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COVER STORY

Case raises bar for class certification

State Court of Appeal clarifies use of surveys as evidence for case

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A decision in an epic class action could make it harder for plaintiffs' lawyers to use surveys to muster evidence they need to certify a class.

A 1st District Court of Appeal panel affirmed a lower court decision Wednesday that denied certification to a class of U.S. Bank National Association officers who claimed they were wrongfully denied overtime pay.

The opinion authored by Justice Robert L. Dondero is the latest, and perhaps last, turn in the lawsuit filed by salesman Samuel Duran that claims to represent bank employees as far back as 1997. *Duran et al. v. U.S. Bank National Association*, 2018 DJDAR 617.

A landmark 2014 state Supreme Court decision in *Duran* set rules of thumb for how plaintiffs' lawyers may use surveys and statistical sampling to move for class certification. The high court ruling was crucial in stating plaintiffs' lawyers must bring to court a realistic trial plan before their class is certified.

This latest ruling in *Duran* "is a very practical nuts and bolts" opinion on the limits of lawyers surveying potential class members and reaching conclusions through their sample, said Felix Shafir, an appellate defense attorney at Horvitz & Levy LLP.

The decision was published, Shafir said, because there is scant authority in California on how statistical sampling is actually supposed to play out.

Paul Cane, an appellate defense lawyer at Paul Hastings LLP, said the latest *Duran* decision is not the end of the world for plaintiffs' attorneys, but it does create class certification barriers. "I don't think this opinion does away with statistical sampling," he said. "It simply requires that such sampling be reliable."

Duran emanates from a once obscure state law exemption that employers need not pay overtime to traveling salespeople if they spend the majority of time off company premises.

Represented by Edward J. Wynne of the Wynne Law Firm, Duran sued on behalf of sales workers who, he claimed, spent more than 50 percent of their time at a bank locale, and so therefore were being unlawfully denied overtime pay.

Alameda County Superior Court Judge Robert B. Freedman granted Plaintiffs' original class certification motion notwithstanding conflicting evidence presented by the parties as to whether the business banking officers spent a majority of their time outside bank locations, and there was no plan to manage individualized issues. After the conclusion of Phase I of the trial where the Court, in a bench trial, found classwide liability in Plaintiffs' favor, Plaintiffs conducted a survey of the class in 2008 regarding the average amount of overtime worked by people who responded to the survey. Judge Freedman ultimately gave 260 bank employees a $15 million award.

Tim Freudenberger, Founding Partner & Chair of CDF's Class Action Defense Litigation Practice Group

An appellate panel reversed Freedman's award and the state Supreme Court affirmed. The high court found that the class's chosen sample size of 20 bank employees was neither random nor based on scientific principles. The court noted that 75 class members testified that they did, in fact, mostly work outside a bank locale.

The fact-intensive ruling gave plaintiffs hope that a survey could yield class certification.

But a new trial court judge, Wynne Carvill of Alameda County Superior Court, denied certification, finding that a phone survey conducted by plaintiffs of class members was plagued by self-selection bias and an insufficient response.

The appellate court's opinion noted that only 54 percent of potential class members who were called responded, and that those who did pick up the phone were perhaps motivated by a grievance. Additionally, the panel, which also included Justices Jim Humes and Sandra L. Marguiles, said the difference in unpaid overtime hours between the new 2015 survey and the original 2008 study were too great to be reconciled.

Shafir noted that plaintiffs' counsel was hobbled by the fact that the hours worked in question occurred years ago, perhaps explaining the discrepancy.

Plaintiffs' lawyers reached Friday said that the case was an instance of bad facts making bad law. "Generally one would expect the surveys to have shown the same or similar results," said Glenn Danas, of Capstone APC. "That these surveys didn't suggest that this case may have been an outlier."

Eric S. Kingsley of Kingsley & Kingsley said that the decision was published due to the overall importance of the litigation. But he hoped that the facts were so unusual that the case would hold little precedential value.

Messages left with Wynne and also U.S. Bank attorney Timothy M. Freudenberger of Carothers DiSante & Freudenberger LLP were not returned.