

EXPERT ANALYSIS

California Supreme Court Stabilizes the Law In State Misclassification Class actions

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In a long-awaited decision, the California Supreme Court in *Duran v. U.S. Bank*, 59 Cal. 4th 1 (Cal. May 29, 2014), clarified California's standard for certifying class actions in employee misclassification cases. In doing so, the court issued badly needed guidance to trial courts deciding whether employee wage class actions may be certified (or remain certified) as class actions.

While the court's standard is not identical to that set forth in the U.S. Supreme Court's landmark decisions in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), *Duran* is a major step in bringing California's law on class certification in line with the standards prevailing at the federal courts and in other states.

Duran's effect will be far-reaching. The court's rigorous and sensible analysis requires trial courts to conduct a far more thorough analysis at the time of class certification concerning the practical means by which individual defenses to class claims can be resolved, including a realistic trial plan that permits employers to litigate individual liability defenses. Although the decision did not expressly overrule any prior authority, its reasoning suggests that many cases in recent years applying vague and soft standards for certification of employee wage class actions may no longer be good law. The result will likely be a fairer playing field for employers in litigation over certification of employee class actions.

BACKGROUND

Duran arose from a complaint alleging that loan officers working for U.S. Bank were misclassified as exempt outside salespeople under Section 1171 of the California Labor Code. Relying heavily on the California Supreme Court's 2004 decision in *Sav-On Drug Stores v. Superior Court*, 34 Cal. 4th 319 (Cal. 2004), the trial court certified the case as a class action based on evidence that the loan officer position was "standardized," that the bank had classified all loan officers as exempt without examining each employee's duties or work habits, and that the company allegedly failed to train or monitor employees to ensure that the exemption requirements were satisfied.

Duran is particularly significant because, as the court put it, it was "an exceedingly rare beast: a wage-and-hour class action that proceeded through trial to verdict." Because of this, the trial court in *Duran* was actually required to implement a trial plan.

Hence, the problem. From the time of certification onward, U.S. Bank had shown with declarations and other testimony that many loan officers met the exemption standard. The trial court, however, not only rejected this evidence, but excluded it entirely, relying instead upon testimony from 20 randomly selected class members in addition to the two named plaintiffs (called the representative

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witness group, or RWG). Trial was held in two phases, leading to a verdict against the company as to *all loan officers* based upon testimony from members of the RWG only.

On appeal, the 1st District Court of Appeal reversed, severely criticizing the trial plan's reliance on representative sampling, holding that this denied U.S. Bank its due process right to litigate affirmative defenses.

THE COURT'S DECISION

The California Supreme Court's decision did not reverse the certification order outright, but rather remanded the case to the trial court. However, its extensive affirmation of an employer's right to litigate individual affirmative defenses — and emphatic rejection of the trial court's flawed trial plan — left little doubt that the plaintiffs will have a difficult time constructing a plan that will pass muster under the court's new standard.

KEY FEATURES OF THE COURT'S DECISION

Settlement can no longer be assumed

Having seen the impact of certification through trial in this case, the court forthrightly confronted an assumption implicit in much class-action litigation that most cases will settle. Instead, the court required an actual workable trial plan, saying, "Settlement should never be treated as a foregone conclusion."

Trial plans now required

For the first time, the California Supreme Court explicitly required that courts, *at the class certification stage*, consider a plan for how to manage individualized issues at trial. "Trial courts must pay careful attention to manageability when deciding whether to certify a class action," the court said.

How this will play out in future cases is unclear. However, the court in *Duran* discussed the use of sampling and statistical evidence, rejecting as flawed the approach adopted by the trial court because the sample was insufficiently small, was biased and had too large a margin of error. In the future, we can expect much more time and effort being expended on both sides with experts arguing the validity of trial plans based on surveys, sampling and statistics.

California procedure more closely tracks Federal Rule of Civil Procedure 23?

Appearing to follow the lead taken by the U.S. Supreme Court's decision in *Dukes*, the California Supreme Court increased focus on individual differences among the claimants in a class. Although it rejected the notion that an employer had the unlimited right to present individual evidence on every plaintiff in a class, the court nevertheless reinforced the right to present individualized evidence to impeach and challenge "common evidence" in a class action.

The decision reaffirmed the principle, similar to the one written in the federal Rules Enabling Act, that "the class action procedural device may not be used to abridge a party's substantive rights." This principle would appear to disapprove a trial plan in which parties who could not recover in a single action could nevertheless recover as part of a class.

Debate over the California outside sales exemption

The court fleshed out its previous decision on the outside sales exemption in *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (Cal. 1999). Specifically, it discussed when and how that standard might be applied in a class action. Thus, although reliance upon the average hours spent by an employee on an exempt task might not be dispositive in every case, failure to show that

employees performed their jobs in uniform fashion presented individualized issues that must be addressed by the court in a motion for class certification. This reaffirmed the trend, first seen in the Court of Appeal's 2006 decision in *Dunbar v. Albertson's Inc.*, 141 Cal. App. 4th 1422 (Cal. Ct. App., 1st Dist. 2006), in which courts increasingly have denied certification of misclassification class actions because the time spent on various tasks varied within the putative class.

The state Supreme Court seems to have left later cases to draw the exact boundaries of the exemption. In a single concurring vote, Justice Goodwin Liu appeared to take a broader view of the outside sales exemption, seeing it as less directly tied to the proportion of time actually spent by the employee in outside sales. Without explicitly saying so, the court appeared to clarify its 2004 decision in *Sav-On*, noting that in *Sav-On*, there was evidence that class members performed essentially the same tasks, most of which were non-exempt.

Questions left for later cases

In an intriguing subplot, the court finessed the question of the extent to which differences in damages can prevent certification. It noted and affirmed the principle that different calculations of damages should not prevent certification. However, it noted that some questions phrased as damages questions might actually inherently require decisions on liability. "In other words, decisions about the *fact* of liability are reframed as questions about the *extent* of liability," the court said. This boundary will doubtless require further clarification in the future.

The court also declined to decide whether the standard for adjudication of class certification is different under California's unfair-competition law, Cal. Bus. & Prof. Code § 17200, or whether the *absence* of a uniform policy supports certification if such a policy is required by law.

CONCLUSION

In all, however, *Duran* introduces a welcome clarification to the California law of aggregate litigation. Its definitive affirmation of a defendant's right, grounded in due process, to present individual defenses, and the directive to evaluate those rights at the time a class action is certified, should make the law more practical and less unpredictable.

The reasoning in Duran suggests that many cases in recent years applying vague and soft standards for certification of employee wage class actions may no longer be good law.



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