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CALIFORNIA SUPREME COURT RAISES THE BAR FOR PLAINTIFFS IN CERTIFYING WAGE-AND-HOUR CLASS ACTIONS

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On May 29, the California Supreme Court issued a landmark decision on the litigation of wage-and-hour class actions, easily the most important such decision since the Court's *Brinker Restaurant* decision in April 2012. In *Duran v. U.S. Bank National Association*, the Supreme Court laid down strict requirements that plaintiffs must meet before they can certify a class, demonstrating not only that common issues predominate over individual issues, but also that the court will be able to conduct a manageable trial on a class-wide basis without impinging on the employer's substantive rights.

In devising a manageable trial plan, plaintiffs will not be precluded outright from suggesting the use of representative testimony and statistical sampling methods. However, the Court expressed significant concerns about the use of such methods because of the high risk that they will interfere with an employer's substantive rights to a fair trial, as happened in this case. While such statistical methods may have some continuing viability as a method to calculate *damages*, it strongly appears from the Court's decision that such methods will rarely be suitable as a way to establish the threshold issue of the employer's *liability* in a wage-and-hour class action.

The Facts and Holding of the *Duran* Case

Duran is an overtime misclassification case. Plaintiffs alleged that certain bank business officers (BBOs) were misclassified as exempt under California's outside sales exemption. A key issue under this exemption was whether the class members spent more than half their time away from the bank's premises engaged in sales activities. The bank did not maintain records of the BBOs' hours or where they spent their time. However, at the class certification stage the bank offered evidence that showed considerable variability on this issue; dozens of the class members admitted in declarations that they spent over half their time "outside" the bank.

Nonetheless, the trial court certified a class and held a bench trial. The court rejected the parties' suggested trial plans and devised its own plan. This turned out to be a textbook example of how *not* to conduct a class-wide trial of a wage-and-hour claim.

Under the court's plan, the court permitted evidence only from a random sampling of 20 class members, plus the named plaintiffs, and excluded any evidence pertaining to the other 240 or so class members. The judge then extrapolated the evidence from the sample group to the full 260 class members and concluded that all 260 of the class members were misclassified as exempt. Then, in a "phase two" damages trial, the judge extrapolated the average amount of overtime reported by the sample group to the class as a whole and awarded $15 million to the class. The judgment in the plaintiff's favor was overturned by the California Court of Appeal. Plaintiffs then appealed to the Supreme Court.

The Supreme Court's Holding

The Supreme Court unanimously found, in agreement with the Court of Appeal, that the trial court's trial management plan, and its use of statistical sampling to prove both liability and damages, were fatally flawed in a multitude of ways. In particular, the trial plan effectively deprived U.S. Bank of the ability to put on relevant evidence to defend itself, both at the liability and damage stages of the case.

The Court affirmed that a class should not have been certified on the basis that it was. It rejected the $15 million award in favor of the class and remanded the case back to Alameda Superior Court, ordering the trial court to "start anew by assessing whether there is a trial plan that can properly address both common and individual issues if the case were to proceed as a class action."

In its decision, the Court did not rule out the possibility that statistical sampling and survey evidence could ever be used in the trial of a wage-and-hour class action. However, it expressed strong reservations about the use of such techniques to establish an employer's *liability* (as distinct from damages) in such a trial. It held that at the certification stage – not some later stage closer to trial – plaintiffs in a wage-and-hour class action must demonstrate to the trial court's satisfaction, after a rigorous review, that a class-wide trial would be manageable, without violatingthe employer's substantive rights. The Court ruled that even though common issues are predominant, to the extent there are *any* individual issues that need to be tried, there must be a manageable way to try those individual issues. This includes the employer right to try its affirmative defenses, even when those defenses turn on individual questions.

Among the interesting quotes from the Court's decision:

- "Trial courts must pay careful attention to manageability when deciding whether to certify a class action. In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class….Trial courts also have the obligation to decertify a class action if individual issues prove unmanageable." (Slip Op. p. 24)

- "Defenses that raise individual questions about the calculation of *damages* generally do not defeat certification…However, a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability….[quoting from another case] 'Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability.'" (Slip Op. p. 25)

- "Statistical methods cannot entirely substitute for common proof…There must be some glue that binds class members together apart from statistical evidence….In addition, as we will discuss, a statistical plan for managing individual issues must be conducted with sufficient rigor." (Slip Op. pp. 26-27)

- "If statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use….Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable." (Slip Op. p. 27)

- "In general, when a trial plan incorporates representative testimony and random sampling, a preliminary assessment should be done to determine the level of variability in the class…If the variability is too great, individual issues are more likely to swamp common ones and render the class action unmanageable." (Slip Op. p. 28)

- "We have long observed that the class action procedural device may not be used to abridge a party's substantive rights." (Slip Op. p. 30)

- "Although common proof may be possible if there are uniform job requirements or policies, an employer's liability for misclassification under most Labor Code exemptions will depend on employees' individual circumstances. Liability to one employee is in no way excused or established by the employer's classification of other employees." (Slip Op. p. 33)

- "[A]ny procedure to determine the defendant's liability to the class must still permit the defendant to introduce its own evidence, both to challenge the plaintiffs' showing and to reduce overall damages. No case, to our knowledge, holds that a defendant has a due process right to litigate an affirmative defense as 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." (Slip Op. p. 35)

- "We need not reach a sweeping conclusion as to whether or when sampling should be available as a tool for proving liability in a class action. It suffices to note that any class action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses. If a defense depends upon questions individual to each class member, the statistical model must be designed to accommodate these case-specific deviations. If statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties." (Slip Op. p. 38)

Analysis and Comments

Duran on the whole is a highly favorable decision for California employers. It will not put an end to the continuing wave of class action litigation in California. The Court did not make a sweeping decision that statistical sampling can *never* be used in a wage-and-hour class action as a method of establishing an employer's liability toward the absent class members. However, without question, the Court's ruling will make it more difficult for plaintiffs to win class certification in many wage-and-hour cases, and other employment-related class actions as well. It also will make it easier for employers to get cases decertified. Additionally, when one of these cases gets to trial, it will ensure a fairer procedure for employers than the ones that often have been sought by plaintiffs in the past.

Although *Duran* is an overtime misclassification case, its favorable holdings will apply as well to other kinds of wage-and-hour claims, typically those in which employers can show widespread variability in how the putative class members have been affected, if at all, by the alleged Labor Code violations. *Duran's* holdings can also be applied to claims outside the wage-and-hour arena, such as discrimination class actions.

In our experience, plaintiffs often overlook the need for a manageable trial plan when they move for class certification. Often, they represent to the court that they will be able to come up with a plan by the time of trial. Courts all too often have not been rigorous in addressing the trial plan up front. This will no longer be permitted.

Moreover, for years plaintiffs have argued that they should be allowed to conduct a survey or submit declarations from some small fraction of the class, and then extrapolate the results of that evidence to the entire class. This, too, will no longer be allowed.

Over the last 18 months or so, wage-and-hour class actions have been finding favor with the California Courts of Appeal. The trend of the published rulings has been running decidedly in the favor of plaintiffs. Perhaps after *Duran* the pendulum will begin to swing back in the employers' direction.