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Viewpoint: Keep Employee Class Actions Viable

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It is now up to the state's Supreme Court to decide whether already underrepresented employees harmed by workplace violations will have access to the justice promised by class action procedures.

The California Supreme Court recently heard oral argument in *Duran v. U.S. Bank*. The Duran case presents the issue of whether representative testimony and statistical evidence may be used to prove wage and hour violations in a class action.

While the subject may sound dry and technical, what is at issue here is the continued vitality of class actions to remedy violations of workers' rights. Since class actions are generally the only viable mechanism to enforce overtime and other fundamental workers' rights, the court's ruling may have a lasting impact on whether the courtroom doors remain open to California workers. If not, employers will thumb their noses with impunity at Labor Code protections, knowing most workers will have no realistic chance of enforcing their rights.

Regardless of how the Supreme Court views the use of statistical evidence as presented in the trial record of *Duran*, the court should clearly reaffirm the longstanding principles that workers can bring class actions to vindicate their rights and that representative and statistical evidence are valid and constitutionally sound methods to prove class action violations in appropriate cases.

In *Duran*, the Court of Appeal reversed a $15 million judgment in favor of the class of 260 business banking officers. The court found the judgment was based on a flawed trial plan which failed to comport with the guidelines for using statistical evidence set out in *Bell v. Farmers Insurance Exchange*, (2004) 115 Cal.App.4th 715 ("*Bell III*"), in a number of key respects. The Court of Appeal wrote that "the sampling done in the *Bell III* case was at all times random, unlike here where a comparatively high number of [class members selected to be in the sample group] opted out before trial, and the trial court allowed evidence from the two named plaintiffs not randomly chosen to be extrapolated to the entire class." The Court of Appeal in *Duran* also emphasized that the judgment was affected by a much higher margin of error than in *Bell III*.

However, the Court of Appeal did not stop there. The *Duran* opinion contains some broad-brush language that U.S. Bank and its big business amici have seized upon to argue several troubling propositions to the California Supreme Court. First, they brazenly argue the broad proposition that statistical evidence should never be allowed to prove liability in overtime class actions. Then the bank argues it should have an unfettered right to bring in each and every class member to prove its affirmative defense that some of the individuals were properly treated as exempt. The bank and its big business friends go on to argue that it is improper to allow a class action to go forward if even a small minority of the workers is not entitled to overtime pay—even where the overwhelming majority was harmed by the employer's widespread violations of wage laws.

The California courts have long recognized that class actions are necessary to affect complete justice. In *Sav-On Drugstores, Inc. v. Superior Court*, (2004) 34 Cal.4th 319, the California Supreme Court reaffirmed both the non-waivable right to overtime pay and the vital importance of class actions as the most viable means of protecting workers' statutory rights. The Supreme Court ruled that the lower courts are to favor class actions and be flexible and innovative in adapting class action procedures to maximize workers' vindication, including cases where the defendants' pay practices result in "widespread [that is, not necessarily universal] de facto misclassification" of workers.

The extreme arguments made by the bank and its allies cannot prevail unless the Supreme Court abandons public policies mandating the protection of workers' rights. The bank's argument that statistical evidence should be unavailable to prove classwide violations defies logic, customary business practices and existing law. Statistical

evidence is widely and customarily used in the business world and is well established for determining a variety of legal questions. Why should businesses be able to make all sorts of decisions based on statistical analysis and projections, only to reject reliable statistical evidence that is in many cases the only way to provide a measure of justice to workers cheated of overtime pay? As recognized in *Bell III*, supra, 115 Cal.App.4th at 752 (approvingly cited in *Sav-On*), the defendant's due process rights are met so long as the use of statistical evidence results in an accurate and reliable determination of aggregate liability. While statistics provide a different form of proof than individualized testimony, when properly supported and reliably presented it is no less accurate or fair.

The bank's position that it has a due process right to march in hundreds of class members to prove its affirmative defense is not rooted in any bona fide legal analysis, but is a convenient argument that the bank has seized upon to shield itself from liability by putting hurdles in the way of workers seeking justice. The goal isn't upholding its due process rights; it is to render class actions unworkable and unappealing.

Finally, the argument by the bank that a class should not be certified even if just a few class members might have been properly classified is a red herring that turns justice on its head. *Sav-On* explicitly acknowledges that class actions are proper where there are widespread, but not necessarily universal, violations of worker rights. The defendant's due process interest is satisfied where the aggregate liability is accurately determined, whether that is through statistical or other reliable evidence.

As recognized in *Bell* and *Sav-On*, there are procedural mechanisms—like sworn claim forms or investing claims administrators with authority to investigate fraudulent claims—available to trial courts to prevent windfalls to class members who may not deserve a recovery. Most significantly, California public policy makes it more important to ensure the vast majority of workers have a practical procedure to obtain relief for violations of their rights rather than prevent a few anomalous class members from getting a windfall from an aggregate total that has been fairly and accurately determined.

The California Supreme Court may find the specific record in *Duran* is distinguishable from that in *Bell* and other overtime class misclassification cases. But *Bell* and *Sav-On* make it clear it is not a violation of due process to allow classwide determinations of liability and damages if the sample is statistically valid and can be reliably extrapolated to the entire class.

At the end of the day, the Supreme Court should reaffirm these sound principles. Whether the Supreme Court approves the trial court's rulings in *Duran* or not, it should not throw the baby out with the bathwater and should keep the class action procedure alive and viable to provide justice to those workers who are harmed by widespread violations of workers' rights laws.

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