

Both Sides Claim Victory In Calif. High Court OT Case

By **Ben James**

Law360, New York (May 29, 2014, 9:06 PM ET) -- The California Supreme Court's Thursday decision erasing a \$15 million win for U.S. Bank NA workers drew plaudits from management-side lawyers who said the ruling raised the bar for class certification, but it was also praised by plaintiffs' attorneys who noted that it didn't slam the door on the use of statistical sampling in wage class actions.

The Golden State's highest court unanimously upheld an intermediate appeals ruling that struck down a \$15 million judgment in the plaintiffs' favor, and ordered the declassification of the current and former business banking officers who said they were misclassified as overtime exempt. Employer-side lawyers said the ruling was a positive development for businesses and would translate to courts requiring a more robust showing from plaintiffs seeking class certification.

"It's not only a victory for employers; it's a victory for the system," Jones Day partner George Howard said. "It's going to require that the parties, and the trial courts, be more thoughtful and look more intently and more thoughtfully at how the case is going to be tried at the certification stage, and not later."

Both the Supreme Court and an intermediate appeals court tore into the trial court's handling of the case, known as *Duran v. U.S. Bank*, in which a 21-person sample of a roughly 260-person class served as the basis for the finding that the whole group had been misclassified.

The case was closely watched by attorneys who were interested in what the justices might say about the viability, or lack thereof, of statistical sampling to prove liability and damages in wage-and-hour class actions. While sampling could be appropriate in some cases, the trial court's approach in this case specifically was "profoundly flawed," the high court concluded.

Management-side lawyers homed in on what the Supreme Court said about the need for a "trial plan" and what the decision said about the requirement that plaintiffs present a workable trial plan in order to gain class certification.

"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," the decision said, using italics to emphasize the words "at the certification stage."

While the requirement for a trial plan showing how the plaintiffs will prove their claims on a classwide basis is not a new requirement for certification, plaintiffs in wage-and-hour cases often gloss over that

requirement when they seek class status and courts sometimes let them get away with it, management-side lawyers said.

“The courts sometimes, and plaintiffs often, felt like this was an issue that could be addressed when you get closer to trial, and what we're hearing from the Supreme Court is that it needs to be addressed when plaintiffs ask for class status, otherwise certification is not proper,” Orrick Herrington & Sutcliffe LLP partner Andrew Livingston said.

The ruling went on to say that while the predominance of common questions is frequently a big factor when certification is being considered, courts also have to pay close attention to manageability too.

“If the court makes a reasoned, informed decision about manageability at the certification stage, the litigants can plan accordingly and the court will have less need to intervene later to control the proceedings,” the opinion said, adding that courts are also obligated to decertify classes if individual issues subsequently prove too unruly.

And while the case turned on misclassification and California's unfair competition law, its impact will likely be felt in a variety of types of wage-and-hour cases, according to Morgan Lewis & Bockius LLP's Carrie Gonell.

“Misclassification cases certainly aren't the only type of wage-and-hour cases where there are issues of variability in the employee experiences that are relevant to the claims,” she said. “The message is twofold: Certainly the courts should be requiring a trial plan and making sure the case is manageable, but if the court later determines that there are manageability issues, the court should decertify at that point as well.”

Plaintiff-side employment lawyers, however, also welcomed Thursday's decision, painting it as a positive development for the plaintiffs as well as workers in California generally.

Altshuler Berzon LLP's Michael Rubin, who represented several amici at the high court and shared the plaintiffs' oral argument time, said U.S. Bank had won only on “limited grounds.”

The appeal called into question the ability of wage-and-hour plaintiffs to use statistical sampling and representative testimony to prove damages or liability, but the court avoided drawing any sweeping conclusions, plaintiffs attorneys say.

“The whole point of this case from the defendant's point of view was to eliminate the use of statistical evidence, random sampling and surveys in class action employment litigation, and the court resoundingly rejected that argument,” Rubin said.

And while the challenged appeals court decision seemed to put an end to the case as a class action, the Supreme Court's ruling said that the trial court could entertain a new class certification motion, the Wynne Law Firm's Edward Wynne, who argued for the plaintiffs, said Thursday.

“Are we disappointed that we didn't hold on to the judgment ? Sure, but the important point here is that we have another shot at certification,” Wynne said.

Wynne said the defendants and their supporting amici were “shooting for the moon” and that the case could have sounded the death knell for class action litigation in California.

“At the end of the day, this is an important victory for the plaintiffs bar, because this appeal was not about Duran, it was about the viability of class actions going forward,” he said.

--Editing by Elizabeth Bowen and Chris Yates.

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