LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, APRIL 26, 2012

Judicial paternalism and the wage class action

By Brian Sinclair

Having defended dozens of employers against hundreds of wage-and-hour class actions, I have never had one tell me that it preferred that the case proceed as a class action. I also have not had one employer tell me that it thought the class action procedure was fair or beneficial. Therefore, I was concerned by a passage in the recently published *Brinker* case that plaintiffs may attempt to exploit in class action certification proceedings.

More specifically, when explaining why trial courts should generally ignore the merits of a claim when analyzing the propriety of class certification, the *Brinker* court reasoned that this approach allows employers to obtain the full "benefits" of a later victory. The Supreme Court's rationale was that "to prematurely resolve such disputes ... places defendants in jeopardy of multiple class actions, with one after another dismissed until one trial court concludes there is some basis for liability and in that case approves class certification. It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff."

Some plaintiffs may rely on this passage in class certification motions to attempt to persuade trial courts of the "fairness" to employers and employees alike from the class procedure. Courts should, however, avoid adopting a paternalistic approach of protecting employers. As is often the case with paternalistic policies, there are significant inefficiencies and drawbacks that may follow. For example, it more frequently is the case that an employer will not face multiple unsuccessful wage-and-hour class actions until a court finally approves a class action. Rather, a single disgruntled former employee and his or her attorney most often initiate class actions, while the rest of the workforce has no interest in suing the employer. Moreover, as the *Brinker* case demonstrates, there is substantial judicial energy that is devoted to class action litigation. The overburdened California court system would likely save significant time and resources if it weeded out meritless class actions earlier in the process. This would allow courts to focus their attention on cases that actually have merit.

In addition, employers without exception will dispute the notion that class actions are somehow "fair" or "beneficial." Instead, most employers believe that the class action process is stacked against them. If an employer defeats a class certification motion, it is subject to the very evil that the Supreme Court warns about — multiple lawsuits, including multiple class action lawsuits. For example, in *Bridgeford v. Pacific Healthcare Corp*, the appellate court held that a wage-and-hour class action was not barred by collateral estoppel, even though the company defeated class certification in an earlier lawsuit asserting "substantially similar" claims.

If, on the other hand, the employer loses the class certification battle, it is stuck with two very unpleasant options: spend substantial sums to settle the class action, or, alternatively, spend substantial sums to defend the policy or conduct at issue in the lawsuit. Even if the employer chooses the latter approach and wins, a successful outcome is not necessarily a victory for the employer. Rather, the employer will have incurred substantial sums defending itself, and those amounts are either not recoverable under the law or not recoverable because the named plaintiff would not have the resources to reimburse the employer. In addition, even a victory after class certification does not ensure that another plaintiff-employee will not later challenge the same conduct by either narrowing the class, alleging slightly different facts, or alleging the challenged conduct has changed.

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There are other potential inefficiencies that also undermine the "fairness" of class actions to employers. One need look no further than the recently published opinion from the California Court of Appeal in *Duran v. United States Bank National Assn*. That case involved the wage claims of a relatively small class of about 260 employees. The *Duran* opinion describes a grueling litigation history, particularly after class certification was granted. The litigation included multiple motions to decertify the class (one filed before trial and one filed after the first of two trial phases), motions for summary adjudication, two separate trial phases, and all the extensive motion practice, discovery and use of expert witnesses that accompanies class action litigation.

All of these efforts were undone after the court of appeal agreed that the trial court should not have certified the class in the first place. The trial court mistakenly allowed the alleged common issues, perceived efficiencies, and the claimed expediency of a classwide process to overcome the due process rights of U.S. Bank to show that some members of the class did not actually work the hours claimed or that they were not entitled to meal periods or additional wages. Hence, U.S. Bank had to incur significant fees and costs to defend the class action. After reading the case, one could reasonably assume that U.S. Bank would have been better off if the trial court had denied certification at the outset, even if U.S. Bank later had to defend multiple individual actions. And, since the appellate court ordered the case decertified, U.S. Bank is faced with the serial class actions that the Supreme Court warned about.

Another example of courts taking an overly paternalistic approach is found in cases allowing wage-and-hour class actions to proceed even in the absence of a named plaintiff. For example, the First Appellate District recently held in *Pirjada v. Superior Court* that trial courts can permit discovery or require that a notice be sent to putative class members "to identify a substitute class representative in place of one who" voluntarily decided to settle his individual claim, ostensibly to assist "in learning the names of other individuals who might assist in prosecuting the action." The *Pirjada* court came to this conclusion, even though the named plaintiff did not want assistance prosecuting the action, but instead had joined in the request to dismiss the action. The only ones who appeared to want the case to continue were plaintiff's attorneys. The *Pirjada* case again demonstrates the lengths some courts (and the legislature) will go to protect the interests of employees to the detriment, and often great expense, of employers.

It is true that certifying wage-and-hour class actions is sometimes appropriate. Courts should, however, reject arguments from plaintiffs about the perceived "fairness" or "benefit" to the employer when deciding whether or not to certify a class. This viewpoint is often at odds with the employer's (and even the employees') best interests. In addition, if an employer truly believes certification is the superior approach to defending a class action, it can certainly stipulate to certification.

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