

Statistical Sampling Inappropriate in Wage and Hour Class Action

California Court of Appeal reaffirms in Duran v. U.S. Bank National Association that class actions cannot trump a defendant's due process rights.

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In an opinion with significant implications for California employment law class actions, the California Court of Appeal in *Duran v. U.S. Bank National Association* ruled that a trial court's use of statistical sampling violated the defendant's due process rights. On February 6, the First Appellate District decertified the *Duran* class and overturned a \$15 million judgment that was entered following a bench trial at which a sampling of class members was used to determine liability and damages for the entire class.¹ Citing approvingly to language in the U.S. Supreme Court's recent *Wal-Mart Stores, Inc. v. Dukes*² decision, the Court of Appeal observed that this "trial by formula" was inappropriate, and further held that using sampling to establish classwide liability violated the defendant's due process rights to challenge each class member's claims.

Denying that its ruling will decide "whether the class action will survive as an effective method to try wage and hour misclassification cases," the California Court of Appeal observed that statistical sampling may still be appropriate at the damages stage of trials. *Duran*, however, not only delimits the use of sampling in misclassification class actions but also raises serious questions about the manageability of other employment law class actions where liability depends upon the conduct of each class member.

Background

U.S. Bank (USB) employed 260 business banking officers (BBOs) over a period of several years. The BBOs were responsible for developing and managing the bank's relationships with small businesses. Their job duties involved contacting prospective customers at their places of business to develop new relationships and expanding relationships with existing customers, with the focus on securing deposits and loans.

USB alleged that the BBOs were properly classified as exempt under several exemptions, including the "outside salesperson" exemption for employees who "customarily and regularly work[] more than half the working time away from the employer's place of business" selling items or receiving sales orders.

1. 12 Cal. Daily Op. Serv. 1601, 2012 WL 366590 (Cal. Ct. App. Feb. 6, 2011).

2. 564 U.S. ___, 131 S.Ct. 2541 (2011).

In 2005, the four named plaintiffs filed their motion for class certification. The motion was supported with declarations from 34 current and former BBOs who indicated that they regularly worked overtime hours and spent less than half of their workdays engaged in sales-related activities outside of branch offices. USB concurrently filed a motion seeking to deny class certification, which was supported by declarations from 75 putative class members attesting to the fact that they regularly spent more than half their time engaged in sales activities outside USB's offices. USB also submitted evidence that the four named plaintiffs had admitted facts proving that they were properly classified as exempt under the outside salesperson exemption. The plaintiffs' counsel subsequently filed an amended complaint, substituting two new class representatives for the four previously named plaintiffs. Thereafter, the trial court granted the motion for class certification and the case proceeded to a bench trial.

Overruling USB's objections that its due process rights would be violated unless it was permitted to present evidence regarding each class member, the trial court proposed using a sample of 20 (later 19) class members who would testify at trial and upon whom classwide liability and damages would be based. USB was prohibited from introducing evidence regarding any BBOs who were not part of the 20-person sample, including the 75 declarations supporting USB's claim that at least some of the BBOs qualified for the outside salespersons exemption. However, the trial court allowed the two named plaintiffs to testify and to be present during the entire trial.

After the plaintiffs finished presenting their case, USB filed an unsuccessful motion for judgment on the grounds that the plaintiffs were required to prove that each and every BBO had been misclassified as exempt and, further, that the evidence showed several class members were properly classified.

The trial court subsequently held that the two named plaintiffs and 19 class members comprising the representative sample were uniformly misclassified as exempt and that all 21 individuals had worked uncompensated overtime. Relying on calculations supplied by the plaintiffs' experts, the court concluded that the testifying witnesses had worked an average of 11.87 hours of overtime per week (with a margin of error of plus or minus 5.14 hours per week).

Court of Appeal: Use of Sampling Violated Due Process

On appeal, the *Duran* court concluded that the trial judge's decision to use a 21-person sample was fundamentally flawed for several reasons. First, the 21-person sample was chosen without any consideration as to probable margin of error or other statistical analysis. Second, the 21-person sample was not random, due to both the inclusion of the two named plaintiffs and the fact that several people originally selected for the sample chose not to participate after being contacted by the plaintiffs' counsel. Third, the high margin of error for the alleged 11.87 hours of weekly overtime (plus or minus 5.14 hours) suggested it was a statistically invalid result.

Although it was sufficiently troubled by the use of a 21-person sample, the California Court of Appeal observed that "[f]undamental 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." Having determined that the only evidence that would be permitted at trial was evidence related to the two named plaintiffs and 19 randomly selected class members, the trial judge prohibited USB from introducing any evidence that the 239 other class members were either properly classified as exempt or did not work overtime hours. As a result, USB could not introduce the 75 declarations that class members had signed indicating that they qualified for the outside salesperson exemption, or the four former named plaintiffs' testimony that they

spent more than half of their time outside the office. Because of the trial judge’s conclusion that the class members in the 21-person sample were uniformly misclassified as exempt—a finding that was then applied to every member of the class—even current and former employees who had signed declarations attesting to their exempt status would receive sizable payments from the \$15 million judgment.

The Court of Appeal noted that the outside salesperson exemption generally turns on a detailed, fact-specific determination of how an employee actually spends his or her time, as well as on the employer’s realistic expectations of the job and the extent to which the employee diverges from them. Citing several federal and state cases, the court concluded that when liability depends on an employee’s individual circumstances, due process principles require that a defendant retain the right to assert the exemption defense as to every potential class member. As the first California court to discuss *Dukes* in a published decision, the *Duran* court also observed that the unanimous Supreme Court had expressly disapproved of any “trial by formula” where a defendant was not permitted to litigate its statutory defenses to individual claims.³

Concluding that a “trial in which one side is almost completely prevented from making its case does not comport with the standards of due process,” the Court of Appeal held that the trial court’s refusal to allow USB to introduce evidence to challenge the claims of the other 239 class members was reversible error. Furthermore, the court held that “the issue here is not just that USB was prevented from defending each individual claim but also that USB was unfairly restricted in presenting its defense to class-wide liability.” In light of the evidence in the record that some BBOs were properly classified as exempt, the Court of Appeal decertified the class.

Given the size of both the judgment (\$15 million) and the amount of fees previously awarded to plaintiffs’ counsel by the trial judge (\$18 million), the *Duran* ruling will likely be appealed to the California Supreme Court.

This is an important case that every employer must factor in when defending against wage and hour and other employment class actions. If you have any questions about the *Duran* decision or would like to discuss how this case might impact litigation strategy, please contact any of the following Morgan Lewis attorneys:

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3. See our LawFlash on the *Dukes* decision, “*Dukes v. Wal-Mart*: Supreme Court Announces New Class Action Standards That Will Substantially Curtail Employment Discrimination Class Actions, As Well As Consumer, Antitrust, and Other Class Actions” (June 22, 2011), available at <http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/1809884f-cf70-4064-9b6b-0b991eb0cb0c>.

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