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Class Confusion

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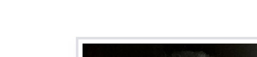

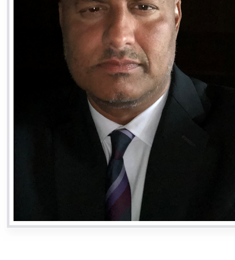

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Much has been said and written about class actions. Now that class certification issues are being litigated, rather than resolved through settlement, the law is beginning to take shape. Five years ago when *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), was decided by the California Supreme Court, there were no real published appellate decisions giving guidance to trial courts on the standards for class certification, particularly in the wage and hour context. It was the wild, wild west - decisions all over the spectrum. Today, it seems like every week a new decision emerges regarding class actions.

Still, confusion reigns supreme. One of the most problematic issues is that of merits. Opposition to certification often focuses on the credibility or sufficiency of the evidence. Some know that if they can make it appear as though the class members are not telling the truth about the underlying violations, the court will likely miss the forest for the trees and deny class certification. A common tactic, and one that is gaining traction, is one where the employer proffers individual anecdotal stories of liability, reshapes the plaintiffs' theory of the case, and then claims that "individual issues predominate." Of course, this is particularly problematic when the employer argues that it is perfectly acceptable for it to treat all of its employees as one group for purposes of classifying them as exempt employees, but that the trial court can only determine the validity of that classification by looking to the "specific job duties" of each putative class members. Moreover, while some have marginalized *Sav-On* as an "abuse of discretion" ruling - i.e., one that supports the trial court whichever way it rules on the certification issue, more recent decisions have, in fact, clarified that much less deference should be given to a trial court's denial of class certification where the court used improper criterion or made erroneous legal assumptions.

For example, in *Bufil v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193 (2008), the appellate court reversed a trial court's denial of class certification in a putative class action alleging missed meal and rest periods. The trial court held that certification was inappropriate because individual issues predominated the discussion of each employee's understanding of their rights to take "on duty" meal breaks. The appellate court, however, noted that this analysis failed to consider the plaintiffs' theory of the case. It noted that the plaintiffs argued that the defendant's policy and practice on meal and rest breaks was the real issue, and that the proposed class was ascertainable from company records.

Similarly, in *Gahazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524 (2008), the appellate court reversed the trial court's denial of class certification of a class of limousine drivers seeking overtime pay. The defense used the "bait and switch" technique to confuse the trial court as to the actual theory of liability. It successfully claimed that because the work of its employees varied from "assignment to assignment" and "week by week" that class treatment was impossible. The appellate court disagreed. It noted that common legal issues were presented by the impact that the employer's common policies had on how the drivers spent their time. Furthermore, the Diva court ruled that whether some drivers were ultimately compensated for their on-call time was irrelevant because any class member who received full compensation could be excluded from recovery if liability was found. See *Franco v. Athens Disposal Co., Inc.*, 171 Cal.App.4th 1277 (2009), in which the court reversed the trial court's denial of class certification for conducting merits analysis and failing to consider the plaintiffs' theory of the case.

In *Aguiar v. Cintas Corp. No. 2*, 144 Cal.App.4th 121 (2006), the appellate court again reversed the trial court's denial of class certification. In evaluating the superiority issue, the *Aguiar* court held that "wage and hour disputes routinely proceed as class actions." In fact, the court opined that if class certification were denied requiring individual cases, repetitious litigation concerning the applicability of the wage and hour issue would ensue, "burdening the courts and creating the possibility of conflicting results."

On Aug. 20, the 9th Circuit jumped into the debate when it reversed a denial of class certification in *Rodriguez v. Hayes*, 2009 DJDAR 12450. The interesting and somewhat related point here was that the district court's decision was not afforded the "traditional deference" that normally comes with such decisions because the court made "no findings whatsoever" in support of its denial of class certification. As a result, the 9th Circuit analyzed the certification de novo, noting that "we may evaluate for ourselves" whether the class should have been certified in the first instance. While the respondents were quick to point out "multiple reasons" for denying certification, the 9th Circuit did not buy those arguments. Instead, it recognized that it "would be engaging in mere guesswork were we to assume the district court relied on any particular reason or reasons." While some pundits have argued that under California law, a court does not have to explain the basis of its decision on class certification absent a request by the losing party for findings under Code of Civil Procedure Section 632, *Stevens v. Montgomery Ward & Co.*, 193 Cal.App.3d 411 (1987), it remains unclear what the standard of review should be under those circumstances. Without findings of facts and the application of law, a reviewing court will be deprived of any meaningful review of the trial court's decision. Perhaps the California Court of Appeal will follow the lead of the 9th Circuit on this issue and afford no deference to those trial courts that refuse to provide such findings.

Of course, the California Supreme Court said in *Sav-On* nearly five years ago, that the only real question on certification is "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amendable to class treatment." The "as an analytical matter" is the key to this statement. The phrase signifies a hypothetical, something in theory. It is not based on who is telling the truth about the merits of the claim - that is for a jury to decide. Some courts, it seems, are nevertheless unduly concerned with the merits of the case, resolving "credibility issues" with employee witnesses who support class certification. See *Lebrilla v. Farmer's Group Insurance*, 119 Cal.App.4th 1070 (2004), in which the court held that the trial court should not involve itself with the merits of the underlying action during the certification process.

But employee witnesses often have never had their deposition taken or ever testified in a court proceeding and are easily manipulated by overbearing questions and personalities. Add to that the fact that the employee is being asked to testify against his or her employer to whom they are reliant on for a paycheck in these tough economic times. Years after our Supreme Court instructed trial courts to be "procedurally innovative" and use statistical evidence, sampling evidence, expert testimony and other indicates of a defendant's centralized practice to evaluate whether common behavior makes certification appropriate, some trial courts have lost their way. But a new day dawns.

Overshadowing the certification debate is the recent ruling on the Labor Code's Private Attorney General Act of 2004 claims. The California Supreme Court's decision in *Arias v. Superior Court*, 46 Cal.4th 969 (2009), ruled that plaintiffs do not need to meet class certification requirements to proceed with class-wide recovery. In so ruling, the court rejected numerous arguments from the defense bar that maintaining a representative action without meeting class certification requirements violates due process rights. The Supreme Court countered that Private Attorney General Act claims are asserted on behalf of the state, and that, as such, the penalties are recoverable without meeting certification under Code of Civil Procedure Section 382, as with any government action. Under the Private Attorney General Act, plaintiffs are entitled to penalties of $100 per violation for the initial violation, and $200 per violation for subsequent violations.

Because plaintiffs are entitled to measure the penalties based on the entire group of "aggrieved employees" discovery must necessarily continue irrespective of the ruling on class certification on the underlying Labor Code claims. Moreover, the trial courts will likely utilize techniques such as representative sampling, statistical evidence and expert testimony to determine the amount of penalties due; rather than opt for hundreds or thousands of mini-trials to establish the violations. Sound familiar? It should given *Sav-On's* instructions to the trail courts nearly half a decade ago.

Given that in all reality, class actions for wage and hour violations will continue regardless of certification, the question then becomes what exactly has an employer gained by defeating class certification? What "efficiencies" has the trial court advanced? The answer, if Private Attorney General Act claims are present, is likely none. In fact, the case is all the more complicated because there is no blueprint for the trial of Private Attorney General Act "non-class" class actions. Given the trial courts seeming reticence to apply (or misinterpret) the certification rules of *Sav-On*, courts will surely see much more, not less, litigation - but will the trial courts follow the mood of the unanimous California Supreme Court or be sucked into the minutiae of individual analysis, individual discovery, individual credibility issues and, ultimately, individual trials? The brave new world of class action litigation heads into uncharted waters. It's enough to make one nostalgic for the good old days when defendants, early in litigation, recognized their potential liability and globally settled the class claims through mediation.

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