

DURAN V. U.S. BANK: WHEN CLASS CERTIFICATION GOES WRONG

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The California Supreme Court recently handed down a landmark decision on class actions. The trial judge lost control of the certification and evidentiary presentation of the case resulting in a \$15 million verdict against U.S. Bank National Association (USB). In this long-awaited decision, the California Supreme Court acknowledged the blatant errors perpetrated by the trial court and class counsel, and provided valuable guidance for employers and their attorneys in defending class actions. *Duran v. U.S. Bank National Association*.

Microscopic Sampling

In this case, loan officers who were hired as outside salespersons claimed they were misclassified as exempt. In California, outside salespersons are exempt from overtime and minimum wage requirements if they customarily and regularly work more than half of their working time away from the employer's place of business selling products or services. *Duran* turned on whether loan officers spent more than 50% of their time engaged in sales outside of a U.S. Bank (USB) branch or other fixed location. If they did, the exemption applied and no overtime was due.

During the class certification proceedings, the parties presented conflicting evidence relevant to the applicability of the outside-sales exemption. Specifically, USB presented declarations and deposition testimony from 79 loan officers indicating that they each typically spent more than 50% of their workday engaged in outside sales, while the plaintiffs presented declarations from 34 loan officers asserting that they typically spent less than half of their work day engaged

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in such activities. Despite these variations, which raised the clear problem that individualized fact issues prevailed over the common one, the court certified a class of approximately 260 USB loan officers, and the case proceeded to trial.

The ensuing trial was deeply flawed. To that end, the trial court largely ignored recommendations from the statistical experts employed by both parties, and instead devised its own trial plan involving two phases. For the first phase of trial (liability), the court selected a “random” sample consisting of 20 class members. Only 14 of the original 20 loan officers testified at trial, along with five alternates and the two named plaintiffs for a total of 21 class members.

USB was precluded from presenting testimony from any class members outside of the group of 21, including the 79 loan officers that testified to spending more than 50% of their time engaged in outside sales (and therefore exempt). Relying on the testimony of the 21 class members, the Court determined that *all* 260 loan officers were misclassified and owed overtime. In its appeals, USB protested that it unlawfully was prevented from defending itself when the trial court permitted the loan officers to prove their claims using only a small non-representative sample of class members.

In the next phase of the trial (damages), the plaintiffs’ statistical experts testified that class members worked an average of 11.87 hours of overtime each week, with an astonishingly high margin of error of 43.3%. The trial court overruled USB objections and its expert testimony regarding plaintiffs’ flawed statistical methodology and awarded approximately \$15 million in damages for all 260 class members. Not surprisingly, the Court of Appeal reversed the verdict and decertified the class. The California Supreme Court granted review.

Supreme Court Provides Much-Needed Guidance

As expected, the California Supreme Court unanimously affirmed the judgment of the Court of Appeal. Some of the highlights from the California Supreme Court’s decision which for the most part greatly benefits employers in defending class actions and achieving decertification where appropriate, include the following:

1. Class certification continues to require that common rather than individual issues predominate, but the trial court erroneously focused on the predominance of common questions to the exclusion of the individual issues at trial. Employers therefore have a right to present evidence to refute sampling evidence, which may permit employers to go outside of the pooled samples.
2. In certifying a class action, the trial court must conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. In this case, the trial judge short-circuited the analytical test by simply ignoring the individualized issues presented by USB and certifying the class.
3. The Supreme Court did not reject the proper use of statistical evidence in appropriate cases or the use of appropriate surveys and statistical sampling. But the court made clear that statistical methods cannot substitute for common proof, reasoning that there must be some “glue” that binds class members together apart from statistical evidence.
4. 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 and the defendant must be provided an opportunity to impeach a plaintiff’s statistical model or otherwise show its liability is reduced. In this case, experts were ignored.
5. If the variability among class members is too great, individual issues, as in this case, likely will swamp common ones and render a class trial unmanageable. Decertification must be ordered whenever a trial plan proves unworkable.
6. Employers have a due process right to litigate their affirmative defenses in class actions, even where the defense touches on individual issues. Affirmative defenses include the defense that class members were properly classified as exempt. “If statistical methods are ultimately incompatible with the nature of plaintiffs’ claims or defendant’s defenses, resort to statistical proof may not be appropriate.”
7. If sampling is used, the sampling techniques must satisfy realistic guidelines to minimize risk of error. For example, the sample size must be sufficiently large, the sample must be randomly selected, and the margin of error cannot be too high.

Despite its many highlights, the California Supreme Court’s decision still left some important questions unanswered. For

instance, the court declined to specifically resolve the issue of whether statistical evidence and representative testimony can be used to establish *liability* (as opposed to *damages*) in a class trial. Given the absence of binding California authority and the split in federal authority on the subject, the use of statistical evidence to establish liability is an issue that will undoubtedly resurface in the future.

Practical Tips

The best practice for employers in defending class actions based on misclassification is to avoid policies that would facilitate class actions being proved by representative sampling, including obtaining legal counsel before classifying a job, creating properly worded job descriptions, conducting individualized reviews of employees classified as exempt on a routine basis, implementing self-evaluation procedures for each individual employee supporting exempt status, taking prompt and effective disciplinary action when employees deviate from their realistic job duties, keeping adequate records regarding these steps and procedures for maintaining exempt status, and conducting frequent internal audits to assure that these procedures are being followed.

When faced with class actions, employers should begin early by obtaining expert assistance where appropriate and establishing the kind of defense evidence improperly rejected by the *Duran* trial court. Of course, if you have not done so, consider having properly worded arbitration agreements that would prevent adjudication on a class basis, thereby altogether precluding the dilemma of the class action and related proof issues.

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