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Wage-and-hour class actions: The law and the cases that have shaped it

Strong labor laws, the Unfair Competition law and recovery of attorney's fees drive employment class actions in California

Class actions have long been an important procedural device permitting one plaintiff to litigate on behalf of a group of similarly affected individuals (i.e., the "class"). Yet, class actions have not been used in earnest in the wage-and-hour context until after the turn of this century.

Plaintiffs' increased reliance on class actions for the private enforcement of labor laws has been particularly pronounced in California for several reasons. First, California's wage-and-hour laws are significantly more protective of workers than federal law and the laws of many other states. Second, California's Unfair Competition Law ("UCL") adds a consumer-protection cause of action, independent of Labor Code violations, by allowing plaintiffs to additionally assert their Labor Code violations as "unlawful," "unfair," or "fraudulent" business practices. The UCL also has a longer statute of limitations that extends the reach of plaintiffs' Labor Code claims from three to four years. Finally, California allows recovery of attorney's fees for prevailing employees, a right which prevailing employers do not have.

Three California Supreme Court cases have particularly influenced wage-and-hour class actions in California. The first is *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. In *Sav-on*, the trial court certified the overtime claims of the Sav-on retail chain's salaried assistant managers. Sav-on argued that the case was unsuitable for class treatment because it had a right to litigate the exemption defense as an individual issue to each manager, whom it classified as exempt employees. Sav-on argued that individual issues would overwhelm any common issues at trial and thereby preclude class certification.

The Supreme Court disagreed and upheld the trial court's order. The Court explained that the class-action device is a procedural mechanism designed to manage and adjudicate the claims of multiple plaintiffs in an efficient manner such that joining their claims in a single action is superior to individual trials. The Court found "[t]he trial court in this case determined that plaintiffs had established … that common issues predominate and ruled that a class action is "superior to alternate means for a fair and efficient adjudication of the litigation." (*Sav-on,* at 326.)

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Acknowledging that the question of how managers spent their time could raise individual issues of fact, the Court held that such issues did not necessarily *predominate* where plaintiffs had presented substantial evidence of common policies relevant to the adjudication of all class members' claims. (*Id*. at 332-333.) The Court held that to manage such individual issues, a trial court must consider the use of "innovative procedural tools," including the use of statistical evidence and expert testimony. (*Id*. at 332-339.) Recently, the Supreme Court affirmed and expounded those principles in *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 33, 51. The Court stressed that any statistical model of proof permitted by the trial court in a misclassification trial must allow the defendant an opportunity to impeach the model or otherwise show that its liability is reduced because some plaintiffs were properly classified as exempt. (*Id*. at 13, 38, 49.)

Finally, the *Sav-on* court reiterated the long-established principle that differences among class members in the amounts of damages or restitution resulting from defendant's unlawful conduct do not bar class certification: "We have recognized that the need for individualized proof of damages is not per se an obstacle to class treatment[.] [It is therefore not] a bar to certification that individual class members may ultimately need to itemize their damages." (*Id*. at 334-335.)

The second significant case in California wage-and-hour class actions is *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094. While not a class action, the *Murphy* case resolved a hotly-contested issue in wage-and-hour class actions of whether the additional hour of pay that an employer must pay under Labor Code section 226.7 for failing to provide a meal or rest break is a wage or a penalty.

The *Murphy* court ruled in favor of employees: "The [Industrial Welfare Commission] intended that, like overtime pay provisions, payment for missed meal and rest periods be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards." (*Id*. at 1110.)

The importance of the *Murphy* court's ruling on the wage versus penalty issue cannot be overstated. Because the statute of limitations for wage claims under the Labor Code is three years (extended to four under the UCL), as compared to a one-year statute for penalty claims (with no corresponding extension under the UCL), the economic stakes in meal-break and rest-break class actions increased dramatically as a result of *Murphy*.

The financial impact of the *Murphy* Court's ruling led to the third seminal case in California wage-and-hour class jurisprudence, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Because of the potentially catastrophic consequences for an employer sued by its employees because of "missed" meal or rest breaks, employers shifted their focus to the liability determination under Labor Code section 512 (for meal breaks) and the applicable Wage Order (for rest breaks). Employers argued that the standards for "providing" meal breaks or "authorizing and permitting" rest breaks under these provisions necessarily required individual "mini-trials" and therefore could not be adjudicated on common proof in the class action context.

The *Brinker* court clarified the standards for when an employer would be deemed to have satisfied its obligations to provide the requisite breaks. In short, an employer required to provide a meal break must ensure that employees are able to take a 30-minute uninterrupted meal break free of all duty starting no later than at the end of the fifth hour of work. The employer must also ensure that employees are able to take a 10-minute rest break for every four hours of work or major fraction thereof and may not impede the employees' ability to avail themselves of their breaks.

The *Brinker* court also reaffirmed the general rule that a class will be certified where *liability* can be determined by facts common to all class members even if the class members must individually prove their damages. (*Id*. at 1022.) As applied in the employment context, where employers are required to implement policies that meet Labor Code requirements, the implication is clear: "Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage-and-hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Id*. at 1033.) Where plaintiffs present a "theory of liability – that [the employer] has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law – [that theory] is by its nature a common question eminently suitable for class treatment." (*Ibid*.)

Types of class actions

Traditional "opt-out" class actions

The traditional class action seeking damages in the wage-and-hour context, whether proceeding under Rule 23 of the Federal Rules of Civil Procedure or, in California, under Code of Civil Procedure section 382, requires that the representative plaintiff present substantial evidence satisfying the follow -ing "prongs": (1) Numerosity; (2) Ascertainability; (3) Commonality; (4) Typicality; (5) Adequacy; (6) Superiority; and (7) Manageability.

• Numerosity

A class is sufficiently numerous to warrant class treatment when it is impracticable to bring all class members before the court. (Code Civ. Proc., § 382; Fed. R. Civ. P. 23.) While "[n]o set number is required as a matter of law for the maintenance of a class action," case law indicates that 30-40 class members satisfies the numerosity requirement because at that point, joinder is not practical. (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.) In fact, numerous courts have certified smaller classes. (See, e.g., *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 [28 class members]; *Bowles v. Superior Court* (1955) 44 Cal.2d 574 [10 class members].)

• Ascertainability

An alleged class "is ascertainable if it identifies a group of unnamed

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plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1532.) This is met if objective criteria are used to describe class members. (*Lewis v. Robinson Ford Sales, Inc.* (2007) 156 Cal.App.4th 359, 370.) The court need not identify each member of the class; it need only determine whether the class is readily identifiable. (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1422; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.)

• Commonality (Predominance)

Commonality requires the presence of questions of law or fact that are common to the class as a whole, rather than applicable only to certain class members. (*Sav-on*, *supra*, at 326.) A "common question" is a question, the determination of the "truth or falsity of which will resolve an issue that is central to the validity of each one of the claims in one stroke." (*Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2545.)

Common questions *predominate* where they "present a significant aspect of the case [and] can be resolved for all members of the class in a single adjudication." (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1022.) "The 'ultimate question' that the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" (*Brinker, supra*, at 1021.)

In accordance with these precepts, courts have approved of class actions in wage-and-hour cases when the allegations disclose standardized and uniform wage-and-hour policies affecting all class members in the same manner. (*Brinker, supra*, at 1033; *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (9th Cir. 2009) 571 F.3d 953, 958 ["centralized rules, to the extent they reflect the realities of the workplace, suggest uniformity among employees that is susceptible to common proof].)

• Typicality

A representative plaintiff's claim is "typical" of the class if it arises from a similar event, practice, or course of conduct that gives rise to the claims of the other class members and if the elements of the cause of action that the class representative must prove to establish the defendant's liability are similar. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47.)

• Adequacy

Adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.)

Although the main factor in determining the adequacy of a class representative is potential conflicts of interests, courts also look at many factors relating to whether the proposed representative is qualified to undertake the task of representing the interests of absent parties. Factors include the proposed representative's knowledge of the case and his or her duties as class representative; his or her credibility, integrity, and financial resources; and the relationship between the representative and class counsel. (Newberg on Class Actions § 3:66 (5th ed.); see also *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1272 [attorney who is representative or spouse of representative may not also serve as class counsel or share in fee award].)

• Superiority

The party seeking class certification "has the burden to establish that class action will be a superior means of resolving the dispute." (*Bell v. Superior Court* (*HF Fox, Inc.*) (2007) 158 Cal.App.4th 147, 172.) In determining whether a class action is superior to individual litigation, courts look at a variety of factors, including class members' interest in individually controlling their own litigation; the desirability of concentrating claims in one forum; and potential problems that could arise in managing the case as a class suit. (Newberg on Class Actions § 4:68 (5th ed.).)

• Manageability

The "manageability" inquiry is really a subset of the superiority inquiry. (See Newberg on Class Actions § 4:72 (5th ed.).) Courts do not consider whether a class action is manageable in the abstract but rather focus on problems that might occur in managing it compared to the problems that could occur in managing litigation without a class suit. The manageability inquiry is a comparative one: "[W]e are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives." (*Williams v. Mohawk Industries, Inc.* (11th Cir. 2009) 568 F.3d 1350, 1358.)

Given that the alternatives are rarely more manageable than litigation class suit, manageability "will rarely, if ever, be in itself sufficient to prevent certification of a class." (*In re Visa Check/MasterMoney Antitrust Litigation* (2nd Cir. 2001) 280 F.3d 124, 140.) Indeed, courts in at least seven circuits, including the Ninth Circuit, have held that there is a presumption against dismissing a class action on manageability grounds or that such dismissals are disfavored. (See, e.g., *In re Live Concert Antitrust Litigation* (C.D.Cal. 2007) 247 F.R.D. 98, 148.)

Finally, because the cases most likely to be unmanageable are those involving a myriad of individual issues, the manageability concern often simply echoes the predominance analysis. Therefore, courts generally hold that if the predominance requirement is met, then the manageability requirement is met as well. (See, e.g., *Klay v. Humana, Inc.* (11th Cir. 2004) 382 F.3d 1241, 1272 ["[W]here a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions."].)

FLSA "opt-in" collective actions

Congress passed the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*, ("FLSA") to protect American workers from unfair working conditions.

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The FLSA requires employers to pay their non-exempt employees a certain minimum wage for all hours worked and overtime for hours worked over 40 in a work week. A typical FLSA collective action involves one or more of the following alleged FLSA violations: (1) misclassifying non-exempt employees as exempt and failing to provide overtime pay for hours worked in excess of 40 hours a week; (2) making improper deductions from exempt employees' salaries; (3) failing to pay non-exempt employees for all hours worked, including minimum wage; and/or (4) failure to pay or miscalculating overtime for non-exempt employees.

As with a Rule 23 class action, a named plaintiff in an FLSA collective action files suit, pursuant to the procedural provisions of 29 U.S.C. § 216(b), on behalf of himself and other similarly situated current or former employees. There are several notable procedural differences, however, between a Rule 23 "class action" and an FLSA "collective action."

First, a Rule 23 class action does not require putative class members' consent. Instead, once the court certifies a class, all members are parties to the action (and bound by the judgment) unless they opt out by requesting exclusion from the lawsuit. In contrast, the FLSA requires individual employees to affirmatively consent in writing to *opt in* as a party to a collective FLSA action. An individual who does not consent to join the collective action neither benefits from nor is bound by the judgment in the lawsuit.

Second, unlike Rule 23 class actions, courts use a two-phase inquiry to determine whether to certify a collective action under the FLSA. During the first stage (the conditional certification stage), the certification requires only "a modest factual showing" that the plaintiff is similarly situated with the other employees whom he or she seeks to notify of the action. That relatively lenient standard frequently results in conditional certification of the collective action. Following more detailed discovery, the court employs a stricter standard to determine whether the filing plaintiff(s) and the other collective action members are sufficiently similar to certify the collective action.

Third, under Rule 23, the statute of limitations may be tolled pending the court's decision on class certification. In contrast, under the FLSA, the statute of limitations as to an individual claimant continues to run until that claimant has filed a consent to opt in. As a result, the statute of limitations may have already run for many putative members before they receive notice that a lawsuit has been filed.

From a practical standpoint, the main disadvantage with collective actions under the FLSA, as compared with Rule 23 class actions, is the FLSA's requirement that any "class member" who wishes to participate must affirmatively opt in. This typically leads to smaller classes than in cases certified under Rule 23, as current employees are notoriously reluctant to opt in for fear of retaliation.

PAGA representative actions

The Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code sections 2698-2699.5, provides for the recovery of civil penalties for the violation of the Labor Code through a civil action brought by an aggrieved employee. Section 2699 provides that an aggrieved employee may bring a *representative* action on behalf of himself and other current and former employees. An "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed. (Lab. Code, § 2699.)

Because a representative PAGA claim is considered a law-enforcement action, and because the representative plaintiff acts as the proxy or agent of the state's law-enforcement agencies, class certification requirements do not apply. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 975, 980-988.) Moreover, the California Supreme Court recently held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-384, that a provision in an employment agreement seeking to compel a representative PAGA action to arbitration is contrary to public policy and unenforceable as a matter of state law.

Forced arbitration

Following *AT&T Mobility, LLC v. Concepcion* (2011) 131 S.Ct. 1740, any analysis of a potential wage-and-hour class action must include the possibility that the client, and/or the potential class members, signed an arbitration agreement. The client will often be unaware that she has signed an arbitration agreement, so the issue requires extensive investigation.

The Federal Arbitration Act ("FAA"), which provides for the enforcement of private agreements to arbitrate disputes, states that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Thus, arbitration clauses may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." (*Concepcion*, 131 S.Ct. at 1746.)

In determining enforceability of an arbitration clause where a "generally applicable contract defense" is raised, "federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" (*Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889, 892.) Courts refuse to enforce arbitration agreements primarily for (1) lack of formation – the enforcing party is either itself not a signatory or cannot produce the necessary evidence to show that your client agreed to arbitrate; and (2) unconscionability.

California's doctrine of unconscionability is codified in Civil Code section 1670.5(a): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Because the statute does not define unconscionability, courts look to the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 for the

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"definitive pronouncement" of the doctrine. (*Ferguson v. Countrywide Credit Indus., Inc*. (9th Cir. 2002) 298 F.3d 778, 782-83.) *Armendariz* explained that "unconscionability has both a procedural and a substantive element," the former focusing on "oppression" or "surprise" due to unequal bargaining power, and the latter on "overly harsh" or "one-sided" results. (24 Cal.4th at 112-115.) Although both procedural and substantive unconscionability must be present, courts utilize a "sliding scale" approach where "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."(*Ibid*.)

Since *Concepcion* came down in 2011, courts in California wage-and-hour cases have continued to use the doctrine of unconscionability to invalidate arbitration agreements. In *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, the court upheld the trial court's refusal to enforce an arbitration agreement that it found to be both procedurally and substantively unconscionable. The agreement was procedurally unconscionable because it was presented to employees on a take-it-or-leave-it basis, workers were not given sufficient time to review it, and it was only partially translated into Spanish even though many company employees spoke only Spanish. (*Id*. at 83-85.) The agreement was substantively unconscionable because it lacked mutuality, as the employer could bring claims for damages in any forum while employees were limited to arbitration. (*Id*. at 85-89.)

In *Chavarria v. Ralphs Grocery Co.* (9th Cir. 2013) 733 F.3d 916, the Ninth Circuit found that the FAA did not generally preempt contract defenses under California state law and invalidated the employer's forced arbitration agreement as unconscionable. The procedural unconscionability was based on the agreement's inclusion in an employment application. The agreement's take-it-or-leave-it nature meant that "Chavarria could only agree to be bound by the policy or seek work elsewhere." (*Id*. at 923.) The court likened the agreement to prior cases where arbitration agreements had been found invalid – the procedural unconscionability doctrine kicks in where the "employee is facing an employer with 'overwhelming bargaining power' who 'drafted the contract and presented it to [the employee] on a take-it-or-leave-it basis.'" (*Ibid*.)

On the substantive side, Ralphs' arbitration agreement was impermissibly one-sided and cost-prohibitive. The agreement disallowed the use of an arbitrator affiliated with AAA or JAMS and provided for a selection process that in practice would always result in Ralphs picking the arbitrator. (*Ibid*.) In addition, arbitration fees were required to be paid from the outset, and split between parties. Because the estimated fees ranged from $7,000 to $14,000 per day (*Id*. at 925), the agreement thus impermissibly imposed "non-recoverable costs on employees just to get in the door." (*Id*. at 926.)

The *Chavarria* court also found that California laws on substantive and procedural unconscionability did not disproportionately affect arbitration agreements and were therefore not preempted by the FAA. (*Ibid*.) The Supreme Court had held in *Concepcion* that the FAA preempts state law contract defenses that disproportionately impact arbitration agreements, even if such defenses apply to all contracts generally. (*Id*. at 1748.)
In *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304, the Court found a waiver of class arbitration enforceable even where the individual cost of proving a claim exceeded any potential recovery.

As to preemption of substantive unconscionability claims, the *Chavarria* court's inquiry focused on whether the arbitration agreement prevented the "effective vindication" of a right. (Under *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 105 S.Ct. 3346, 3359, arbitration agreements that do so are invalid.)

The *Chavarria* court noted that this "effective vindication" doctrine survives *Italian Colors*. Even though *Italian Colors* upheld an arbitration agreement despite high costs of proving a claim, the Supreme Court suggested that an arbitration agreement may be impermissible if "filing and administrative fees attached are so high as to make access to the forum impracticable." (*Italian Colors, supra,* at 2310-2311.) The up-front filing fees in Ralphs' agreement in fact were found to present this exact situation, effectively foreclosing the pursuit of claims. (*Chavarria, supra*, at 927.)

Chavarria thus suggests grounds on which a mandatory arbitration agreement may be found invalid, even post-*Concepcion* and post-*Italian Colors*, departing from a general trend of upholding such agreements. In the employment context, it suggests that the asymmetric bargaining power at play in the employment relationship is grounds for procedural unconscionability. The Ninth Circuit noted, in concluding, that "federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power." (*Chavarria, supra*, at 927.)[1]

Finally, as noted *supra*, the California Supreme Court recently held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-384, that a provision in an employment agreement seeking to compel a representative PAGA action to arbitration is contrary to public policy and unenforceable as a matter of law.

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Author's notes:

[1] The analysis of the *Chavarria* opinion, in part reproduced here, first appeared on 12/26/2013 in an article posted on the OnLabor blog written by Rebecca Chang. The full article is available at http://onlabor.org/2013/12/26/an-explainer-ninth-circuit-on-mandatory-arbitration-in-employment-contracts-chavarria-v-ralphs-grocery/.

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