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Management Alert

California Court of Appeal Follows *Dukes* And Rejects "Trial By Formula" In Class Action Trials

On February 6, 2012 the California Court of Appeal, First District, issued its opinion in *Duran v. U.S. Bank*. In a matter of first impression, the Court of Appeal considered whether class action plaintiffs may use statistical sampling and representative evidence to establish liability on a class-wide basis. In an extremely thorough opinion, the court gave a resounding "no" to that question, reversing a $15 million judgment on the basis that the trial plan had unconstitutionally deprived U.S. Bank of due process. The Court of Appeal also ordered that the class should be decertified, because the trial court had erred in assuming that liability for a class of 260 members could be extrapolated from findings based on testimony from a trial sample of 20 plaintiffs.

Background Facts

Plaintiffs filed the case in Alameda County Superior Court , alleging that U.S. Bank's Business Banking Officers ("BBOs") were misclassified as exempt employees. After class certification, Judge Robert Freedman granted Plaintiffs' motion for summary adjudication on the Bank's defenses of administrative exemption and commission sales exemption. The case then went to a bench trial on the Bank's remaining defense under the outside sales exemption.

Over the Bank's repeated objections, the trial court conducted the liability phase of the trial based on a purportedly random sample of 20 class members. The Bank attempted to proffer evidence from 70 BBOs who signed declarations that they spent more than 50% of their time outside of the office (and therefore were properly classified as exempt employees). The court, however, prohibited the Bank from presenting any evidence from class members (or BBOs who opted out) other than those selected to be in the trial sample. The court determined that the Bank had misclassified 19 of the 20 class members in the sample, and then extrapolated from that result to a conclusion that all 260 class members had been misclassified.

The court then conducted a damages phase in which it adopted the view of plaintiffs' expert that, with a 95% confidence level, the average class member worked 11.87 hours of overtime per week, with a margin of error of 43%—in other words, the actual average overtime could fall anywhere in the range of 6.7 hours to almost 17 hours per week. The trial court entered judgment against the Bank in the amount of approximately $15 million.

The Ruling

The Court of Appeal reversed the judgment because it found that Judge Freedman's trial plan did not reflect a statistically significant and reliable methodology. Although the Court of Appeal stopped just short of issuing a bright line rule, the court came close to holding that statistical extrapolation cannot determine collective liability in a wage and hour class action. The decision also recites numerous trial court errors that deprived the Bank of fundamental due process. (The Court of Appeal noted that the trial court conceived of the unprecedented trial plan entirely on its own, without relying on the advice of expert witnesses.)

The Court of Appeal further faulted the trial plan for denying the Bank a chance to put on any evidence outside of the trial sample, including the testimony of class members that they were properly classified. This evidence, if admitted and credited, would have established that at least one-third of the class was properly classified. The Court of Appeal was troubled that the judgment awarded an average of over $50,000 to each of the 239 absent class members, while the Bank was precluded from putting on evidence that may have prevented at least one-third of them from any recovery: "fundamentally, the issue here is not just that USB was prevented from defending each individual claim but also that USB was unfairly restricted in presenting its defense to class-wide liability."

In reaching this conclusion, the Court of Appeal cited the U.S. Supreme Court's disapproval in *Wal-Mart Stores v. Dukes* of "trial by formula:" "the same type of 'trial by formula' that the U.S. Supreme Court disapproved of in *Wal-Mart* is essentially what occurred in this case."

In the Phase II damages trial, the trial court compounded its statistical errors in constructing the trial sample utilized in Phase I. The trial court failed to follow acceptable statistical principles in Phase I, and then utilized those improper liability findings as the basis for restitution calculations in Phase II. The improper sampling methodology in Phase II resulted in a 43.3% margin of error in determining the Bank's more than $14 million aggregate liability on restitution, which the Court of Appeal identified as a separate due process violation. Although the Plaintiffs cited *Bell v. Farmers Insurance Exchange* as precedent for using statistical sampling to prove liability and damages, the Court of Appeal distinguished *Bell* on the grounds that in *Bell* the sampling methodology was agreed to by the parties, and that the sampling was used only to determine collective damages, not liability.

What Duran Means For Employers

The *Duran* decision is unquestionably welcome news for employers defending class actions in California. No California appellate court has ever held that statistical sampling may be used to prove liability, and now *Duran* confirms that such a proposition is highly dubious, while stopping just short of categorically repudiating it. Any trial court attempting to craft a class action trial plan will have to be very careful to avoid the statistically improper methodologies employed by this trial court, both as to liability and as to damages.

Another key lesson from *Duran* is that employers should object at every opportunity to trial schemes that lack statistical support and that may offend due process. The decision also contains excellent language and analysis supporting decertifying a wage and hour class action in appropriate circumstances. Employers can only hope that the California Supreme Court will not disturb this well-reasoned, favorable ruling.

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