



Duran v. U.S. Bank: *The California Supreme Court Raises the Bar for Certifying a Class in Wage-and-Hour Cases*

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In a highly anticipated decision, the California Supreme Court has held that a trial court erred in trying a wage-and-hour class action by means of a sampling technique that neither provided a valid basis to determine liability nor permitted the defendant its due process right to raise affirmative defenses to the plaintiffs' claims. *Duran v. U.S. Bank Nat'l Ass'n*, No. S200923 (May 29, 2014). The court's decision in *Duran* also makes clear that before a trial court certifies a class, it should require the plaintiff to present a trial plan that will permit the case to be tried manageably on a class basis. *Duran* also considerably strengthens the defense argument that exempt-status misclassification cases are inherently fact-intensive and usually not suited to class certification.

The Trial Court Proceedings and Appeal

In *Duran*, the plaintiffs alleged that U.S. Bank loan officers (called "business banking officers" or "BBOs") were misclassified as exempt from overtime under California law. U.S. Bank classified the loan officers as exempt, relying on the "outside sales" exemption. Under that exemption, an employee who spends more than half of his or her time on sales activities outside of the office is exempt from overtime. U.S. Bank contended that BBOs spent more than half of their time outside of the office calling on clients and prospective clients, promoting U.S. Bank products and services, and generating new sales leads. The plaintiffs, by contrast, alleged that most of the time, BBOs performed their work in the office, and that U.S. Bank failed to take steps to ensure that BBOs were, in fact, spending more than half of their time outside the office to justify their exempt status.

The trial court granted class certification, even though U.S. Bank submitted declarations from 75 BBOs attesting that they spent more than half their time working outside the office. The trial court gave as its reasons for certification: (1) the BBO position was "standardized"; (2) U.S. Bank classified all BBOs as exempt, without examining their individual duties or work habits; and (3) U.S. Bank failed to train or monitor BBOs to ensure that exemption requirements were satisfied.

For the trial, the plaintiffs proposed using a survey of class members to determine how much time class members spent on outside sales activities. Then a random sample of class members would be taken to proceed with focused discovery and a phase one trial. If liability were found, the plaintiffs proposed, aggregate, classwide damages would be determined at a phase two trial. Finally, the parties would agree on a claims procedure to distribute damages to individual class members.

U.S. Bank objected to the use of representative sampling. Instead, U.S. Bank argued for dividing the class into 20 or 30 groups and having special masters conduct individualized hearings on liability and damages.

The trial court took a different path from both sides. It decided that at the phase one trial, it would take testimony from 20 randomly selected class members (out of a class of about 260 members) in addition to the two named plaintiffs (who had replaced the original plaintiffs when the original plaintiffs admitted they spent more than half of their time on sales activities outside the office). Based on its findings about these witnesses (which the Supreme Court called the “representative witness group” or “RWG”), the trial court announced, at a phase two trial it would decide whether to extrapolate its phase one findings to the class as a whole.

Before the trial began, nine class members opted out, including four who were part of the RWG. U.S. Bank sought to include their testimony at trial, but the trial court refused. U.S. Bank also sought to introduce at trial testimony from and about BBOs not part of the RWG, but the trial court refused that request, too.

After a 40-day bench trial, the trial court found against U.S. Bank, ruling that it had not established that the BBO position was exempt, and that *all* class members had been misclassified.

At the phase two trial, the trial court refused U.S. Bank’s request to admit evidence that at least some class members were correctly classified as exempt. The plaintiff’s expert testified that the trial court’s phase one finding of liability could be extrapolated to the class with a 13 percent margin of error, and that the number of overtime hours the class worked was an average of 11.87 hours, with a margin of error of plus or minus 5.14 hours, or 43.3 percent.

Essentially accepting the testimony of the plaintiff’s expert, the trial court found that U.S. Bank owed the class \$8,953,832 for unpaid overtime wages (\$14,959,565 with interest).

On appeal, the Court of Appeal reversed the trial court, ruling that the trial court’s reliance on representative sampling to determine liability denied U.S. Bank its due process right to litigate affirmative defenses. The Court of Appeal also held that the trial court erred in not decertifying the class because of the individualized differences among class members presented.

The Supreme Court’s Decision

The Supreme Court unanimously affirmed the Court of Appeal. The Supreme Court held that a class should not be certified without a manageable trial plan; that certification must continually be reevaluated and the class decertified if individual issues later are seen to predominate; and that the employer has an absolute right to present its affirmative defenses. In this case, the court ruled, the trial court’s sampling method neither was statistically valid nor afforded U.S. Bank its due process right to present affirmative defenses. Although the court did not rule out the use of statistically valid sampling in some class actions to establish liability, and did not hold that a defendant has the right to present affirmative defenses as to the claims of every class member, the court held that the trial court here erred in adopting a plan that had no representative validity and precluding U.S. Bank from presenting defenses to the claims of the class.

Besides its recognition that a plaintiff must present a manageable trial plan before a class should be certified, and imposition of meaningful standards for a class trial plan, the court’s opinion in *Duran* is very important for other exempt-status misclassification class actions, and wage-and-hour class

actions generally. The court noted that California's "50%-plus" test for exempt status—that the employee spends more than half of the time performing exempt job duties—"has the obvious potential to generate individual issues because the primary considerations are how and where the employee actually spends his or her workday."

In the misclassification context ... trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action. Depending on the nature of the claimed exemption and the facts of a particular case, a misclassification claim has the potential to raise numerous individual questions that may be difficult, or even impossible, to litigate on a classwide basis. Class certification is appropriate only if these individual questions can be managed with an appropriate trial plan.

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Wide variation among class members is a factor informing whether the exemption question can be resolved by a simple "yes" or "no" answer for the entire class.

Furthermore, citing a number of California Court of Appeal decisions in which class certification was denied (such as *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974 (2013); *Keller v. Tuesday Morning, Inc.*, 179 Cal. App. 4th 1389 (2009); *Walsh v. IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440 (2007); *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723 (2010); *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422 (2006); and *Soderstedt v. CBIZ Southern California, LLC*, 197 Cal.App.4th 133 (2011)), the court noted that "[u]nless an employer's uniform policy or consistent practice violates wage and hour laws ..., California courts have been reluctant to certify class actions alleging misclassification."

However, the court also noted that "[t]his is not to say that an employer's liability for misclassification may never be decided on a classwide basis."

The class action trial may determine that an employer is liable to an entire class for misclassification if it is shown that the employer had a consistently applied policy or uniform job requirements and expectations contrary to a Labor Code exemption, or if it knowingly encouraged a uniform de facto practice inconsistent with the exemption. ... However, any procedure to determine the defendant's liability to the class must still permit the defendant to introduce its own evidence.... No case, to our knowledge, holds that a defendant has a due process right to litigate an affirmative defense to each individual class member. However, if liability is to be established on a classwide basis, defendants must have an opportunity to present proof of their affirmative defenses within whatever method the court and the parties fashion to try these issues. If trial proceeds with a statistical model of proof, a defendant accused of misclassification must be given the chance to impeach that model or otherwise show that its liability is reduced because some plaintiffs were properly classified as exempt.

Significance of *Duran*

The importance of *Duran* to wage-and-hour class action litigation is difficult to overstate. Not since *Sav-on* has the California Supreme Court addressed the propriety of class certification in a misclassification case, and unlike *Sav-on*, *Duran* provides substantive standards for lower courts to follow in deciding whether certification should be granted. The court's emphasis on the need for a workable trial plan is particularly significant, since unfortunately trial courts sometimes certify classes without adequately analyzing how the case can be tried on a class basis. That may be a good strategy for inducing defendants to settle rather than risk standing trial without meaningful standards and process, but it hardly affords due process.

Duran also should be cited frequently in non-misclassification wage-and-hour cases. Recently, too many courts, misreading the Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012), have concluded that practically any claim can be certified so long as the plaintiff's theory of relief appears to be susceptible of common proof, regardless of whether under the governing legal standard the material issues to be tried are, in fact, subject to individualized differences, making class treatment inappropriate.

Finally, seizing upon the Supreme Court's language in *Duran* that in the right case, statistical evidence could be used to prove a misclassification claim, the plaintiffs bar likely will continue to try to use survey evidence to prove up class claims. The defense bar nevertheless should rely heavily on *Duran* that without a sound statistical basis, the evidence should not be allowed, and that the defendant cannot be limited by a statistical case from presenting its defense to the class claims.

In addition, to counter any purported representative showing by the plaintiff, the defense should be sure to gather and present direct evidence showing individualized differences among putative class members in what job duties they perform and how much time they spend on those duties. This evidence can include putative class member declarations, the results of time-shadow studies, and even video evidence.

Even more persuasive to a judge may be evidence that existed before the onset of litigation showing those differences. For example, periodic employee self-audits, in which the employee reports on what job duties he or she performed over a specified time period and how much time was spent on each duty, can be a very valuable tool, both in ensuring that the employee is meeting the 50%-plus test on a consistent basis and helping the employee re-balance his or her workload in the event that the test is not being met (or, if necessary, reclassifying the employee as non-exempt). These self-audits can be used both to oppose class certification and to support the employer's defense at trial. Paul Hastings has helped clients develop and implement these self-audits. It is something every employer facing an ongoing risk of an exempt-status misclassification claim should consider as part of an overall compliance program.

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