age, condition and use of the part being replaced, resolving the Class's claims will require the Court to confront individual questions, and the commonality element will not be satisfied. On the other hand, if 'like kind and quality' refers only to the design and material of the part replaced, valuation questions may be addressed on a class-wide scale, and the condition of each Class *35** Member's used OEM part will be irrelevant. The Court therefore must examine the definition of 'like kind and quality' under the Policy." (Foultz, *supra*, 2002 WL 452115 at p. 6.)

In Pennsylvania, as in California, interpretation of an insurance policy is a matter of law to be decided by the court. (Foultz, *supra*, 2002 WL 452115 at p. 6; *Ray v. Farmers Ins. Exchange* (1988) 200 Cal.App.3d 1411, 1415, 246 Cal.Rptr. 593 (Ray).) The *Foultz* court explained some courts addressing the term "like kind and quality" discuss the "term broadly and provide little guidance as to what the term's underlying meaning is. Frequently, courts have stated that a 'like kind and quality' replacement provision requires the insurer 'to put the automobile in as good condition as it was before the collision' without reaching a conclusion as to whether age and use should be factors in determining the condition or whether an examination is limited to the suitability

and material of the parts in question. [Citations.]" (Foultz, *supra*, 2002 WL 452115 at p. 7.) Coincidentally, the *Foultz* court gives as an example the very same California case Farmers believes is dispositive.

In *Ray*, *supra*, 200 Cal.App.3d at p. 1416, 246 Cal.Rptr. 593, the jury concluded Farmers did not breach its insurance policy contract by failing to compensate the plaintiff, after repair of his wrecked car, for the car's diminution in market value because of its status as a wrecked car. The appellate court affirmed the judgment finding Farmers did not have a duty to repair the automobile both to its preaccident condition and market value. It explained the insurance policy has a provision giving "Farmers the right to elect to repair Ray's vehicle if the cost to repair to 'like kind and quality' was less than the actual cash value of the vehicle at the time of the loss." (*Id.* at p. 1416, 246 Cal.Rptr. 593.)

The *Ray* court examined *Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 57 Cal.Rptr. 100, the only other California case interpreting the phrase "like kind and quality." It noted the *Owens* court determined, "The type and extent of repair contemplated by this provision were such as would place the automobile in substantially the same condition it was before the accident.... ***1082** If the damage was such that the automobile could not be restored to this condition [the insurer] was required to pay the actual cash value thereof at the time of loss." (*Ray*, *supra*, 200 Cal.App.3d at pp. 1416-1417, 246 Cal.Rptr. 593.) Based on this definition, the *Ray* court reasoned "like kind and quality" could not be the equivalent of "actual cash value" as suggested by the plaintiff. Rather, it concluded the provision simply required Farmers to repair the plaintiff's car to "its preaccident safe, mechanical, and cosmetic condition" (*Id.* at p. 1418, 246 Cal.Rptr. 593.)

We agree with the *Foultz* court that *Ray* provides little guidance as to the precise definition of preloss condition. The opinion does not specify whether age, use, or condition should be factors. We are unpersuaded by Farmers' contention the case is dispositive. Rather, we are convinced, as was the *Foultz* court, by the out-of state authority holding "that 'like kind and quality' refers only to a part's material and suitability, not its age or extent of use." (Foultz, *supra*, 2002 WL 452115 at p. 7.)

The court in *Foultz* went on to explain that in *Maryland Motor Car, Ins. Co. v. Smith* (Tex.Civ.App.1923) 254 S.W. 526, “for example, the plaintiff brought suit against her automobile insurer to recover the amount that it would have cost to repair her vehicle with [like kind and quality] parts. In affirming the trial verdict in favor of the plaintiff, the Texas Appellate Court found that “[t]he words “of like kind ****36** and quality” do not refer to parts of like age, use, and condition, or present cash value or the parts injured or destroyed by the fire. The words are used as relating to quality and suitability or fitness for the purposes used.” [Citation.]. [¶] Similarly, *North River Insurance Co. v. Godley* [(Ga.Ct.App.1936)] [55 Ga.App. 52] 189 S.E. 577... revolved around a plaintiff’s attempt to recover for damages to his roof under an insurance policy that allowed recovery up to the cost to repair the property with ‘material of like kind and quality.’ To define this term, the Georgia Court of Appeals held that ‘the expression “material of like kind and quality” refers to the kind and quality used in the original construction. There is no plea and no contention that the roof could have been repaired by using old shingles.’ [Citation.] On a related note, the Florida District Court in *Siegle v. Progressive Consumers Ins. Co.* [(Fla.Dist.Ct.App.2001)] 788 So.2d 355... looked at the relationship between “like kind and quality” and market value: A repair with like kind and quality would thus require the property to be restored to good condition with parts, equipment and workmanship of the *same essential character, nature and degree of excellence which existed on the vehicle prior to the accident*. The damaged vehicle may or may not be returned to its pre-accident market value, but a return to market value is not what the words ‘repair’ with ‘like kind and quality’ commonly connote and is not what an ordinary insured would reasonably understand the phrase to mean. The psychology of the market place, which assigns a lesser value to an adequately and competently repaired vehicle, has nothing to do with the ***1083** ‘quality’ of the repair itself. [Citation.]” (*Foultz, supra*, 2002 WL 452115 at p. 7.) In short, many out-of-state courts have similarly concluded the words “kind and quality” relate to “suitableness of fitness for the purpose intended.” (*Ibid.*)

On a final note, the *Foultz* court commented, “Another indication that age is irrelevant to a part’s kind and quality is the fact that many courts have held that depreciation, which accounts in part of the age of and wear-and-tear on a specific item, cannot be consid-

ered as a factor when calculating the costs of repairs based on parts of ‘like kind and quality.’ ” (*Foultz, supra*, 2002 WL 452115 at p. 8.) Depreciation is usually considered only when an insurer elects to pay the “actual cash value” of the damaged property. By electing to repair or replace, the insurer “elected a measure of loss that does not allow for depreciation. [Citation.]” (*Ibid.*) Indeed, under Farmers’ policy in this case, an alternative to replacing the damaged part is to pay for “new property less an adjustment for physical deterioration and/or depreciation.”

The insurance company in *Foultz* admitted its appraisers do not record or describe the preaccident condition of the vehicle or its parts. According to the company’s Vice-President, a car with a dented door that is further damaged in a collision will be replaced with an undamaged door (even if another dented door could be located). Thus, very telling was the insurance companies own application of the term. It was understood a rusty fender damaged in a collision would not be replaced with a different rusty fender. (*Foultz, supra*, 2002 WL 452115 at p. 9.)

Based on the above “case law and respected authorities” the *Foultz* court concluded, “[T]he age and use of an individual Class Member’s OEM parts is not pertinent to determining whether the replacement parts are of ‘like kind and quality.’ Rather, ‘like kind and quality’ centers on the original parts’ OEM status alone, and an analysis may focus on the quality of OEM parts and Contested Crash Parts in general. As such, contingent on her ability ****37** to substantiate her generalizations as to the quality of OEM parts and the Contested Crash Parts, the plaintiff will be able to establish damages and the value of such damages on a class-wide basis. [Citation.]” (*Foultz, supra*, 2002 WL 452115 at p. 9.) We agree and adopt this sound analysis and reasoning.

That being said, we obviously were not won over by the decisions of our sister states denying class certification. Suffice it to say, the state courts rejecting class certification uniformly interpret “like kind and quality” as being tied to the preloss condition of each vehicle.^{FN7} In nearly every instance, ***1084** there is a noticeable sense of disbelief at the notion imitation parts *can never* be of “like kind and quality” to OEM parts.^{FN8} And, it should be noted, several of the decisions were handed down before *Avery, Foultz*, and their progeny. For the reasons stated above, we inter-

pret “like kind and quality” differently and do not wish to speculate on whether plaintiffs will be able to prove their case.

FN7. We note several sister states credited by Farmers as denying class certification, never directly addressed the issue now before us. For example, from Washington came the case *Schwendeman v. USAA Casualty Insurance Co.* (2003) 116 Wash.App. 9, 65 P.3d 1-but it is inapt because, unlike the insurance policy in our case, the USAA insurance policy qualified the phrase “like kind and quality” to specifically include analysis of each vehicle's age, use, and condition. The court's analysis centers on interpretation of a totally different policy provision and thus is of no value to our case. The case from Massachusetts, *Roth v. Amica Mutual Ins. Co.* (2003) 440 Mass. 1013, 796 N.E.2d 1281 is hardly worth mentioning because denial was based on the fact the motion was untimely filed. (*Id.* at p. 1283.) And, the one published case from Texas interpreting the phrase “like kind and quality” was rendered in the context of reviewing a summary judgment (entered in favor of the insurer). (*Berry v. State Farm Mutual Automobile Ins. Co.* (Tex.App.2000) 9 S.W.3d 884.) The court did not consider the merits of certifying the class.

FN8. As boldly stated by one trial court, “[T]his court is of the belief that such a proposition cannot be proven given that this country's free market economy relies heavily on the ability to manufacture and sell non-original or imitations items, i.e., generic drugs.” (*Herrera v. United Automobile Ins.* (Fla.Cir.Ct. Dec. 12, 2002) No. 001540CA25, 2002 WL 32072837 [nonpub. opn.].) This statement was an advisory opinion-the court had already determined the plaintiff lacked standing to represent the class because her car was repaired using OEM parts and, therefore, she would not be entitled to damages.

[14] Indeed, it remains to be seen whether the trier of fact will be persuaded by the plaintiffs' common proof and experts' testimony as to the quality of OEM

parts and the imitation crash parts. However, we are certain that, at this time, it is not our role, nor the trial court's job, to involve ourselves with the merits of the underlying action or which parties' experts are most qualified. The Lebrillas' expert's lengthy declaration (10 pages) presents several reasoned and plausible explanations as to why non-OEM parts can be discussed with common evidence and in a blanket fashion. He is the designated expert in numerous other out-of-state class actions involving non-OEM crash parts, including *Avery* and *Foultz*. Farmers' contention the expert's opinion is flawed is an argument best left for trial. As decided by our Supreme Court, “[W]e view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious.” (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 439-440, 97 Cal.Rptr.2d 179, 2 P.3d 27.)

III

OTHER ARGUMENTS TO CLASS CERTIFICATION ARE WITHOUT MERIT

On appeal, Farmers raises several arguments not mentioned by the trial court ****38** when making its ruling. We will briefly explain why we find these arguments meritless.

***1085** THE CALIFORNIA CODE OF REGULATIONS

[15] Title 10, section 2695.8, subdivision (j) of the California Code of Regulations provides, “No insurers shall require the use of non-original equipment manufacture replacement crash parts in the repair of an automobile unless: (1) the parts are at least equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit and performance”

Farmers asserts the statute does not apply to it because it does not require the use of non-OEM parts. Alternatively, Farmers points out the provision fails to expressly prohibit the use of non-OEM parts, and therefore, the Legislature impliedly determined “at least some non-OEM parts” are of “like kind and quality” to OEM parts.^{FN9} Farmers fails to appreciate the Lebrillas are not objecting to the use of every non-OEM part, only a narrow subset of “crash parts” which they claim are uniformly inferior. According to the Lebrillas, interpretation of the phrase “like kind

and quality” can be based entirely on the statute. The Lebrillas assert they have common proof the imitation parts at issue are not equal to the OEM parts “in terms of kind, quality, safety, fit and performance.” (Cal.Code Regs., tit. 10, § 2695.8, subd. (j)(1).)

FN9. Farmers' argument that the regulation is inapt because there is no proof it has a policy *requiring* the use of non-OEM parts cannot serve to deny certification. As noted above, neither we, nor the trial court, can or will consider the merits of the underlying action in determining whether the class should be certified.

The legislative requirement that insurers use replacement parts of like “kind, quality, safety, fit and performance” to OEM parts suggests to us the Legislature is well aware there have been problems with some non-OEM parts. Indeed, as noted by Farmers, one year after the Lebrillas filed their lawsuit, the Legislature enacted Senate Bill No. 1178, authorizing a study to “consider the appropriate criteria or standards [necessary] for certifying crash parts” and to identify an oversight agency for certifying non-OEM parts. (Assembly Committee on Business and Professions, Staff Comments on SB 1178, as amended April 26, 2001 (July 10, 2001).) As noted by the committee authoring the bill, “There recently has been a rash of class action litigation regarding the use of non-OEM parts” and a dramatic increase in the price of OEM parts, resulting “in a virtual monopoly for OEM parts manufacturers.” (*Ibid.*) The committee commented insurance rates “are on the rise at a more rapid rate than they might otherwise be if insurance companies felt more confident using non-OEM parts.” (*Ibid.*) Clearly, the Legislature and insurance companies are aware that not all inferior non-OEM parts have been eliminated. Thus, we reject Farmers' suggestion it can be inferred the Legislature in passing California Code of Regulations, title 10, section 2695.8, subdivision (j), impliedly determined “crash parts” are not inferior.

***1086 CRITICISMS OF PROPOSED DECLARATORY AND INJUNCTIVE RELIEF**

[16] Farmers contends the Lebrillas' “proposed declaratory relief failed to eliminate the inherently individualized issues that permeated all of their causes of action. Specifically, it claims “a declaration ‘inter-

preting’ the insurance policies would need to be coupled with some form of ‘retroactive analysis of the repair jobs that have occurred’ and thus each class member will have to establish an individualized assessment of each car, each part, each ****39** repair.” It adds, the Lebrillas cannot show substantial benefits would accrue from class treatment. Farmers misunderstand the type of relief the class is requesting.

As the Lebrillas explain on appeal, “The onus of complying with the policy as judicially construed falls on Farmers. There will be no analysis for the court to do. Under plaintiffs' proposed injunction, Farmers will be ordered to adjust its insureds' claims in accordance with [the] judicially declared meaning of the ‘like kind and quality’ provision. It will be left to Farmers to adjust insurance claims in accordance with claims procedures already in place ... [and] it will be up to Farmers to ensure that each class member receives the coverage required under the policy. [¶] These obligations are fairly paced on Farmers because adjusting claims is squarely within Farmers' expertise.”

The Lebrillas maintain a similar injunction was approved in *State Farm Mutual Automobile Ins. Co. v. Mabry* (2001) 274 Ga. 498, 556 S.E.2d 114, 123(*Mabry* .) Farmers asserts the case does not pass muster under California law for three reasons: (1) Georgia law, unlike California law, requires insurers to compensate for the “diminished value” of a vehicle that has been wrecked and repaired; (2) the insurance company had no methodology in place to assess for diminished value justifying a court order requiring the insurance company to go back and look for a potential coverable loss for every policyholder in the prescribed class; and (3) the court failed to acknowledge the possibility that not every class member suffered damages and in California liability as to each class member must be established by common proof. Farmers is wrong.

First, the case is instructive because, like ours, it involves interpretation of an insurance contract—the outcome of which potentially will affect a class of policyholders. The legal underpinnings of the contract provision at issue are irrelevant. What matters is that in both cases it must be decided how courts can compel an insurance company to “perform contractual duties which the trial court has declared that party is obligated to perform.” (*Mabry, supra*, 556

S.E.2d at p. 123.)

Contrary to Farmers' contention, the court found the insurer liable to each class member. Specifically, it was determined the insurer had breached its ***1087** contractual duty to each policy member in the prescribed class by failing to look for loss in diminished value. Farmers apparently forgets the *Mabry* court was not asked whether the class was properly certified but rather did the court abuse its discretion in ordering the injunction. As such, Farmers' criticism of the court's failure to address the issue of common proof is misplaced.

Farmers argues an injunction is not necessary because "the putative class members have an adequate remedy via individual breach of contract claims." However, as aptly pointed out by the Lebrillas, the amount of recovery for each class member makes separate small actions impractical. When arguing the motion below, their counsel explained that to prevail in a small claims action against Farmers, each plaintiff would have the added expense of hiring experts to testify about the "like kind and quality" of imitation crash parts. Obviously, this would make separate actions unlikely and is another reason justifying certification.

Undaunted, Farmers specifically targets class certification of the UCL claim. It asserts a UCL action already provides an "expedited mechanism for obtaining declaratory, injunctive and restitutionary relief on behalf of the general public" and thus, giving it class treatment is superfluous.****40** In addition Farmers cautions, "Certification of [the] UCL claim would actually be detrimental to absent policy holders."

[17] "[A] UCL claim is procedurally distinct from a class action and ... the two have different purposes. However, the mere fact that they differ does not mandate a conclusion that they are incompatible... [U]nder the proper circumstances set forth in Code of Civil Procedure section 382, certifying a UCL claim as a class action furthers the purposes and goals underlying both of these actions." (*Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 658, 125 Cal.Rptr.2d 46.) A trial court " 'may conclude that the adequacy of representation of all allegedly injured borrowers would best be assured if the case proceeded as a class action. Before exercising its discretion, the trial court must carefully weigh both the

advantages and disadvantages of an individual action against the burdens and benefits of a class proceeding for the underlying suit.' [Citation.]" (*Id.* at p. 660, 125 Cal.Rptr.2d 46, italics omitted.)

The Lebrillas assert class certification in this case offers advantages to both sides. For plaintiffs, a class action is a stronger tool to ensure Farmers will be "required to give up wrongfully obtained" money. (*Corbett v. Superior Court, supra*, 101 Cal.App.4th at p. 671, 125 Cal.Rptr.2d 46.) "[D]isgorgement of wrongfully obtained profits could be larger when the victims are not completely identified." (*Ibid.*) Farmers, as a class action defendant, "can achieve final repose of the claims against them." (*Ibid.*) "Judgments in individual ***1088** representative UCL actions are not binding as to nonparties. Thus, a defendant may be exposed to multiple lawsuits and therefore reluctant to settle a case that will not be final as to all injured parties. With a class action, each participating member of the class is a party to the lawsuit and subject to the court's jurisdiction." (*Ibid.*)

Farmers' suggestion a "class action would thwart the streamlined procedure intended by the UCL" was specifically addressed and rejected in *Corbett v. Superior Court, supra*, 101 Cal.App.4th at p. 671, 125 Cal.Rptr.2d 46. That court reasoned, "There is no evidence that the purpose of the lower standard of proof in a UCL claim was to offset the consequences of prohibiting a class action. Moreover, the streamlined procedure is designed to benefit the public; the consumer would have to balance the burden and expense of a class action by its potential benefit. Providing the plaintiff with this alternative would not obstruct the purpose of the UCL, nor would it place any greater burden on the defendants." (*Ibid.*) Farmers fails to offer any other disadvantage to certifying the UCL claim as a class action.

ABANDONMENT OF CLAIMS

[18] In its final argument, Farmers is highly critical of the Lebrillas' failure to seek class certification of every cause of action. Citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701, Farmers suggests the Lebrillas breached their fiduciary duty to the class by trying to achieve commonality for certification purposes by impermissibly abandoning a portion of the rights and remedies available to member of the putative class. It

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states an absent policyholder bound by any judgment in a certified UCL action would be forever barred from pursuing a breach of contract action or any other claim for damages.

[19] The Lebrillas point out Farmers is essentially asking us to hold a class cannot be certified anytime the class representative fails to seek certification of fewer than all causes of action. Of course there is currently no such rule. “To maintain**41 a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class. [Citation.]” (*City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 463, 115 Cal.Rptr. 797, 525 P.2d 701.) “When appropriate, an action may be maintained as a class action limited to particular issues.” (Cal. Rules of Court, rule 1855(b); see also *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 471, 174 Cal.Rptr. 515, 629 P.2d 23.)

In *City of San Jose*, the court determined class certification was inappropriate because the plaintiffs failed to “raise claims reasonably expected to be raised by the members of the class and thus pursue a course which, even *1089 should the litigation be resolved in favor of the class, would deprive the class members of many elements of damage.” (*City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 464, 115 Cal.Rptr. 797, 525 P.2d 701.) In that case, the putative class was a group of people living under the flight pattern of the city airport. In an effort to achieve commonality, the representative plaintiffs sought damages only for diminution in market value. The court determined this decision effectively waived for “hundreds of class members, any possible recovery of potentially substantial damages-present or future. This they may not do.” (*Ibid.*) “Damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort [citation]; actual injuries to the land [citation]; and costs of minimizing future damages. ([Citation].)” (*Ibid.*)

Without explaining why, Farmers states class certification should have been sought for the breach of contract cause of action. Farmers fails to point out what the class would have to gain by this additional claim, in addition to the ones already alleged. Unlike the case in *City of San Jose*, exclusion of the claim does not waive a crucial or unique category of damages.

As currently filed, the class action seeks full restitution to each class member “of all monies wrongfully acquired by Farmers resulting from its wrongful conduct.” The Lebrillas note that had they sought certification on all causes of action, “Farmers would no doubt contend that a class action would be unwieldy.” And, as the Lebrillas correctly point out, anyone dissatisfied with their potential relief in a class action has various remedies, including opting out of the class. (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 925-926, 107 Cal.Rptr.2d 761.)

The order denying class certification is reversed. On remand, the trial court is directed to enter a new order granting the Lebrillas' motion seeking statewide class certification. Appellants shall recover their costs on appeal.

We concur: RYLAARSDAM, Acting P.J., and MOORE, J.

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