Central District Class Actions, a Catch 22

Do you ever find yourself in a situation where you were about to devour a scrumptious piece of cake only to watch it magically disappear from your plate before you could take a bite? Plaintiffs encounter something very similar when filing for class action certification in the Central District of California. The Central District Local Rules give plaintiffs 90 days to file a motion for class certification after they file their claim. The Federal rules also flexibly provide for certification at "an early practicable time." At the same time, the Supreme Court requires a rigorous analysis prior to certifying a class. The question on everyone's mind is: How do we gather enough information for the rigorous analysis required by the court and still comply with the strict 90-day filing period at the pleading stage? Or, can we eat the cake provided by the flexible Federal rules before the Central District takes it away?

BRIAN KABATECK is a consumer rights attorney and founder of Kabateck Brown Kellner in Los Angeles. He represents plaintiffs in mass torts litigation, class actions, insurance bad faith, insurance litigation, and commercial contingency litigation.

Cake and class actions are similar in more ways than one might think. Both are potentially capable of filling us with a sense of contentment. And, if we are deprived of either one - a piece of cake or a class action certification - an overwhelming feeling of disappointment is inevitable.

Class actions were established to provide people who have no means or incentive to pursue their rights with the opportunity to have their day in court. They also carry the added benefit of promoting efficiency in litigation. In fact, class actions are the single most powerful way large groups of people can bring the same claim in court.

Of course, the court must give its permission to groups that wish to form a class. And this is where things get tricky. Supreme Court precedent, the Federal Rules of Civil Procedure, and local rules, govern the issue simultaneously when filing class actions in the Central District.

The Supreme Court in *General Telephone Co. of Southwest v. Falcon*, (457 U.S. 147, 160 (1982)) laid out the requirements for successful class certification. According to the opinion, courts must conduct a rigorous analysis to decide whether the certification requirements have been met. This rigorous analysis rule was born out of a need to require more precise pleadings and reasonable specificity for class certification. But even more than that, the decision to require more initial information and a more thorough analysis was designed to protect class members.

Federal Rule of Civil Procedure 23 governs the timing requirements of class action certification. The rule provides that courts have to decide whether or not to certify a class at an early practicable time. This language was added as a result of amendments made in 2003. Prior to those amendments, the rule required certification as soon as practicable. The 2003 modification was part of a series of amendments aimed at codifying the best practices that courts developed over the years to effectively and fairly supervise class action litigation. Changing the language to an early practicable time suggests that, depending on the complexity of the issue, the courts may take more time to make a decision and to enable plaintiffs to gather the information they need. As the Advisory Committee Notes suggest, the realities of trial sometime require additional time to obtain information needed to carry out the rigorous analysis required by the Supreme Court.

The Supreme Court and the Federal Rules make this clear: In the interest of more precise pleadings and best practices, some flexibility is necessary in the class certification process. The Local Rules of the Central District of California (23-3), however, provide for only 90 days to file a motion for class certification after the complaint has been filed. Ninety days might seem like a generous stretch of time. But when taking the realities of trial into consideration, 90 days are rarely enough. Generally, a defendant has 20 days after service to respond to a complaint. Extensions of at least 30 days are then freely given. In fact, the Central District allows the parties to stipulate to a 30-day extension to respond without a court order. If the defendant files a Rule 12 motion, the motion will not be heard for at least another 21 days. Thus, a minimum of 71 days out of the 90 can pass before many cases move past the pleading stage.

So, is it possible to have your cake and eat it too when it comes to class certification? Can one really have precise pleadings and a rigorous analysis when 71 days of the 90 allocated for finding information are already spoken for?

In more complex cases, the information needed to support class certification is rarely readily available. Plaintiffs either need to be given the opportunity to conduct some pre-certification discovery or courts need to be more understanding of the fact that limited time produces limited amounts of quality information. Judges in the Central District have discretion to waive the 90-day rule, but there have been instances when they have refused. If a waiver is not granted, the plaintiff is faced with the following dilemma. He can either file a motion for class certification prematurely without sufficient supporting evidence or conduct a discovery and risk dismissal for failure to file within the 90 days as mandated by the local rule. Failure to comply with the 90-day rule is grounds alone for denying class certification in the Central District of California.

To answer the question we have all been waiting for: It does not seem possible to have it both ways when it comes to class certification. In the majority of cases, additional time is needed to acquire enough information for courts to do a rigorous analysis. Ninety days, keeping in mind the realities of trial, are only enough in the simplest of cases. Certainly, most class actions tend to allege systematic and widespread wrongdoing, and that usually requires a complex set of facts. If Central District judges don't readily give waivers to these kinds of complex cases, then the rule has the potential of defeating the very purpose of class action litigation by dismissing most, if not all, of the serious, complex and meritorious, claims. And that would make many plaintiffs and their lawyers sick to their stomachs.

New Year Brings New Rules for Appellate Lawyers

What do the universe, the national debt, the federal tax code, the waistline of the average American, the iTunes library, and the California Rules of Court all have in common? They are all perpetually expanding. And on Jan. 1, 2010, as usual on the first day of the New Year, the California Rules of Court will expand just a bit further. Summarized below are selected changes to the Rules of Court that will affect civil appellate practice and take effect on that date.

JOHN A. TAYLOR JR. is a partner with the civil appellate law firm of Horvitz & Levy in Encino, and a member of the Judicial Council Appellate Advisory Committee of California.

"There's something happening here, what it is ain't exactly clear..." (Buffalo Springfield, *"For What It's Worth"*) Rule 8.104 establishes that the time to file a notice of appeal in a civil case begins to run when the superior court mails or a party serves a file-stamped copy of the judgment or a document entitled "Notice of Entry of Judgment." But a recent court decision, *Citizens for Civil Accountability v. Town of Danville*, 167 Cal. App. 4th 1158 (Ct. App. 2008), held that electronic service of a judgment by the court did not start the time running for filing the notice of appeal because electronic service was not "mailing" of the judgment within the meaning of Rule 8.104. To avoid this result in future cases involving electronic service, Rule 8.104 is being revised to provide that the time for filing a notice of appeal runs from when the superior court "serves" rather than "mails" the judgment or notice of entry of judgment, and to clarify that service under the rule can be made in any manner permitted by the Code of Civil Procedure - *including* electronic service when permitted.

"The record shows I took the blows, and did it my way..." (Frank Sinatra, *"My Way"*) The trial court pleadings in the record on appeal can be transmitted to the appellate court in a clerk's transcript prepared by the superior court, or in an appendix that is generally prepared by the appellant. Although under Rule 8.124(a) the appellant ordinarily gets to designate which method to use, a respondent who designates an appendix within 10 days of the filing of the notice of appeal can force the appellant to assemble all the relevant trial court documents in an appendix rather than having the superior court prepare a clerk's transcript containing those documents. To eliminate any hardship this provision may cause to *indigent* appellants-who may not have the financial or other resources to assemble an appendix-Rule 8.124(a) is being modified to provide that a respondent *cannot* preempt the appellant's choice of a clerk's transcript where the appellant obtains a fee waiver for the cost of preparing the clerk's transcript.

The rules governing the record on appeal have also been revised to allow parts of the record from a prior appeal in the same case to be incorporated by reference in appendices and in the clerk's and reporter's transcripts, and to permit the inclusion of copies of documents from a prior appeal in a clerk's transcript. (Rules 8.124(b), 8.147(b)). Finally, another revision will allow a party preparing an appendix to obtain a copy of a document or exhibit from another party. (Rule 8.124(c)).

"Every year is getting shorter, never seem to find the time...." (Pink Floyd, *"Time"*) Undoubtedly this year's most popular revision will be an amendment to Rule 8.212 that increases the time to file an appellant's opening brief from 30 to 40 days after the record is filed in the Court of Appeal. The extended time is being provided because there is sometimes a delay between the time the appellant receives notice that the record has been filed in the Court of Appeal and when the appellant actually receives a copy of the record, and the average size of the record on appeal has grown, making it increasingly difficult for appellants to finish reviewing the record and prepare the opening brief within 30 days. Unfortunately for respondents, they get no corresponding additional time-a respondent still has only 30 days to file his or her brief after the appellant's opening brief has been filed.

"Help me...I'm in trouble again" (Joni Mitchell, *"Help Me"*) In a limited civil case, Rule 8.882 currently allows the parties to stipulate to extensions of up to 30 days of additional time to file briefs in the superior court appellate division. Unlike in an unlimited civil case, however, there is no provision allowing a party to apply to the court for additional time when the amount of stipulated time has already been used up and good cause can be shown for why the brief has not yet been completed, or when the opposing party is unwilling to stipulate to an extension. To correct this discrepancy between limited and unlimited civil appeals, Rule 8.882 will be revised to add a new subdivision providing for such applications. (A new optional Judicial Council form-APP-106-will be available after July 1, 2010 for use by parties to request such an extension in the appellate division.)

"You don't look different, but you have changed, I'm looking through you, you're not the same..." (The Beatles, *"I'm Looking Through You"*) Rule 8.885 is being amended to provide that in limited civil cases-those heard before the appellate division of the superior court-the assigned judges may participate in oral argument using videoconferencing. In many superior courts, the judges assigned to the court's appellate division may include judges from superior courts in different counties, requiring many hours of travel and travel costs in order for the assigned judges to attend oral argument. In addition, difficulties in finding a day when all the assigned judges can clear their calendars for such travel often means that oral argument is delayed. Under the revised rule, the judges may participate in oral argument by videoconference where ordered by the presiding judge or authorized by local rule. The parties must appear in person for the oral argument at the superior court that issued the judgment or order under appeal, and the oral argument must be open to the public at that same location.

"You can't always get what you want, but if you try sometimes you just might find you get what you need...." (The Rolling Stones, *"You Can't Always Get What You Want"*) A petition for a writ of supersedeas is used to ask the appellate court to stay the enforcement of a trial court judgment or order while an appeal from that judgment or order is pending. Currently, when the record on appeal has not yet been filed, Rules 8.112 (in unlimited civil appeals) and 8.824 (in limited civil appeals) require that the petition attach the judgment or order being appealed, the notice of appeal, and a statement of the case that includes a summary of the material facts. But those documents and the summary do not always provide the appellate court with the information it needs to determine whether a writ of supersedeas should be issued. Consequently, Rules 8.112 and 8.824 are being amended to require the attachment of a reporter's transcript of any oral statement by the court that supports the ruling(s) being challenged on appeal (replacing the former requirement of a summary of the material facts) and a reporter's transcript of the proceedings in which the request for a stay was denied by the trial court. If either transcript is unavailable, a declaration summarizing such proceedings must be attached to the petition.

"Give me your answer, fill in a form...." (The Beatles, *"When I'm Sixty-Four"*) At the beginning of 2010, several new forms approved by the Judicial Council will be available to civil practitioners. A new "Notice of Entry of Judgment or Order" form (CIV-130) can be used whenever service of notice of entry of a judgment or order is required to trigger the time for filing a motion (e.g., new trial motion), a writ petition (e.g., from denial of summary judgment), or an appeal (e.g., from a judgment or other appealable order). New forms for respondents to designate the record on appeal (APP-010, APP-011, and APP-110) can be used by respondents to elect an appendix in lieu of a clerk's transcript, and to counter-designate the record on appeal.

Links to the actual text of these rule changes (and others) can be found at http://www.courtinfo.ca.gov/jc/documents/age102309.pdf.