

## [Ninth Circuit Upholds Use of "Preemptive" Motion to Deny Class Certification](#)

Posted on July 13, 2009 by [Larry Golub](#)

In most lawsuits seeking to certify a class action, the motion to determine whether a class can be certified is brought by the plaintiff(s). But not always. In a new case issued July 7 by the Ninth Circuit Court of Appeals, [Vinole v. Countrywide Home Loans, Inc.](#), (Case No. 08-55223), the Appellate Court found that the District Court had properly considered and granted the defendant's motion to deny certification.

The *Vinole* action was brought by a proposed class of current and former Home Loan Consultant employees of Countrywide, who claimed they were misclassified as exempt employees and thus not paid overtime and other wages. While Countrywide applied a uniform wage exception to these employees and therefore contended it was not obligated to pay them overtime, Countrywide also presented evidence that it had no control over what the employees did on a daily basis and did not monitor their work performance. As a consequence, Countrywide contended that these employees were exempt from overtime under California and Federal law.

Ten months after the lawsuit was filed – and before plaintiffs moved to certify a class – Countrywide filed a motion to deny certification of the class. The District Court granted the motion and the plaintiffs took an interlocutory appeal to the Ninth Circuit. The primary argument raised on appeal was the assertion that it was *per se procedurally improper* for the District Court to have decided a motion to deny class certification, before the plaintiffs had brought their affirmative motion for class certification. The court advised, however, “[a]lthough we have not previously addressed this argument directly, we conclude that Rule 23 does not preclude a defendant from bringing a ‘preemptive’ motion to deny certification.”

In support of that conclusion, the court first explained that nothing in Federal Rule of Civil Procedure 23 “either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question.” It then rejected plaintiffs’ argument that allowing such motions to deny certification would open “troubling new territory,” since federal courts have “repeatedly considered defendants’ motions to deny class certification.” It also rejected plaintiffs’ reliance on cases that plaintiffs claimed espoused a “*per se* rule” disallowing such preemptive motions.

The plaintiffs argued that it was procedurally unfair for Countrywide to move to deny class certification prior to the pre-trial motion deadline and before plaintiffs had sufficient time to conduct discovery. The Ninth Circuit quickly disposed of these assertions, finding that there was no timing restriction violated by Countrywide and the plaintiffs had nearly ten months to conduct informal and formal discovery to oppose Countrywide’s motion. In other words, there is no procedural unfairness in the trial court deciding Countrywide’s motion when it did.

Finally, plaintiffs argued that the District Court had abused its discretion by finding common issues did not predominate in light of the uniform wage exemption employed by Countrywide as to the plaintiffs. The Ninth Circuit found, however, that despite using such a uniform exemption, there were still individualized inquiries that would need to be made as to how each of the

employees carried out his or her work, perhaps requiring “several hundred mini-trials” with respect to each employee’s actual work performance.

The lesson to be learned from *Vinole* is that, in the appropriate case, defendants should consider the filing of a motion to deny class certification, which may be an effective vehicle to short-circuit a putative class action.