

**In the Wake of *Concepcion* and *Dukes*, Consumer Class Action Lawyers Must Soldier
Forward By Leveraging Their Rich History and Taking Some Clues from the
Whistleblower Bar**

By Steven N. Berk

Introduction

As an attorney who has specialized over the last several years in prosecuting nationwide consumer class action cases, I, like many of my colleagues, fear the Supreme Court's recent decisions in *AT&T vs. Concepcion* and *Dukes v. Walmart* represent a tipping point that will fundamentally limit and perhaps ultimately eliminate the viability of the consumer class action practice. If that occurs (still in doubt at this writing) what alternatives are available to me (and my colleagues)? Being a former federal prosecutor and having worked on both sides of whistleblower cases over the years, the Qui Tam bar seemed a viable alternative. To study that option in more depth, I attended the 11th Annual Conference of Taxpayers Against Fraud, a prominent stop for lawyers specializing in prosecuting claims on behalf of a growing number of different kinds of whistleblowers. Starting with the False Claims Act (the great granddaddy of them all) and more recently followed by a panoply of statutes containing some whistleblower provisions, the bar representing whistleblowers is dynamic and robust.

The Conference was timely and substantively rich. However, at times my mind wandered toward the bigger picture, or so I rationalized. I couldn't get the strong parallels between the two practices—Qui Tam and class action—out of my head. Although many of my colleagues in the class action bar are in a deep malaise that has engulfed the practice since *Concepcion* and *Dukes*, looking to how and why the parallel Qui Tam bar has flourished may allow us to successfully navigate a legal landscape driven by a powerful political agenda that, simply put, is dead set on destroying the class action mechanism despite its 700-year-old history in both British and American jurisprudence.

Although important distinctions exist, there seem to be three core concepts that help illustrate the parallel nature of these two practices. First, both are deeply embedded into

American jurisprudence. The whistleblower's important role dates back to at least the Civil War, when Congress enacted legislation to punish fraud on the Federal Government.¹ In those days, fraud mainly consisted of selling defective munitions and sick mules or horses to the Union Army.² Class actions or actions on behalf of non-present members are part of the first codification of the Federal Rules of Civil Procedure (1928); the general concept of mass actions and suits on behalf of non-present class members dates back to British Common Law and at least the fourteenth century. Second, both practices work in conjunction with, or on a parallel track with, state and federal prosecutors. In the case of a Qui Tam action, private members of the bar initiate the proceeding, but by its decision to intervene or decline, the government plays a pivotal role in the direction and outcome of the case. On the class action side, many cases (securities and antitrust in particular) are generated from an ongoing or completed government investigation and prosecution. Third, both practices share the moniker of being "a protector of the individual" against overreaching by corporate interests. In today's vernacular, they are in the same "space." Despite this, Qui Tam lawyers, with their ability to direct billions back to government, enjoy a relatively high place in the public's perception while class action lawyers are dismissed with the back of the hand and the stereotype that they take all the money and leave class members with pennies.

Qui Tam Lawyers Have Statutory Authority

Beginning with the Federal False Claims Act³ and now spanning a range of statutes, the whistleblower and his attorney have codified an important and, under some statutes, necessary role.⁴ They are part of the process. They are engrained in the fabric of the statutory scheme.

¹ US v. Bramblett, 348 U.S. 503, 506 (1955).

² Lary Lahman, *Bad Mules A Primer on the Federal False Claims Act*, Oklahoma Bar Journal Articles (Jan. 3, 2012), http://www.okbar.org/obj/articles_05/040905lahman.htm.

³ The False Claims Act, 31 U.S.C. §§ 3729-3722

⁴ See Occupational Safety and Health Act, 29 U.S.C. § 660 (2011); Surface Transportation Assistance Act (STAA), 15 U.S.C. § 31105 (2011); Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651 (2011); International Safe Container Act (ISCA) 46 U.S.C. § 80507 (2011); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2011); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367 (2011); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (2011); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (2011); Clean Air Act (CAA), 42 U.S.C. § 7622 (2011); Comprehensive Environmental Response,

From that comes much of the legitimacy enjoyed by the Qui Tam bar. It could be said that the whistleblower's statutory rights and protections are akin to a consumer class action attorney being able to plead a private right of action on behalf of a class. But in many ways, the Qui Tam lawyer has more than just a private right of action. They not only generate the case by filing under seal, they then enjoy various rights to participate in the litigation even when the government decides to intervene.

Additionally, the Qui Tam lawyers have largely avoided nationwide efforts at tort reform and a growing resentment of "trial attorneys." They are not seen as part of the problem. To the contrary, they continue to expand their portfolio by successfully lobbying for the inclusion of whistleblower protections in a range of legislative schemes. Notably, a new whistleblower provision in the controversial Dodd-Frank legislation has survived despite a strong, well-funded opposition led by corporate interests and spearheaded by the U.S. Chamber of Commerce. While the provision is not all that was hoped for, it does provide a mechanism for whistleblowers to participate and receive monetary awards in cases selected and prosecuted by the Securities and Exchange Commission.

In comparison, the efforts of the class action bar have had less impressive results. Not only do critical pieces of federal legislation, such as the Federal Trade Commission Act, lack a private right of action; state consumer protection statutes—the bulwark of a consumer class action attorney's authority—are being narrowed by judicial interpretations disallowing class

Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (2011); Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (2011); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2011); Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514 (2011); Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129 (2011); Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2011); National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142 (2011); Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087 (2011); The Patient Protection and Affordable Care Act (ACA), PL 111-148, March 23, 2010; Consumer Financial Protection Act of 2010 (CFPPA) 12 U.S.C. § 5567 (2011); Seaman's Protection Act (SPA), 46 U.S.C. § 2114 (2011); FDA Food Safety Modernization Act (FSMA), P.L. 111-353.

treatment in favor of only individual cases.⁵ Similarly, reliance requirements are being read into other statutes, making class treatment a virtual impossibility.⁶

Simply put, class action attorneys are not—like their brethren in the Qui Tam bar—returning billions of dollars to the U.S. Treasury. But efforts to carve out footholds wherever possible must be pursued with intelligence and vigor. Is it likely that Congress will pass a private right of action for Section 5 of the Federal Trade Commission Act? No, but legislative efforts should be redoubled on both state and federal levels to advocate for a private right of action and statutory protections for class actions on every piece of consumer protection and regulatory statute.

Ironically, now is an excellent time to redouble efforts and seek statutory legitimacy. Both federal and state prosecutors are strapped for resources and in many places face government freezes and cutbacks. The private bar has sufficient capacity. It can be an efficient, competent and fully motivated flexible enforcement division that can be deployed to enforce the legislative intent of a host of regulatory imperatives.

Lawyers Representing Whistleblowers Have Powerful Friends

With statutory authority comes powerful friends. As a lawyer who has attended a few consumer class action seminars over the past several years, I was struck by the strong presence of government attorneys at the TAF conference in comparison to similar conferences in other fields of law. Several state and federal prosecutors made presentations. They not only told a few war stories; they cajoled, preened and otherwise tried to impress the group. They were hunting for cases.

“File your case in Nashville, we have great food, music and we will vigorously consider your claims.” “No you must come to DC.” “No, New York, we have this innovative ‘public-private partnership’ where everyone benefits.” “Forget those places; Baton Rouge is the place you want to be. We have better food and great football.”

⁵ See, e.g., T. C. A. § 47-18-109; Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301 (Tenn. 2008) (barring class actions for consumer protection claims in Tennessee);

⁶ 82 N.Y. Jur. 2d Parties § 259; Weinberg v. Sun Co., Inc., 565 Pa. 612, 777 A.2d 442 (2001)

What a refreshing change of pace for a maligned consumer class action lawyer who often felt I needed to apologize for what I did for a living. Here was the mighty federal government and the New York Attorney General's office asking to play.

The government lawyers were not lower level line prosecutors who drew the short straw and were forced by some midlevel manager to make a token appearance. Nope, the speakers at the TAF conference *were* the bosses. The crowd included U.S. Attorneys from at least three jurisdictions and senior government attorneys from civil fraud and other areas of the Department of Justice. Their presence alone was telling. But they were also articulate, sincere and straightforward about the need to work together to forge private-public partnerships to fight for taxpayers and against government waste and abuse. The issue is limited resources. The Department of Justice, through the various U.S. Attorneys Offices, simply does not have enough resources to go it alone. There seems to be genuine mutual respect and fellowship as one panel after another included a government lawyer (sometimes two) teaming up with a private attorney to present a topic or lead a discussion.

They had a common goal: Fighting fraud and maximizing the dollars returned to the government. Surely issues may exist beneath the surface, and it may not be all smiles, but the incentives of both the government and private bar were in sync. Not a bad place to start. Topping it off was a keynote lunch speech by no less than Royce Lamberth, the Chief Judge of the United States District Court for the District of Columbia. He emphasized the importance of the false claim cases, the importance of working together and finally some level of frustration with the failure of the government to move cases fast enough. Yes, the government, not the private bar, was to blame.

Class action attorneys need to work more closely with state and federal prosecutors and program administrators. As just one example, class action attorneys should push to attend the National Association of States Attorneys General National Conference. Their value proposition to these often beleaguered, overcommitted state prosecutors is, "We have the resources, know-how and willingness to pursue cases that can make you look good. Tell us your priorities and we will deliver." Similarly, the same effort at outreach should include federal officials. And not just at the Department of Justice, but also directly at the operation level (FTC, SEC, Treasury Department). Consumer attorneys should take every opportunity to work with federal officials.

Fostering a collaborative environment is a necessary first step toward building the type of trust that comes with joint prosecutions in accordance with a statutory grant similar to the False Claims Act.

Whistleblowers and Their Attorneys Have More Support Among the Public and Private Officials

We've heard it time and again, class action lawyers take millions, while their clients receive pennies. It has become a label we can't shed.⁷ Class action lawyers are no longer thought to protect individuals from the big bad corporations, as seen in the movie *Erin Brockovich*, but have now acquired a reputation to pursue frivolous claims that benefit the representation more than the class members. Class action lawsuits with low settlements are known as "coupon settlements" because at times they take the form of "coupons" that can be redeemed for future purchases with the defendant company. This type of settlement now dominates perceptions of the class action lawsuit. You don't hear that about whistleblowers. Yes, there is shock at huge awards, like the \$96 million that Cheryl Eckard earned blowing the whistle on Glaxo-SmithKline's improper drug manufacturing, processing, and labeling practices. But still, whistleblowers are the stuff of Hollywood movies. (Think Russell Crowe as the jittery, risk-it-all whistleblower, alone and gambling with his life to take on the tobacco industry in *The Insider*.) In comparison, the class representative willing to stand up to an exorbitant early termination fee by a telecom company hardly generates the same level of support.

This public approval (or at worst, indifferent acceptance) of the function of the whistleblower translates to a favorable environment on Capitol Hill and in state legislatures throughout the United States. In fact, 21 separate federal statutes contain whistleblower protection provisions and entire offices are dedicated to ensuring that the programs run smoothly

⁷ See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little?, 158 U. Pa. L. Rev. 2043, 2043 (2010) ("Class action lawyers are some of the most frequently derided players in our system of civil litigation."); Martin H. Redish, Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals, 2003 U. Chi. Legal F. 71 (2003) ("Public attitudes about plaintiffs' class action lawyers have often been strongly negative [in recent years].").

and whistleblowers' rights are secure.⁸ By any measure, the role of the whistleblower and the profile of their counsel has grown over the past decade. Importantly, that stature has support on both sides of the aisle. Indeed, a leading proponent of whistleblower provisions is conservative republican Senator Charles Grassley,⁹ who is currently targeting pharmaceutical companies for defrauding federal health care programs.

In comparison, the class action attorney does not have a comparative champion. While the Class Action Reform Act of 2005 has not turned out to be the death knell to class actions that some of its supporters hoped for, it does represent a successful limitation on class actions.¹⁰ On the other side of the coin, talk of a “legislative” fix to *Concepcion*¹¹ has likely reached its final destination: the House Subcommittee on Courts, Commercial, and Administrative Law. Not only will the Republican-led house reject that fix, but I suspect several Democrats would be unsympathetic to doing anything that could be construed as benefiting class action attorneys. Indeed, based on his record as a senator I would not be surprised if even President Obama refused to stick out his neck for the class action bar in an election year.

Class Action Lawyers Can Change the Paradigm

To be sure, whistleblower attorneys have a distinct advantage over class action attorneys. Their work results directly in the government receiving money—billions. In these days of huge

⁸United States Department of Labor, Whistleblower Protection Program, <http://www.whistleblowers.gov/> (last visited Jan. 4, 2012).

⁹ See, e.g., Dennis J. Ventry Jr, *Whistleblowers and Qui Tam for Tax*, 61 Tax Lawyer, (2008) (“These individuals [federal whistleblowers], Grassley said, “often risk their careers to expose fraud, waste, and abuse in an effort to protect not only the health and safety of the American people, but the federal treasury and taxpayer dollars.” But he likely was thinking in particular of *tax* whistleblowers, given that he had championed legislation in 2006 for the expansion of an IRS Whistleblower Office and that his staff wrote the provision in the Tax Relief and Health Care Act of 2006 that authorized such an office, greatly enhancing the IRS whistleblower program.”)

¹⁰ Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After Cafu & Mmtja*, 41 Loy. L.A. L. Rev. 965, 1035 (2008) (CAFA does not appear to sound the death knell of class actions for several reasons).

¹¹ H.R. 1873, 112th Cong. (2011).

budget deficits that is profoundly significant. Moreover, the very structure of the False Claims Act and other whistleblower statutes requiring that the private bar work with the government creates a symbiotic. Simply put, the private bar must allow the government the opportunity to intervene and proceed with the prosecution.

No such analog exists on the class action side. Moreover, monies received by class action attorneys typically do not go into the coffers of a federal or state treasury. In grand terms class action attorneys effectuate a transfer of wealth back from corporations to consumers. That transfer is not automatically seen as a positive development; simply ask the U.S. Chamber of Commerce. Despite this mixed perception, class action attorneys can begin to change the paradigm. They can start quantifying these results in money and value obtained for consumers. It is that simple. Consumers lose billions every year in deception, defective products and sharp corporate practices. Like their friends in the Qui Tam bar, they must illustrate those concrete results. That will surely go a long way toward developing trust, legitimacy and a road toward sustainability even in the face of an indifferent legislature and a hostile judiciary.

Class Action Law's Rich History

Class action suits have been serving the public interest for centuries. The jurisprudential history of class actions shows that, far from a modern creation of convenience, the class action has a rich history in efficiently and fairly administering justice for those who might otherwise go unrepresented.

The tradition of class actions dates back nearly a millennium to 1125 and the reign of Henry III.¹² The most commonly cited case that synthesizes the rules of a modern class action is *Brown v. Vermuden* (1676), 1 Ch. Cas. 272, 22 Eng. Rep. 796.¹³ That's right, 1676. The dispute involved a defendant class of miners failing to pay their full tithes to a local parish. The court held in favor of the parish and, more importantly, held that the judgment bound all members of the defendant class—even those who were not directly involved in the litigation.¹⁴

¹² Susan T. Spence, *Looking Back . . . In a Collective Way, a Short history of Class Action Law*, 11 A.B.A. J. Business Law Section (July/August 2002).

¹³ Id.

¹⁴ Id.

More recent, but still centuries old, the case of *Discart v. Otes*, 30 Seld. Society 137 (No. 158, P.C. 1309), offers a clear example of a class action prosecuted by a representative plaintiff.¹⁵ In *Discart*, the citizens of the Channel Islands, a group of islands in English possession off the Northwest coast of France, brought suit against Sir Otes Grandison, to whom King Edward I had granted the islands.¹⁶ The islanders complained that Otes' demand for all rents to be paid in French currency as opposed to the debased local currency had effectively tripled the rents owed to Otes.¹⁷ The local Island Court deferred the case to the King's Council, ordering "that Discart and all that are in like case with [him] are bidden to appear ... before that same Council, either in person or by someone representing them all, to hear its opinion and to receive such judgment as shall there be delivered."¹⁸ The island inhabitants were therefore afforded the right to pursue their grievances, which might otherwise have been impracticable, through a binding class action. Unfortunately, as you might expect, English Nobility won out against the island inhabitants.¹⁹

The modern American rules for class action litigation owe their heritage to Equity Rule 38, which existed until the adoption of the modern Federal Rules of Civil Procedure following the Rules Enabling Act of 1938.²⁰ According to the Advisory committee notes, Rule 23 adopted the old equity test of allowing class actions where the question is "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."²¹ Developments in the 1966, 2003, and 2007 amendments have given us the class action under Rule 23 that we know today. Still, despite recent clarifications of the rule, our mission remains the same as those barristers of centuries past: to represent the interests of aggrieved class members who are too numerous, or whose individual losses are too small, so as to render individual representation unfeasible.

Just as the *Qui Tam* bar traces its history to the Civil War, we too must emphasize the rich history of class actions. Class actions are evidence of judicial evolution from the days of

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. L. Rev. (1969).

²¹ Fed. R. Civ. P. 23

individual writs (remember your first year doctrinal courses?) to the modern view that even where all of the members of the class may not be able to represent themselves, they deserve justice nonetheless. Class action attorneys should be mindful of the important role we play in the historical evolution in the administration of justice. Were the public more aware of the significant tradition of class action and representative litigation, it might look upon the practice with a more favorable light.

Conclusion

After *Concepcion* and *Dukes*, class action attorneys are no doubt feeling beleaguered. But these decisions cannot wipe out 1,000 years of jurisprudence and a record of substantial victories for consumers. Instead of retreating, the class action bar must redouble its efforts to pursue justice. Like our brethren in the Qui Tam bar, we must demonstrate that class action attorneys add value and represent the rights of individuals and groups that need and deserve our expertise and representation. We must not be defined by our opponents and instead rise above political rancor to focus on protecting the rights of our clients.