A new aggregate litigation model emerges—technology-driven mass actions

Today's technology automates client screening, interviewing, signing, and communications, among other things, enabling the cost-effective mass litigation of smaller claims than ever before

By Ray E. Gallo

Plaintiffs' class action work never has been an easy game, or one for the faint-hearted. But the last few years have brought new impediments to those seeking mass justice. Decisions by the United States Supreme Court have tightened class certification requirements and made it harder to challenge arbitration agreements. (See, e.g., *Wal-Mart Stores, Inc. v. Dukes* (2011) __ U.S. ___, 131 S.Ct. 2541, 180 L.Ed.2d 374; *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740, 179 L.Ed.2d 1740.) To those who think wrongs deserve remedies, and that mass wrongs deserve remedies at least as much as one-offs, these decisions are signs of bad times. Like Proposition 64, which narrowed the application of the Unfair Competition Law (Bus. & Prof. Code §§ 17200, et seq.), these rulings impede efforts to hold businesses accountable for wrongs they commit, even where injustice inarguably results. There were always wrongs with no remedy. Now there are more.

Frustrated and discouraged, some plaintiffs' class action lawyers are contemplating retirement. Some are exploring other practice areas. At my firm, we've spent the last seven years litigating hard-to-certify vocational school fraud cases and, in the process, have developed a technology-driven mass action business model that enables us to cost-effectively litigate smaller claims than ever before—by automating processes that otherwise would overwhelm a firm our size.

Class actions never were a panacea, just the only option for numerous smallish wrongs

Beyond the always-limited availability of class certification, individual litigation always offered superior outcomes—wherever individual litigation was economically viable and the claimant was willing to do the work and take the risk—as illustrated by the often superior outcomes achieved by opt-outs from certified classes**.** *See, e.g.***,** Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 Bus. Law. 307, 382-83 (2014).

The reasons are simple: (1) Class actions exclude all but the evidence common to every claimant; (2) Defendants can afford to pay more per plaintiff when there are fewer plaintiffs; (3) A plaintiff who is prepared to submit to cross-examination can expect to get more for a valid claim than one who is not willing, able, or prepared for that ordeal; and, (4) in individual litigation individual remedies like emotional distress damages can be pursued and necessarily increase the recoverable damages, often by a factor of two or more.

Another unfortunate aspect of class actions is that they always involve releasing the claims of every single class member while often obtaining remedies only for those who make claims—frequently a small fraction of the class. So while in theory you're helping all class members, you often give releases for more individuals than you help.

In short, class actions are most often pursued not because they offer a superior individual remedy, but because they are economical: One stands for all. Prove one case, prove them all. You generally can't do any better. Nothing else is economical when claims are too small to merit individual attention from plaintiffs' lawyers and the courts.

Finally, all class action lawyers know that even a successful class action ends with plaintiffs' counsel, after what is often several years of substantial work, throwing themselves on the mercy of the court to decide— in its discretion—their fees for the time, effort, and expenses invested in the case.

For these and many other reasons, class actions are suboptimal and are routinely referred to in the case law as "rough justice."

Mass actions, aggregate actions with all plaintiffs personally appearing before the court, do not suffer from these shortcomings. A lawyer can simply sign up numerous individual clients and represent them all, individually. The problem is, for small cases, there has been no practical alternative to the class action as a vehicle. It simply has not been economical to handle small claims in any individual way, even when there are large numbers of them.

Building what we needed

In June 2007 the SF Weekly reported that numerous graduates of the California Culinary Academy in San Francisco claimed they were misled during the admissions process to believe chef jobs and chef wages awaited CCA graduates. In fact, CCA graduates on average earned about $11 an hour—a non-living wage, and certainly not one on which graduates could both live and repay the $50,000 or so of CCA student loan debt most graduates carried, often at unfortunately high interest rates. (Our own later surveys indicated that 95% of graduates did not become chefs upon graduation, or ever.) In addition to the low wage, graduates often were offered fewer than 40 hours a week.

Graduates therefore were left with student loans they could not possibly repay on their culinary industry wages. And most of those folks had no other marketable skills. Many faced lifetime insolvency, since student loans are not dischargeable in bankruptcy. Young people who had taken to heart the American exhortation to pursue formal education and training had been ruined by it. Taxpayers had paid much of the bill too (through state and federal grant programs), and seemed sure to pay a lot more when graduates couldn't even pay their federally-guaranteed loans, nevermind their higher interest private ones.

My wife handed me the article. "Maybe you could help these people." I called the reporter and told her I handled consumer class action matters and would be willing to meet with the students.

Cases like this one had been around for years, and smart plaintiffs' class lawyers had consistently declined them. While the misleading intent of the marketing program was clear enough, individual issues potentially precluded class certification: Each student potentially knew different things about the realities of the food preparation labor market, had a different conversation with his or her

salesperson, and achieved a different degree of success and wages in the industry. The cost and complexity of litigation like this, combined with doubts about class certification, made the case unattractive. Moreover, the conventional wisdom was that a student could not blame a school for his or her lack of career success (nevermind that schools love to take credit for their illustrious alumni). Finally, individual litigation of $50,000 claims most likely would fail without a viable large-scale aggregate litigation model: To win would require years of expensive discovery and law and motion work, so only an approach where millions of dollars of work could be done and the cost spread across many claimants made sense.

We felt strongly that the chorus of aggrieved voices rang true. And we felt deeply for these victims facing a lifetime of debt. Knowing that class certification was unlikely, I talked to some personal injury lawyers who had handled mass actions, and I looked at the complex case procedures. I worried about the case taking over my practice, and doing so for years. I worried about going broke trying to help these people. But I concluded that a complex courtroom and its case management procedures would enable a manageable approach to mass litigation. And I chose to take the chance.

We filed *Amador v. California Culinary Academy* in September of 2007 as a putative class action with an initial 39 clients. With email, Internet chatter, and a Myspace posting by one of our clients we reached 500 clients within about two years of filing—proof of the effect the Internet can have on sign-ups.

But our 500 clients scared me. People we had never spoken to were sending in signed fee agreements and completed questionnaires. (Somebody had shared our forms on the Internet.) To clean up this mess without relying on class certification, we built a website to automate client screening, interviewing, signing, and communications. Under *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 53 Cal.Rptr.3d 513, 150 P.3d 198, we discovered the 5,000 member *Amador* class list—complete with the available email addresses. These folks were material witnesses, we needed to interview and/or survey them and, if we wished to, we were constitutionally entitled to offer our services to them by mail and/or email. Moreover, our existing clients had good reasons for wanting us to have more clients: The more clients we had, the more we could afford to invest in the case, the larger the population over which the costs of litigation were spread, and the stronger the chorus of voices crying fraud.

With our first, fairly simple version of our software ready to launch, we went to mediation in August of 2010 presenting a credible threat to ultimately represent perhaps 2,000 individual plaintiffs. Unlike in a class case, each of those plaintiffs could pursue personal damages like emotional distress that might double or triple the value of each claim. For the defense, in a radical change from most class actions, winning on class certification would, at best, be only the end of the beginning. At least theoretically, they could still lose $100 million or more, even without any punitive damages.

The risk posed by our mass action threat, and other factors, moved defendants to pay an unprecedented $40 million class settlement in an education fraud case to get the benefit of a class-wide release.

Mass torts: not just for PI lawyers anymore

Seeing what happened in *Amador*, and eager to put our new knowledge, software idea, and investment to work, we turned our attention to Los Angeles, where together with our co-counsel Kirtland & Packard we had filed *Vasquez v. California School of Culinary Arts* (sister school to CCA) in June of 2008 on essentially identical allegations, but with only a handful of plaintiffs as class representatives. We discovered the class list and in February of 2011 deployed a website running our new software. We sent a simple "lawsuit notice" to class members and gave them the website's URL for more information. Over the next few months our website—using our software—effortlessly screened our potential clients, determined whether they had a valid claim within the statute of limitations, conducted an initial interview process, and presented clients with a fee agreement to review and accept online. It automatically and instantly sent each client his or her fully executed copy of the fee agreement by email together with my personal welcome message and instructions. It allowed us a window to review prospects' information before committing to representation if we wished to do so—or we could set the process to proceed automatically.

Moreover, our software created and deployed a secure custom client portal/website that we could easily edit and control, which enabled us to communicate securely with our clients in a confidential manner, answer questions once for everybody, send mass texts and emails to all or designated segments of our site users, and even exchange documents securely (with clients uploading their documents directly to our database). As a result, in short order we had effortlessly signed-up more than 1,000 individual clients whom we kept fully informed by simple web postings that we could easily make without technical support, and through mass emails. Our clients therefore needed minimal further attention from us. We had 1,000 clients, but the phone wasn't ringing. And my email box wasn't inundated. In sum, our software gave us even better leverage than a class action might, while delivering the benefits of individual litigation and streamlining how we serviced those clients. We could:

- Do all the needed discovery without worry about what the court might ultimately find reasonable;
- Present our best evidence at any trial(s), not just the evidence common to all victims;
- Pursue the significant individual damages that wouldn't have been recoverable on a class basis;
- Set our fees by contract with the client, rather than asking the court for fair treatment at the end and hoping for the best, as required in a class case;
- Get each individual a fair outcome, in which the best cases got the most and the worst cases might lose or get very little;
- Avoid giving releases from victims who did not participate;
- Handle 1,000 individual clients in one case smoothly and manageably (with the exception of needing additional manpower to assemble 1,000 individual—if very similar—sets of discovery responses when that time came).

So a year later, when our co-counsel ably made—but predictably lost—the motion for class certification, I was pleased: Our individual clients' probable upside improved when the court denied class certification. And our own economics were still viable—defendants' win on class certification didn't at all mean that the millions of dollars of work we had done was wasted, or could not be recovered.

These claims remain pending, though a settlement appears imminent. Regrettably, the case will settle for less than its true worth due to the defendant's financial problems with its business model, other litigation, and multiple inquiring attorneys-general. But even a steep discount from the verdict value of these cases represents a big help to our clients, and a profit for us, that never would have been possible without our technology-driven mass action approach.

Our arbitration swarm even worked

The defendants even appeared to regret compelling arbitration against the roughly 50 of our clients with the most up-to-date (and therefore enforceable) arbitration agreements (the rest the Court had thrown out as unconscionable). We promptly began making arbitration demands. But after we won the first arbitration, receiving an award of $60,000 plus our $150,000 in attorneys' fees, the defendants settled the remaining arbitrations (they could call one loss an aberration, but weren't willing to risk the potential effect on their stock of going 2-0, which would have suggested the parent company's insolvency). Together with the cost of their own five-lawyer arbitration team, the defense must have spent $400,000 to resolve that one case, which they originally could have settled for $40,000 given our worries about arbitration. It turns out that arbitrating even smallish cases on an individual basis can be prohibitively expensive for defendants if they're losing, and nicely profitable for plaintiffs' counsel, if there is an attorneys' fees clause.

The future of aggregate litigation

Historically, mass torts have been the province of well-funded personal injury lawyers handling substantial claims that justify the substantial personal attention that injured people need emotionally and the substantial legal work required to handle these never-identical cases. Defective drugs and medical devices, airplane crashes, and asbestos litigation are typical examples. But technology has changed the calculus. It enables a new business model and reminds us of all the ways that individual litigation better serves victims. The smallest claims remain irremediable under this model (there is perhaps still nothing to do about a $20 fraud with an arbitration clause and a class action waiver—future Supreme Court decisions or legislation will have to find a remedy for these wrongs, which the current Supreme Court simply accepts as being irremediable as a practical matter. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Court held the "effective vindication" rule, which prohibits arbitration agreements from requiring parties to waive their rights to pursue federal statutory remedies, only applies when an agreement expressly bans those claims but does not invalidate agreements that merely make it prohibitively expensive to pursue them: "The fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.").

But with technology-enabled mass actions, mass arbitrations, and "arbitration swarms" individual plaintiffs with, for example, $25,000 or more in economic damages, a basis for attorneys' fees, and potential claims for additional general or emotional distress damages can obtain excellent outcomes that would have been effectively unavailable to them in a class action context—as long as there are a lot of them. And, by effortlessly signing up and easily managing 1,000 or more of those cases using software, we can earn a profit if we deliver results.

For these reasons, and with these tools, we see the individual litigation of numerous quasi-class claims as the way of the future. Individual litigation is inevitably more expensive. But with relatively nominal costs for screening, interviewing, and signing up clients, and an easy means to communicate with potentially thousands of clients and manage their data, we see it as profitable and therefore viable in more cases than ever before—enabling lawyers to help victims who currently cannot be helped in any economical manner.

Our positive experiences with our mass-action software have spurred a fully-developed commercial version with an extensive list of features that makes handling these mass cases fun, easy, and economical. Today, we can deploy a powerful new case website in a few hours. The Internet makes marketing easy. Mass torts, bankruptcy creditor representation, anti-trust, wage and hour, and consumer fraud cases, among others, all fit the model. All you need is a strong enough liability case, meaningful but not big damages, an attorneys' fees clause (so the defense cannot put you out of business by trying them all), and a willingness to dive in and use modern technology. Today, we are working on joint ventures with class and mass action lawyers that promise to keep our firm busy for years to come.

Helping others, particularly the most deserving, is the great satisfaction of lawyering. It's what makes the long nights, weekends, stress, and sleep loss of high-stakes contingency work worthwhile. Fortunately, the technology-driven aggregate litigation model means lawyers can do more good than ever before—profitably.

About the Author:

Ray Gallo is a commercial and consumer litigator and entrepreneur in the San Francisco Bay Area. He is the Senior Partner of Gallo LLP (www.gallo-law.com) and CEO of Gallo Digital, LLC (www.gallodigital.com). Additional information about the software discussed in this article is available at www.leverageapp.com.