Brinker: Profundity or periphery?

Despite clarifying several issues, the Court did not settle the central dispute in this wage-and-hour case

By Dan Gildor

Long awaited and much anticipated, the California Supreme Court's decision in *Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004 did less than had been expected to settle the dispute that has arisen between employers and employees swept up by the "wave of wage and hour class action litigation" created by the Legislature when in 2000 it instituted monetary remedies for an employer's failure to provide employees meal and rest periods. Indeed, the opinion appears to be the result of a tremendous effort to find unanimity among the justices, as exhibited by the fact that the opinion's author felt it necessary to author a concurring opinion to "emphasize what . . . [the] opinion does not say" – an opinion which only garnered the support of Justice Liu. (*Brinker*, *supra*, 53 Cal.4th at p. 1052 (conc. opn. of Werdegar, J.).) Accordingly, the unanimity the Court displayed likely masks underlying tensions and fault lines within the Court regarding the scope and extent of an employer's obligation to provide meal and rest periods.

While the Court in *Brinker* did settle some issues regarding the timing of meal and rest periods; and while the Court did hold (as many had anticipated that it would) that though an employer need not police its employees to ensure that they perform no work during a meal period, the employer may not at the same time "impede or discourage" employees from taking meal and rest periods; the Court did not settle the real dispute between employers and employees about what employers must actually do to "provide" meal and rest periods to their employees. (*Brinker*, *supra*, 53 Cal.4th at p. 1040 ["[w]hat will suffice may vary from industry to industry"].) Instead, the Court left it up to the lower courts to define the real legal bounds regarding meal and rest periods. Ironically, those lower courts have mostly shied away from determining these issues over the past four years (with many cases stayed until *Brinker* was determined) in large part because everyone expected the Court to do so.

In all, what was expected to be a watershed opinion that would have settled once and for all the dispute between employers and employees regarding meal and rest periods is instead likely to become increasingly irrelevant with time as plaintiff attorneys begin to pursue meal and rest period claims more and more through the Private Attorney General Act of 2004 ("PAGA"), which does not require claims to be certified as a class action. Moreover, much of the substantive law regarding meal and rest periods will be fleshed out by lower courts. *Brinker* in time, therefore, will largely stand as a case in which the Court reined in a Court of Appeal that had simply gone "too far."

Background

Brinker has been one of the most highly anticipated opinions by the California Supreme Court since the Court launched the many meal and rest break lawsuits that have been filed on the basis of its ruling in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094 that the monetary remedies for failing to provide meal and rest periods were wages, not penalties, subject to at least a three-year statute of limitation. The wait for the Court to issue its opinion was extensive. It took the Court nearly three and a half years between granting review and issuing the opinion. Even after the parties' had completed their substantive briefing, it still took the Court nearly two years to order the case on calendar. In the interim, the Court issued "grant and hold" orders on six cases involving meal and rest period claims, deferring consideration and disposition of those cases pending resolution of *Brinker*.[1] (See Cal. Rules of Court, rule 8.512, subd. (d)(2).)

The case was originally filed in 2004 as *Hohnbaum v. Brinker Restaurant Corp*. The lawsuit was filed by five non-exempt restaurant employees of Chili's who claimed the restaurant illegally denied them meal and rest breaks. The employees challenged the restaurant's practice of having employees take "early lunches" shortly after starting work and then working employees another five to ten additional hours without receiving another meal period. They also claimed that they should have received a rest break before the first meal period. The employees also alleged that they worked "off-the-clock" during meal periods.

The employees asked the trial Court to certify a class of more than 60,000 current and former employees, arguing that class treatment was appropriate because the Court could look to the company's standard policies and practices and time card records to determine that meal period violations occurred. Brinker argued that meal periods need only be "provided," as set forth in the Labor Code. Brinker contended that whether or not any particular manager discouraged or prohibited the taking of a break is a matter that must be decided on an individual basis and not as a class action. The trial court granted the motion for class certification.

Brinker appealed the class certification order. The Court of Appeal held in favor of Brinker on a broad range of issues concerning when an employer's obligation arises to "provide" meal and rest periods to its employees. It held that an employer's

obligation to "provide" employees with a meal period means that the employer must make meal periods "available," not "ensure" they are taken. the Court also discussed that, in all but rare cases, meal and rest period claims are not appropriate to be litigated as class actions because a failure to "provide" must be decided on a "case-by-case basis."

The California Supreme Court granted review on October 22, 2008. By April 2012, the tension in the plaintiff and defense bar was palpable, with both sides believing that however the Court ruled, it would be a momentous victory or loss. The facts in *Brinker* are fairly generic. Like many employers in California, the defendants in *Brinker* had written policies authorizing meal and rest period claims. Notwithstanding those policies, employees often continued to work during their meal and rest breaks.

Because this fact pattern appears in many meal and rest period cases, including some of the six cases that remain pending before the Court, the Court's opinion had the potential to pull the rug out from underneath the numerous wage and hour cases that have been filed over the years alleging meal and rest period violations. The case could also have unleashed a whole new wave of lawsuits that had been sitting on the sidelines. Despite the buildup and the clamor by each side, once the opinion was issued that it had "won," a careful reading of the opinion demonstrates that the Court fell short of resolving the uncertainty that has developed around meal and rest periods.

The Court set the standard

In *Brinker*, the Court addressed whether an employer, having provided its employees a meal period through a formal policy, had to also ensure that the employees did no work during the meal period. The Court easily concluded that employers had no such duty "to police meal breaks and ensure no work thereafter is performed," and that, in fact, the implication of such a duty appeared to conflict with the duty to free employees of all control during a meal period. (*Brinker*, *supra*, 53 Cal.4th at pp. 1038-39 ["the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time"].) According to the Court, an employer satisfies its obligation to provide meal periods if "it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Id*. at p. 1040.) Curiously, though, the Court consciously avoided providing any guidance to employers about what they might do that would constitute impeding or discouraging employees, claiming that "[w]hat will suffice may vary from industry to industry" such that the Court could not "in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker*, *supra*, 53 Cal.4th at p. 1040.)

The problem posed by meal and rest period claims, though, is it is difficult to tell why an employee worked through a break. It could be that the employee simply chose to do so of his or her own free will. But it also could be that the employee had been coerced or provided incentives to forgo the break. Or it could be that the employee was not aware that he or she could take the break without consequence. While no liability ought to attach to the first situation, it clearly must attach to the second. (*Brinker*, *supra*, 53 Cal.4th at p. 1040 ["The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks."].) But as to the third situation, *Brinker* did not even address it.

The real issue at the heart of all meal and rest period cases, therefore, is not whether the employer failed to police its workers to ensure that they performed no work, i.e. that employees are not allowed to choose to continue to work during meal or rest periods, it is whether the employer somehow prevented the employees from taking their breaks, either through affirmative action or more furtive means. But because the parties focused the Court on the "provide versus ensure" issue rather than the real issue of what an employer must do to substantively provide meal periods, the Court said little about how employers' actions could be objectively measured against the employer's obligation. On this question, the Court provided no guidance.[2]

Consequently it remains an open question what exactly an employer must do. Is it sufficient, without more, for an employer to place a policy authorizing breaks in an employee handbook without any mention in any training materials? Is it sufficient, without more, for an employer to simply post the applicable wage order? Must an employer directly advise employees and managers of the employees' right to take meal periods and how must an employer do that? *Brinker* left it to the lower court to puzzle through such questions, ensuring many more years of uncertainty and many more years of noncompliance.

The Court's opinion muddies the water

At the heart of *Brinker* is the argument that many defendants raise in opposing class certification of meal and rest periods. The argument goes like this: "We permitted the employees to take meal and rest periods, therefore to determine whether each employee took a meal or rest period on any given day and, if not, why not, requires an individualized inquiry of each putative class member." They might add that each class member's decision or ability to take a break also could be based upon differing reasons on different days. The defendants in *Brinker* were no exception. As summarized by the Court, the defendants' opposition to class certification was in large part that "it had complied with its legal obligation to make meal breaks available, many employees took those breaks, and inquiry into why particular employees did not take meal breaks raised individual questions precluding class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1020.)

The problem with this argument is that, though it is appealing, it is based on a logical fallacy – the argument assumes the truth of the predicate premise in the argument – that because the employer "permitted" operators to take breaks, it satisfied the legal requirements. The argument ignores the fact that the premise is actually in dispute and that that dispute constitutes a common question that predominates all of the other issues raised by the defense. (*See Brinker*, 53 Cal.4th at p. 1033 ["No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized an employee has no opportunity to decline it."].) The fact of the matter is that in accepting the defense argument as the Court of Appeal did in *Brinker*, the Court had to prejudge the merits and assume that defendants had in fact complied with the legal requirements – irrespective of what the legal requirements are.

In California, prejudging the merits in this way during class certification has long been considered to be error. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 448 [holding that trial court improperly considered and prejudged the legal merit of the claims in the case in denying class certification].) With regard to meal and rest periods specifically, the merits of a defendant's assertion that its meal and rest period policies comply with the law "do not affect the Court's role in determining class certification." (*Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1303.) The rule has been that trial courts are supposed to "scrutiniz[e] a proposed class cause of action to determine whether, *assuming its merit*, it is suitable for resolution on a class-wide basis." (*Linder*, *supra*, at p. 443 [emphasis added]; *accord Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1084; *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1448 ["the grant or denial of a class certification motion is not a ruling on the merits of plaintiff's claims, but only determines whether the case should proceed as an individual action or a class action"]; *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 412-13.)

This rule was created "[o]ut of respect for the problems arising from one-way intervention"[3] – namely, that prematurely concluding that a uniform policy complies with the law and thereafter rejecting class certification "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." (*Brinker*, *supra*, at p. 1034.) According to the Court, "[i]t 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." (*Ibid.*)

Accordingly, when considering motions for class certification, trial courts should "consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. (*Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 327; *accord Jaimez*, *supra*, at p. 1298 [quoting *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531].) As the Second District Court of Appeal stated in *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, "certification of a proposed class cannot be denied based on the trial court's preliminary assessment of the merits of the claims." (*Arenas*, *supra*, at p. 733; see also *Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 901 ["neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies [class action requirements]".) In this context, the Ninth Circuit said it best in *United Steel v. ConocoPhillips Co.* (9th Cir. 2010) 593 F.3d 802. The error in accepting the defense argument that it complied with the law is that the Court does not hold that plaintiff's actual legal theory is one in which individual questions predominate because the Court treats plaintiffs' "actual legal theory as all but beside the point." Instead, the Court holds that defendant's legal theory applies, which is usually one that involves individualized inquiry. (*United Steel*, *supra*, at p. 808.)

The California Supreme Court, therefore, could have easily rejected the Court of Appeal's disposition by relying on the fact that the Court of Appeal clearly erred in prejudging the merits and requiring the trial court to have delved into the merits in ruling on the motion for class certification. But instead, the Court reversed because the Court of Appeal "went too far by intimating that a trial court must as a threshold matter always resolve any party disputes over the elements of a claim." (*Brinker*, *supra*, 53 Cal.4th at p. 1023.)

But if the Court of Appeal went too far, the opinion is largely silent on whether the trial court did not go far enough. After all, the opinion makes clear that legal and factual disputes in *some* circumstances must be resolved in determining class certification. (*Ibid*. ["trial courts must resolve any legal or factual issues that are *necessary* to a determination of whether class certification is proper"].) Indeed, the discretion provided trial courts to defer resolution of issues affecting the nature of a given element only extends to situations where resolution of the disputed issues "would not affect the ultimate certification decision." (*Id*. at p. 1025.) Left unanswered is the question of when exactly it is "necessary" for factual and legal disputes to be resolved or when resolution of disputed issues would not affect the ultimate certification decision.

The opinion provides little guidance. In the context of the rest period claim, the Court held that the trial court was not "obligated as a matter of law to resolve all legal disputes concerning the elements of Hohnbaum's rest break claims before certifying a class." (*Brinker*, *supra*, 53 Cal.4th at p. 1032.) But with regard to the meal period claims, the Court held that whether the trial court may have soundly exercised its discretion in not resolving the disputed legal issues was not relevant given that the certification decision had to be remanded for reconsideration in light of the Court's

ruling on meal period timing. (*Id*. at pp. 1050-51.) The difference according to the Court was that with the meal period subclass, the class definition included class members who would not have a claim based on the now discredited theory that meal periods must be provided every five hours.

The lesson to take away from all of this, then, may be that the plaintiffs in *Brinker* should have avoided intertwining the merits and ultimate facts and conclusions of law into their class definitions. Ideally, classes should be defined in terms of objective characteristics and common transactional facts," and not on the basis of ultimate facts or conclusions of law, i.e. the merits. (*Hicks v. Kaufman and Broad Home Corp*. (2001) 89 Cal.App.4th 908, 915.) Indeed, it is generally considered that "[a] class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a person is a member of the class." (5 James W. Moore, *Moore's Federal Practice* § 23.21[3][c] (2001); see also 2 Newberg on Class Actions, § 6.14, p. 614-15 ["Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief."].) Though in California, "the inclusion of an ultimate issue in the class definition does not defeat ascertainability,"[4] doing so seems to invite trial courts to inquire into the merits of the claim on class certification, particularly now after *Brinker*. The better practice, then, particularly after *Brinker*, should be to define classes strictly based on objective characteristics and common transactional facts. Doing so would avoid unnecessary litigation into the merits during class certification. For instance, if the plaintiffs in *Brinker* had defined the meal period subclass as "class members who worked one or more shifts in excess of six hours," then it would not have been "necessary" to resolve any factual or legal disputes in determining whether to certify the class, and the Court would not have needed to remand certification of the meal period claims.

What will the future bring?

So now that *Brinker* has been decided, what does the future hold for meal and rest period claims? There are the six "grant and hold" cases that are still before the Court. The Court will likely remand them to the respective Courts of Appeal for reconsideration in light of *Brinker*.

But more fundamentally, *Brinker* may ultimately become less and less relevant if, as seems probable, more and more plaintiff attorneys eschew pursuing meal and rest period claims as class actions and instead pursue such claims on a representative basis through the Private Attorney General Act of 2004 ("PAGA"). Several factors are driving this trend.

First, the Court recently held in *Kirby v. Immoos* (2012) 53 Cal.4th 1244 that attorneys' fees are not available under either Labor Code sections 218.5 and 1194 for meal and rest period claims. That leaves plaintiffs to have to seek fees under Code of Civil Procedure section 1021.5, which provides for fees only in the Court's discretion. (See Code Civ. Proc.., § 1021.5 ["Upon motion, a court *may* award attorneys' fees" (emphasis added)].) By contrast, attorneys' fees are mandatory under PAGA. (See Lab. Code, § 2699, subd. (g)(1) ["Any employee who prevails in any action *shall* be entitled to an award of reasonable attorney's fees and costs" (emphasis added)].) Given that the premium wages due employees are recoverable through Labor Code section 558 in addition to other civil penalties, the only tradeoff is the apparent reduction in the number of years employees are allowed to go back to recover wages – three years under section 558 versus four years under the UCL. For many plaintiffs, the mandatory fee provisions in Labor Code section 2699 will likely sway them to pursue their meal and rest period claims via PAGA as opposed to a class action.

Second, PAGA claims do not need to be certified. (*Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 975 [class action requirements "need not be met when an employee's representative action against an employer is seeking civil penalties under the Labor Code Private Attorneys General Act of 2004"].) Consequently, the central issues raised in *Brinker* regarding certification are not implicated. With PAGA, individual claims can be proven individually so PAGA can be used in all the cases where commonality among an entire group of employees might not exist. In this connection, the due process concerns raised in *Duran v. U.S. Bank National Association* (2012) 203 Cal.App.4th 212, *review granted* May 16, 2012 (S200923), dissipate. In *Duran*, the Court is considering whether representative testimony and statistical evidence can be used at trial of a misclassification wage and hour class action to establish liability. But the claims that are brought on behalf of a class in a misclassification wage and hour class action can also for the most part be brought as PAGA actions, with unpaid wages again available through Labor Code section 558 as well as civil penalties. And as above, given that class action requirements do not need to be satisfied in the context of a PAGA action, a defendant will have a chance to present as much individualized evidence as it desires without concern that the action maintain superiority over a mass of individual actions.

Finally, PAGA claims may not be subject to arbitration clauses and preemption by the Federal Arbitration Act. This could be critical as more and more employers get savvy to the inherent advantages that class action waivers in arbitration clauses in employment contracts provide them. If PAGA claims cannot be preempted in the face of arbitration clauses, PAGA claims may end up being the only opportunity for employees to challenge unlawful employment practices in courts of law. In this connection, Division 5 of the Second District Court of Appeal held in *Brown v. Ralphs Grocery Co*. (2011) 197 Cal.App.4th 489 that PAGA could not be preempted. (*Brown*, *supra*, at p. 503.) The California Supreme Court denied review on Oct. 19, 2011, and the United States Supreme Court denied certiori despite arguments by Ralphs Grocery that the Supreme Court's ruling in *AT & T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 mandated a different

result. Notwithstanding *Brown*, Division 2 of the same District Court of Appeal just recently "[r]espectfully . . . disagree[d] with the majority's holding in *Brown*." (*Iskanian v. CLS Transp. Los Angeles, LLC* (Cal. Ct. App., June 4, 2012) 12 Cal. Daily Op. Serv. 6138 at *8.) According to Division 2, even though "PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA," the judges on the panel "believe[d] that United States Supreme Court has spoken on the issue" and that they "are required to follow its binding authority." (*Ibid*.) Given the intradistrict conflict, the California Supreme Court will likely grant review to settle the issue, at least until the United States Supreme Court subsequently grants or denies certiori.

Conclusion

In as much as *Brinker* was anticipated, and even with all the press that the case generated, in the long run, the opinion will not likely stand out as the watershed moment that both the plaintiff and defense bar felt that it would be. Much remains to be done to dissipate the uncertainty surrounding litigating meal and rest period claims as class actions even while many such cases will not likely proceed as representative actions. Only the future will tell how *Brinker* will fit into the developing jurisprudence on rights that have existed for over a century but which have only recently had the spotlight shined on them.

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Endnotes

[1] The six cases include *Brinkley v. Public Storage* (S168806), *Faulkinbury v. Boyd & Associates* (S184995), *Brookler v. Radioshack Corporation* (S186357), *Hernandez v. Chipotle Mexican Grill* (S188755), *Tien v. Tenet Healthcare* (S191756), *Lamps Plus Overtime Cases* (S194064).

[2] The concurring opinion did state that when an employer fails to record meal periods, "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." (*Brinker*, *supra*, 53 Cal.4th at p. 1053 (conc. opn. of Werdegar, J.).) However, that opinion simply represents the opinion of the justices that joined in the opinion that "does not constitute authority under the doctrine of State decisis." (*People v. Super. Ct.* (1976) 56 Cal.App.3d 191, 194; *Turney v. Collins* (1941) 48 Cal.App.2d 381, 388; *accord* 16 Cal. Jur. 3d Courts § 301.)

[3] *Brinker*, *supra*, 53 Cal.4th at p. 1025.

[4] *Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1462; *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915 ["A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law."].)