



Employment class actions in California: 2018 update

The manageability of class claims and the impact of arbitration in class actions

BY CRISTINA MOLteni

Once again, California courts have delved into manageability of class claims and the impact of arbitration in class actions. This has been the trend in the last years and we anticipate that plaintiffs' advocates will contribute to further advance these areas in class actions. This article will share a few thoughts about the latest developments in class certification and employment class action.

Duran v. U.S. Bank National Association

(Jan. 17, 2018, No. A148817)
___ Cal.App.5th ___ [2018 Cal.App.
LEXIS 36]: Manageability

Manageability of a class is again at the forefront with this case going on appeal for a second time. This case was brought by business banking officers, who claimed that they were misclassified as outside salespersons exempt from California's overtime laws when they had actually spent the majority of their working hours inside the employer's premises.

In the first case, the Supreme Court decertified the class and reversed the judgment because the trial court's implementation of trial plan, mainly sampling, prevented USB from proving relevant affirmative defenses and showing individualized issues. (*Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1).

The second time, the new trial court found that plaintiffs had failed to show that common questions predominated, particularly evidence establishing uniformity in how the bank officers spent their time. Further, the trial court pointed to the differences between the responses to surveys presented by plaintiffs on the first and second attempt to certify the class and the corresponding margins of error.¹

The Court of Appeal's decision heavily relies on the first case, highlighting that statistical evidence, per se, is not sufficient to prove liability. "There must be some glue that binds class members together apart from statistical evidence." (*Duran v. U.S. Bank National Association*, 2018 Cal.App. LEXIS 36 at *11). Statistical



evidence cannot be a substitute for demonstrating the requisite commonality or to create predominance when the factual record fails to show it. (*Ibid.*) In order to frame a representative sampling approach to proving class liability, individual issues should be taken into consideration for any statistical approach, and individual issues challenging such sampling can be raised by any defendant.

In this case, defendant pointed out the self-selection bias showed by banking officers who participated in the surveys. The self-selection bias was evident when there was a significant difference in the hours worked – instead of overtime worked which had been reported by the banking officers in both surveys. The difference of hours reported – nearly 10 hours/week – were not backed by any scientific explanation. For that reason, the trial court found that the surveys were not reliable, severely impacting the manageability of the issues pertaining to the affirmative defenses and could not be used to support certification.

This case shows that plaintiffs' advocates should be proactive on attacking defendant's affirmative defenses at the outset of the case, i.e., demurring the answer to the complaint and serving discovery requests such as Form Interrogatories, General No. 15, to be able to properly address the affirmative defenses at the class certification stage.

ABM Industries Overtime Cases

(2018) (Dec. 11, 2017, Nos. A132387, A133077, A133695) ___ Cal.App.5th ___ [2017 Cal.App. LEXIS 1165]: Ascertainability and predominance

In 2007, plaintiffs filed their complaint alleging that ABM violated California labor laws by, inter alia, failing to properly record and compensate employees for meal breaks, requiring employees to work split shifts without appropriate compensation, and failing to ensure that employees were reimbursed for expenses incurred when traveling between work

sites. In 2010, plaintiffs moved to certify a general class of ABM workers and various subclasses of such workers who had been subjected to particular wage and hour violations. After briefing and oral argument, the trial court found plaintiffs' expert evidence inadmissible and denied the motion.²

The trial court refused to certify the class because it believed that the subclasses proposed by plaintiffs were not ascertainable. The trial court particularly opined that defining the proposed subclasses by reference to the alleged Labor Code violations was fatal to class certification, because the members of the subclass could not be identified without a determination on the merits of each class member's case. (*ABM Industries Overtime Cases*, 2017 Cal.App. LEXIS 1165 at *40). According to the trial court, that would make it impossible to provide appropriate notice to the class and to determine who will be bound by the judgment.

However, the Court of Appeal found that a class is ascertainable if plaintiffs, like in this case, supply a reasonable means of identifying potential class members and the class is defined in terms of objective characteristics and common transactional facts sufficient to allow a class member to identify himself or herself as having a right to recover based on that description. So long as these requirements are met, a class is ascertainable, "even if the definition pleads ultimate facts or conclusions of law." (*Id.* at *42). Furthermore, ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata. The Court discounted ABM's speculation that some potential class members identified in the data may ultimately not be entitled to relief because that issue goes to the merits of each class member's recovery and, as such, was an inappropriate focus of the trial court's ascertainability inquiry.

The trial court also declined to certify the class because it determined that

common issues did not predominate over individual inquiries. The ultimate question presented to show predominance is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. (*Id.* at *52).

Individualized issues regarding proof of the amount of damages class members may recover do not defeat a class action, so long as there are common questions of liability amenable to class resolution. (*Id.* at *54). In fact, courts will generally certify a class if the defendant's action can be found to be wrong in the abstract even if no individual person has suffered actual damages. In sum, when analyzing the element of predominance for class certification purposes, the focus must be on the policy the plaintiffs are challenging and whether the legality of that policy can be resolved on a classwide basis (*Id.* at *53).

Brown v. Cinemark USA (2017) 876 F.3d 1199: Appellate Jurisdiction

Silken Brown and Mario de la Rosa filed wage-and-hour class and representative actions under Private Attorney General Act ("PAGA") against Cinemark in state court that were eventually removed to federal court and then consolidated by the district court. The complaints alleged Labor Code violations for failure to provide accurate wage statements, failure to pay minimum wages, waiting time penalties, failure to pay meal and rest period premiums, Unfair Competition Law claims and PAGA claims. The district court dismissed the direct claim for failure to provide accurate wage statements and denied class certification of plaintiffs' meal and rest break claims, reporting time claims, off-the-clock work claims, derivative wage statement claims, and direct wage statement claims. Plaintiffs' remaining individual claims were set for trial.



Defendants filed a summary judgment motion on the remaining claims. The district court issued a tentative ruling, granting defendants' motion in part and denying it in part.

The parties stipulated to the tentative ruling and settled all remaining individual claims; however, plaintiffs reserved the right to challenge the district court's judgment denying class certification of the direct wage claim and dismissing the individual direct wage statement claim, which they appealed.

In light of the recent U.S. Supreme Court decision in *Microsoft Corp. v. Baker* (2017) 137 S.Ct. 1702, defendants sought to dismiss plaintiffs' appeal for lack of appellate jurisdiction because plaintiffs have voluntarily settled some of their claims. However, the Ninth Circuit Court of Appeals distinguished this case from *Baker*.

In *Baker*, the district court declined to certify the plaintiffs' proposed class, and rather than pursuing their individual claims on the merits, the plaintiffs voluntarily dismissed their own claims with the express purpose of creating a final judgment for appeal. (*Id.* at 1711.) The Supreme Court decided that plaintiffs' voluntary dismissal did not qualify as a final decision and this tactic undermined 28 USC section 1291 and its principle designed to guard against piecemeal appeals and subvert the solution to place for immediate review class action orders. (*Id.* at 1707.)

In fact, the Court stated that Brown and de la Rosa continued litigating their remaining individual claims after denial of certification and they did not engage in sham tactics to obtain an appealable final judgment. In fact, the parties entered into a settlement agreement for consideration, whereby plaintiffs expressly preserved certain claims for appeal. For that reason, the Court found that plaintiffs did not intend to sidestep F.R.C.P. 23 (f) governing the appeals from orders granting or denying class certification, and the settlement reached by the parties constituted a valid final judgment.

This case shows that plaintiffs' advocates should be careful while class certification is denied and the remaining individual claims are negotiated with defendants. F.R.C.P. 23 (f) authorizes permissive interlocutory appeals from adverse class-certification orders in the discretion of the Court of Appeal. However, if the Court of Appeal does not authorize such appeal, plaintiffs should pursue their individual claims on the merits to final judgment, at which point the denial of class action certification becomes ripe for review. For that reason, in the event that plaintiffs' individual claims are settled, it is important to include a properly crafted provision preserving claims for appeal, if plaintiffs and members of the purported class anticipate seeking appellate review for denial of class certification.

Sprunk v. Prisma LLC

(2017) 14 Cal.App.5th 785: Arbitration

The enforcement of arbitration provisions and strategies to be used in court to move to compel arbitration are still hot topics, even though it has been more than seven years since *Concepcion*³ and *Dukes*⁴. In this case, Maria Elena Sprunk, the plaintiff, was an exotic dancer who performed at one of the defendant's clubs. She alleged that the dancers were misclassified as independent contractors rather than employees, and that they were consequently denied Labor Code benefits required for employees, such as minimum wages, meal periods, and reimbursement of expenses. In addition, defendant misappropriated tips.

Plaintiff and other class members signed contracts containing an arbitration clause. There were two versions of the arbitration provision, the first one did not specifically address class arbitration and the last version contained an express waiver. Plaintiff signed the first version of the agreement.

Plaintiff moved to certify a class of dancers. In opposition, defendant argued that a class action was not superior to

other forms of litigation because the class members had signed arbitration agreements. In her reply, plaintiff argued that defendant had waived the right to arbitrate by actively litigating the case, i.e., responding to written discovery, producing witnesses for deposition, requesting production of plaintiff's documents and deposing Sprunk. The trial court granted class certification, rejecting defendant's arbitration argument. The trial court found that defendant's delay in seeking arbitration, while taking advantage of the court's processes, meant that defendant had waived its right to arbitrate at least as to plaintiff's claims. After the order granting class certification, defendant filed two separate motions to compel arbitration directed to the class members who signed the two different versions of the arbitration agreement. The trial court rejected defendant's arguments, ruling that defendant had waived its right to compel arbitration based on its delay in seeking arbitration, since the delay was both unreasonable and prejudicial.

The Court of Appeal reviewed various factors that are relevant and properly considered in assessing waiver claims. (*St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187.) Those factors are (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps, such as taking advantage of judicial discovery procedures not available in arbitration had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party. (*St. Agnes*, 31 Cal.4th at p. 1196.)



In agreement with the trial court, the Court of Appeal found that the issue of delay was dispositive in the case. Substantial evidence – such as defendant’s delay in moving to compel arbitration, defendant’s excuse for withdrawing its motion to compel arbitration based upon the state of the law on class arbitration at the time, and the *St. Agnes* factors mentioned above – supported the trial court’s conclusion that a nearly four-year delay between the filing of the action and defendant’s motions to compel arbitration, had operated as a waiver to the right to arbitrate. In fact, it was defendant’s strategic decision to attempt to win the case by defeating the class before seeking to arbitrate, conduct inconsistent with an arbitration right, and defendant’s delay to move to compel arbitration was not excused either by the lack of a certified class or by the unsettled state of the law on class arbitration.

This case shows that plaintiffs’ advocates should be aware of defendant’s attempt of a second bite of the apple when not obtaining the expected results in a class action. For that reason, the *St. Agnes* factors should be at an advocate’s fingertips when assessing the

waiver of defendant’s right to arbitrate individual and class claims.

Conclusion

Manageability of class claims and the impact of arbitration agreements in class actions are here to stay. Class action practitioners should act preemptively, navigating those issues the first day that the intake comes through the door. Arbitration agreements and trial plans cannot be avoided nowadays; however, creative plaintiffs’ advocates can circumvent those extra hurdles by adding causes of action under PAGA to class action lawsuits, and bypassing class certification requirements and arbitration provisions.

Endnotes:

¹ The relative margin of error found acceptable was the standard set in *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715,753, 755-6, which involved a random sample of nearly 300 individuals, who worked an average 9.4 hours of overtime each week, with a plus/minus 0.9-hour margin of error.
² During oral argument, the trial court orally indicated that it was denying the class certification motion. In response, plaintiffs moved to supplement the evidence regarding the qualifications of their expert (Code Civ. Proc., § 473 (b).) The trial court denied plaintiffs’ motion and ultimately issued a written order, formally denying plaintiffs’ class certification.
³ *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740.
⁴ *Dukes v. Wal-Mart* (2011) 131 S.Ct. 2541.



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