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### **California Supreme Court Sets a High(er) Bar for Class Certification in *Duran v. U.S. Bank National Association***

Over the past few years, the United States Supreme Court has issued a number of important decisions that have aided employers who continue to battle class actions. Now the California Supreme Court has gotten in on the action. With its May 29, 2014, decision in *Duran v. U.S. Bank National Association*, No. S200923 (May 29, 2014), the California Supreme Court has added another arrow to the quiver in the fight against class actions.

*Duran* involved an appeal from a trial court's judgment finding a class of U.S. Bank's loan officers was misclassified as exempt from overtime and related requirements under California's outside sales exemption. The trial court had first decided the liability issue by hearing testimony from a small group of "randomly" selected class members and the two named plaintiffs. In the second phase, the trial court extrapolated from the same allegedly random sample of class members to determine the amount of each class member's supposedly uncompensated overtime. During both phases the trial court barred the defendant from presenting any evidence from individuals other than those selected to testify, even though their testimony would have reflected a great degree of variance and experiences as to the job duties and responsibilities of the putative class members.

The California Supreme Court concluded that the trial court's handling of the case was "profoundly flawed" because it had violated the defendant's due process rights. The Court further held that the trial court had erred by denying the defendant's motion to decertify the class once it became apparent that the class action involved serious manageability problems. In so holding, the Court made several points, all of which may prove helpful to employers in battling class certification issues.

First, the Court emphasized several key principles regarding the certification of class actions. In particular, the Court explained that trial courts not only must determine that common issues, as opposed to individual issues, predominate, but they also must consider whether it is feasible to try the case as a class action. In other words, if individual questions arise and such issues cannot be appropriately managed, it is not proper to certify a class. Even after a class is certified, trial courts must continue to consider the

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effect of individual issues. Indeed, courts are obligated to decertify a class action if the need to litigate individual issues would make the class unmanageable.

Second, the Court noted that misclassification cases pose particularly difficult manageability issues. Drawing a distinction between defenses which go to liability versus those which serve only to diminish recoverable damages, the Court explained that “a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability.” Slip op. at 25 (emphasis in original). “Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment the members would be required to individually prove not only damages but also liability.” *Id.* (citations and quotations omitted). Thus, *Duran* makes it less likely that a class will be certified absent persuasive evidence that an employer’s uniform policy or consistent practice violates wage and hour laws.

Third, the Court explained that while it may be possible to manage individual issues through the use of surveys and statistical sampling, these methods cannot substitute for common proof, particularly on the question of liability. There must be “some glue” that binds class members, such as evidence of an unlawful policy or centralized practice. *Id.* at 26. Further, the Court criticized the trial court’s trial plan, noting that it was beset with a multitude of problems. While not rejecting entirely the use of sampling or other statistical methods as a tool for determining liability, the Court explained that a court must ensure the validity of these methods of proof, which usually will require reliance on the parties’ statistical experts. To avoid different types of bias, a sample of class members must be randomly selected and be sufficiently large to provide representative information about the entire class.

Fourth, the Court made clear that a trial court’s management plan for a class action trial must adhere to due process principles by allowing a defendant to present its affirmative defenses, even if these turn on individual questions. A court simply cannot prohibit a defendant from offering evidence supporting its defenses, which is precisely what the *Duran* trial court did.

Certainly, *Duran*'s impact on any particular case will depend on its specific issues and evidence. And employers should expect the plaintiffs' bar to continue to argue that wage and hour class actions can and should be certified, pointing out that *Duran* left open the possibility that the case could still be tried as a class action. Still, *Duran* is an important reminder that courts cannot simply rubber stamp a motion for class certification or run roughshod over an employer's rights. Courts instead must carefully consider whether a class trial of liability and damages issues would be truly manageable and must allow employers the opportunity to pursue their affirmative defenses. Undoubtedly, then, *Duran* has helped establish a higher bar to class certification and will certainly prove useful to employers who are battling these cases.

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