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California Supreme Court Provides Guidance on Class Certification

In its Duran *decision, the court emphasized that trial courts considering class certification must determine whether the case is manageable as a class action.*

On May 29, the California Supreme Court issued its decision in *Duran v. U.S. Bank National Association*,[1] outlining the guiding principles for trial courts for both the class certification and trial phases of wage and hour class actions with respect to (1) the manageability of class action trials and (2) the use of statistical sampling in wage and hour trials.

The decision reaffirmed that trial courts considering certification need to focus not only on whether there are potential common questions to be litigated in the class action, but also whether it is "feasible to try the case as a class action."[2] The court emphasized that, at the class certification stage, whether a class trial may be successfully managed is as important as whether common questions exist. Courts also have a continuing obligation to decertify a class if they determine that the case is no longer viable as a class action.

The court did not completely rule out the use of statistical sampling in wage and hour cases, but a plaintiff who wants to use such sampling must show that there is a statistically defensible way to do so that allows the defendant to litigate its defenses—even when those defenses are potentially individualized in nature. Given that this may not be possible, alternatively, any viable trial plan has to set out how the parties will litigate those individual issues on a manageable basis, if it is possible to do so. Ultimately, any trial plan must account for the fact that "[l]iability to one employee is in no way excused or established by the employer's classification of other employees."[3]

The following sections provide a more in-depth look at the lower court proceedings as well as the California Supreme Court's decision.

Lower Court Proceedings

In December 2001, a putative class action complaint was filed, alleging that U.S. Bank National Association (USB) had improperly classified its business banking officers (BBOs) as exempt, thus depriving them of overtime pay under California law. USB relied primarily on the outside sales exemption, which provides that individuals who customarily and regularly work more than half their working time away from the employer's place of business engaged in sales activities are exempt from overtime pay. The trial court certified a class of more than 200 BBOs.

During a classwide trial, the court relied on representative witness testimony from 22 class members, including the two named plaintiffs, to find that the entire class of BBOs was misclassified and owed overtime. Although USB repeatedly sought during and after the trial to introduce evidence of other class members' experiences to support its outside sales exemption defense, the trial court refused to hear this evidence.

1. No. S200923 (Cal. May 29, 2014), *available at* http://www.courts.ca.gov/opinions/documents/S200923.PDF.
2. *Id.*, slip op. at 22.
3. *Id.* at 33,

On appeal, the appellate court vacated the judgment and decertified the class, finding that USB's due process rights had been violated because of the trial court's conduct.

California Supreme Court Decision

Echoing the appellate court, the California Supreme Court found the injustice of the trial court proceedings to be "manifest" and concluded that USB's due process rights had been violated by the trial court's refusal to consider pertinent evidence that it sought to admit to prove many BBOs qualified for the outside sales exemption and, thus, had no claims for overtime pay.[4]

The California Supreme Court recognized an employer's right to assert and submit evidence to support relevant affirmative defenses, such as the outside sales exemption, that would preclude liability, "even when these defenses turn on individual questions."[5] The court acknowledged that "a misclassification claim has the potential to raise numerous individual questions that may be difficult, or even impossible, to litigate on a classwide basis."[6]

Continuing Obligation to Decertify

According to the *Duran* court, even after a trial court has certified a class, it has an ongoing duty, throughout the life of a case, to determine whether the action may be maintained as a class action. If it cannot be, then the class should be decertified. For example, in *Duran*, USB moved to decertify the class both before and after the trial. In both instances, the trial court denied USB's motions without considering USB's evidence that showed why the case could not proceed as a class action.

An important takeaway for employers going forward is to understand that, even if a trial court initially certifies a class, that does not necessarily mean that the case will proceed as a class through the trial. Discovery that occurs after a class has been certified, for example, could bolster an employer's position that individual questions predominate or that a class trial could not be effectively managed.

Trial Management Plan

The court stressed the importance that trial courts consider the manageability of class actions at the certification stage, including whether and how statistical evidence will comprise part of the proof on class action claims. The court explained that "the manageability of individual issues is just as important as the existence of common questions uniting the proposed class."[7] The court further explained that "a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability."[8]

Statistical Sampling—Errors Committed by the Trial Court in *Duran*

If statistical sampling is ever used in the class context, it must be (1) representative and (2) "the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness."[9] The court was clear that statistical evidence alone would not be sufficient to establish classwide liability. In this particular case, the court faulted the lower court for the representative sampling it relied on to find classwide liability. The errors that the trial court committed in the eyes of the *Duran* court included the following:

- **Sample size too small:** The trial court selected a sample of 22 individuals out of a class of more than 200 without consulting either party's experts or relying on any statistical methodology. Although the *Duran* court

4. *Id.* at 31.
5. *Id.* at 19.
6. *Id.* at 22.
7. *Id.* at 24.
8. *Id.* at 25 (emphasis in original).
9. *Id.* at 50.

did not offer a hard and fast rule for what an appropriate sample size would be, it advised that the parties' experts should be involved, the sample size must be "statistically appropriate," and the sample size must be "capable of producing valid results within a reasonable margin of error."[10] Thus, the variability of class member experiences must also be taken into account when determining an appropriate sample size.

- **Sample was not random:** Even though the trial court initially selected 20 class members at random as a sample, it also included the two named plaintiffs, which undermined the randomness of the sample. The court subsequently excluded one class member from the sample because the court found his experience to be unique and excluded another member because he failed to appear at trial. Also, after permitting the plaintiffs an opportunity to amend their complaint, the court allowed class members a second opportunity to opt out of the class, resulting in four plaintiffs within the sample group opting out. The *Duran* court thus concluded that the sample was not truly random and was biased in the plaintiffs' favor.
- **Intolerably large margin of error:** The trial court erred by relying on a sample that produced a margin of error of more than 43%. The sampled class members worked on average 11.86 hours of overtime per week, but, because of the margin of error, the actual overtime worked could have ranged from 6.72 hours to 17 hours per week. Although noting that such a high margin of error is impermissible, the *Duran* court did not provide any bright-line guidance as to how high the margin of error could be and still be acceptable.

Any trial plan that relies on statistical sampling must not only avoid the deficiencies in the methodology adopted by the trial court here, but it also "must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced."[11]

Scope of the Case

Although the *Duran* court issued its decision in the context of a misclassification case, its general principles regarding the importance of manageability, particularly at the class certification stage, have widespread applicability.

Next Phase of the *Duran* Case

On remand, the plaintiffs in *Duran* may attempt to move to recertify a class of BBOs, but they will have to demonstrate the feasibility of trying the case on a classwide basis. Given the record evidence of differences among how and where the BBOs performed their duties, it is unclear if any trial plan that relies on statistical evidence can ever successfully be developed in this particular case.

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10. *Id.* at 41.
11. *Id.* at 2.

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