Client Alert.

February 9, 2012

Duran v. U.S. Bank: The Aftershocks of the *Wal-Mart Stores, Inc. v. Dukes* Earthquake Hit Class Action-Happy California

By Karen Kubin, William Stern, and Natalie Naugle

The aftershocks continue to reverberate from the earthquake that was the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S.Ct. 2541 (2011). But in California, *Dukes* seemed a harder sell. California law typically favors class actions. Most academics revere them, and plaintiffs' lawyers get all dewy-eyed and liken class actions to a "right"—a rung below voting but still a notch or two above, say, paying taxes.

That just serves to amplify the seismic effect from the decision handed down this week by a California appellate court in *Duran v. U.S. Bank N.A.*, No. A125557, 2012 WL 2012 WL 366590 (Feb. 6, 2012). *Duran*, like *Dukes*, was an employment class action. However, this was a wage and hour "misclassification" case—which, for a time, was California's fastest-growing indoor sport. In a case of first impression, the First Appellate District (based in San Francisco) gave an emphatic "heave ho" to plaintiffs' attempt to use statistical sampling to prove classwide liability and damages. By allowing that, the trial court committed a rare "twofer": one error on the merits and another on class certification.

BACKGROUND

Wal-Mart v. Dukes. In *Dukes*, the Supreme Court reversed certification of a nationwide class of 1.5 million female employees who claimed they had suffered gender discrimination. There, the Supreme Court denounced class plaintiffs' proposed "Trial by Formula" approach to *class certification.* In that case, to establish "commonality" and "predominance," a sample set of class members were selected and deposed, and the number of valid claims identified in the sample would then be extrapolated to the entire class. No, said the Supreme Court. *Wal-Mart*, 131 S.Ct. at 2561.

***Duran Duran*.** Remember Duran Duran, that 80s band that lip-synched its way to MTV stardom? In *Duran*, the plaintiffs not only used the same "Trial by Formula" as in *Dukes*, they used the same expert! Hoping to one-up *Dukes*, they used statistical sampling not just for class certification or proving damages, but for proof of classwide liability.

Duran was a wage and hour class action brought under California's unfair competition law (Bus. & Prof. Code § 17200) on behalf of 260 "business banking officers" who claimed they were misclassified and denied overtime pay in violation of the Labor Code. The trial court in Oakland accommodated. It imposed a trial plan that permitted plaintiffs to prove *both* liability and damages on behalf of the entire class based on phantom evidence—a sample of 20 plaintiffs who were "randomly selected" to testify at trial, while rejecting the employer's *real* evidence consisting of what actual, flesh-and-blood absent class members said in sworn declarations.

Relying on plaintiffs' statistical hocus-pocus, the trial court twice rejected the employer's motions to decertify, which had argued that the core issue of liability—"classification"—was inherently individual and idiosyncratic. Committed to its trial plan, the trial court in this bench trial precluded the employer from offering any evidence or argument related to class

members other than those included in the "random sample," including rejecting the testimony of 78 absent class members—one-third of the class!—who swore that they *weren't* misclassified. After a bifurcated trial, the court entered judgment and awarded $15 million to the class including, oddly enough, to those 78 employees who admitted they were never misclassified! (Remember, this is California.)

HOLDING

On appeal, the appellate court did two things. First, it concluded that the lower court's trial plan was "fatally flawed" as to the merits, because "in foreclosing USB the opportunity to raise individual challenges to the absent class members' claims," the deprivation of the employer's due process rights "was profound." (Slip opn. at 1, 56.) Based on that, it reversed the judgment on the merits. Second, the appellate court ordered the class decertified. (*Id*. at 71-72.)

SOUNDING A RETREAT

Duran was decided by the same appellate panel (but only one judge in common) that seven years earlier had handed down the seminal (and expansive) "statistical sampling" case in California, *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715 (2004). Class counsel argued that they were merely passing through the portal that *Bell* opened, an argument the trial court accepted. But the *Duran* court distinguished *Bell* as a case involving the use of statistical sampling to prove *damages*. This was very different, it said: here, plaintiffs were using sampling to prove *liability*. (Slip opn. at 45.) The court further noted that neither state nor federal law supports the kind of representative sampling employed by the lower court. (*Id*. at 47-51.)

JUNK SCIENCE GIVEN THE BOOT

The Court of Appeal went on to conclude that the lower court failed to follow "established statistical procedures" in adopting his case management plan, outlining six separate ways in which the trial court's acceptance of "random sampling" deviated from accepted standards.

The court further determined that, separate and apart from plaintiffs' flawed statistics, the sampling approach improperly precluded the employer from introducing the 78 sworn statements from absent class members *refuting* plaintiffs' misclassification claims. As to that inexplicable suspension of disbelief by the trial court, the *Duran* court had this to say:

> "[T]he trial court exceeded acceptable due process parameters by limiting the presentation of evidence of liability to the testifying [plaintiffs] only. Fundamental due process issues are implicated not only by the unprecedented and inconsistent use of statistical procedures in the liability and damages phases, but also by the manner in which USB was hobbled in its ability to prove its affirmative defense. Under the court's plan, as reinforced by its rulings on motions in limine and related evidentiary matters, USB was barred from introducing manifestly relevant evidence. This evidence potentially could have greatly mitigated the damages awarded and possibly could have defeated plaintiffs' class action claim entirely." (*Id* at 47.)

As the appellate court put it, "relevancy was dictated by the court's trial plan rather than by the trial itself as it unfolded in the courtroom." (*Id*. at 54.) Citing *Wal-Mart v. Dukes*, the court concluded that the trial court erred in permitting "the same type of 'Trial by Formula' that the U.S. Supreme Court disapproved of in *Wal-Mart*[.]" (*Id*. at 53-4.) The court noted that while statistical sampling is a tool that may be utilized under certain circumstances, the trial court abused its discretion in limiting presentation of USB's affirmative defense to the sample of testifying plaintiffs because a "fair procedure would have allowed USB the opportunity to inquire into the specific circumstances of [each] absent class member." (*Id*. at 59.)

CLASS DISMISSED

The need for individual inquiries also led the appellate court to separately order the class decertified. The court explained that, in considering a motion to decertifiy, "[t]he affirmative defense of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member[.]" (Slip opn. at 69.) The trial court's attempt to manage the individual issues by resorting to statistics and extrapolations that served to mask those individual differences was improper, and rendered its denial of USB's motion to decertify an abuse of discretion. (*Id*. at 73.)

What about the "favored" status of class actions, class counsel urged, and what of expediency? Wage and hour employment class actions are doomed, they complained, citing as proof that it would take 520 days to complete a full-blown trial of all 260 class members in this case. No matter, said the appellate court, "we have never advocated that the expediency afforded by class action litigation should take precedence over a defendant's right to substantive and procedural due process." (*Id*. at 58-59.)

WHAT *DURAN* MEANS

Duran is a game-changer for California class actions. Its implications affect employment class actions, but also California class actions in general.

Implications for Employment Class Actions. *Duran* should have a profound effect on wage and hour class actions, and not just those alleging worker misclassification. Plaintiffs' lawyers have long argued that the *Bell* case is authority for proving liability by statistical sampling. *Duran* makes clear it is not, so plaintiffs' lawyers now will be put to their individual proofs on liability. *Duran* was a long time coming, and should provide welcome relief to employers across the state forced to defend frivolous lawsuits.

Implications for Other California Class Actions. Proof by statistical sampling hasn't been confined to just employment class actions. Statistical sampling has long been a tool used by class counsel in various class action contexts, most notably false advertising cases. (*See e.g., Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1145, 1148 (N.D. Cal. 2005).) *Duran* may finally saw off that unwelcome branch of "junk science."

Contact:

Karen Kubin
(415) 268-6168
kkubin@mofo.com

William Stern
(415) 268-7637
wstern@mofo.com

Natalie Naugle
(415) 268-6630
nnaugle@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.