Wage-and-hour class actions: The dawn after the darkness

New powerful decisions following Brinker *and* Duran *give hope to working-class people*

By Bryan Schwartz

As wage-and-hour class action litigators, the days of 2011 were dark ones. In fact, it seemed all might be lost. In the U.S. Supreme Court, the one-two punch of *Stolt-Nielsen v. AnimalFeeds* (2010) 130 S.Ct. 1758, and *ATT Mobility v. Concepcion* (2011) 131 S.Ct. 1740, seemingly reconstituted a 1925 statute, the Federal Arbitration Act (FAA), to empower corporations to sweep away concerted actions by workers asserting wage claims, simply by requiring employees (or applicants) to sign agreements to arbitrate, long before the signers know they will be deprived of lawful wages. Of course, *Wal-Mart v. Dukes* (2011) 131 S.Ct. 2541, considering the merits of claims at the class-certification stage and harping on managers' discretion as anathema to class litigation, sent a chill down most of our spines.

And in California, we had to contend with *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, which made fee-shifting uncertain and dimmed the likelihood that we, as plaintiff attorneys, could afford to take on smaller wage-and-hour cases and vindicate the rights of working-class clients.

But now, in the fall of 2012, the once-bleak outlook for wage/hour class-action litigators seems not only more hopeful, but presents a host of new opportunities for plaintiffs' attorneys. With the remainder of this article, I will discuss in more detail five particularly hot battlegrounds in the refreshed struggle for workers' wages: 1) arbitration class waiver issues post-*Concepcion* and *Stolt-Nielsen*; 2) how *Wal-Mart v. Dukes* is affecting class certification; 3) new challenges and opportunities in misclassification cases where employers claim administrative, professional, and outside sales exemptions; 4) what is the next likely "shoe to drop" from the U.S. Supreme Court's march to stomp out wage/hour class litigation; and, 5) the implications of *Brinker* and our battle yet to be won in *Duran*, to continue allowing courts to be flexible in determining fair and efficient means to hear class-wide proof, through statistical and representative evidence, as has long been permitted under *Sav-On*.

Arbitration class waiver issues post-*Concepcion* and *Stolt-Nielsen*

In *Stolt-Nielsen,* the Supreme Court held that employers could not be required to engage in class arbitration where the arbitration agreement was silent regarding whether such was permitted and where no evidence proved the parties' intent to agree to class arbitration. Plaintiffs' advocates feared the Court had created the default position that where an employer forgot to prohibit class prosecution of claims against it in its arbitration provision, the employer would remain immune to class suit or arbitration, since it had not overtly agreed to be subject to class claims. Then, the Court sought to finish the job in *Concepcion*, using the FAA to preempt California's *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, with its presumption that a class waiver in an adhesion contract is unconscionable, as discriminatory against arbitration. In other words, we worried that companies after *Concepcion* and *Stolt-Nielsen* would feel free to prohibit wage/hour class litigation against themselves, explicitly, or by default.

Not so fast, said a host of federal and state courts and administrative agencies. Because *Concepcion* did not go so far as to eliminate the unconscionability defense (just California's presumption of unconscionability for class waivers), courts are still finding arbitration agreements unconscionable, applying *Armendariz.* In *Trompeter v. Ally Financial, Inc.,* 2012 WL 1980894 (N.D. Cal. June 01, 2012), Judge Claudia Wilken found an arbitration agreement procedurally and substantively unconscionable under California law, applying *Armendariz*, and found the unconscionable provisions not severable, rejecting the defendant's *Concepcion* argument in support of a motion to compel arbitration and motion to stay.

In *Samaniego,* a wage/hour class action, the Court of Appeal affirmed the trial court, finding a host of flaws in the arbitration agreement, applying *Armendariz* and ultimately rejecting the agreement entirely. No-no's included: that the take-it-or-leave-it arbitration agreement was only in English, a language the worker could not read; that the agreement was part of a lengthy, single-spaced document in small-font print, "riddled with complex legal terminology," and with the arbitration provision buried in the 36th of 37 sections; a shortened statute of limitations for claims; unilateral fee-shifting against workers; and the invocation of the American Arbitration Association (AAA) commercial rules, without attaching the rules or providing them otherwise.

In another wage/hour class action, *Laughlin v. VMWare, Inc*., 2012 WL 298230 (N.D. Cal. Feb. 1, 2012) (Davila, J.), the District Court likewise addressed a

Concepcion motion to compel arbitration, applied *Armendariz,* rejecting several unconscionable provisions (including one that would have made the employee split arbitration fees), but found the unconscionable provisions severable, and referred the entire matter to arbitration.

Most notably, the *Laughlin* court held that it was for the arbitrator to decide the permissibility of class arbitration. (*Id.* at *8.) On August 27, 2012, the American Arbitration Association issued a Partial Final Award on Clause Construction in the *Laughlin* matter, finding that the parties' arbitration agreement permits class arbitration.

The latter confronts employers with a "be careful what you wish for" scenario. Wage/hour class arbitration – with costs to be borne by employers – is awfully expensive, *i.e.,* profitable for arbitrators. Indeed, since *Concepcion,* numerous arbitrators from JAMS, AAA, and other major arbitration services have – like in *Laughlin* – construed arbitration clauses/agreements to permit class-wide arbitration. Courts are mostly saying that arbitrators have this prerogative. (See, *e.g., Sutter v. Oxford Health Plans LLC* (3rd Cir. 2012) 675 F.3d 215 (upholding arbitrator decision to construe arbitration agreement to authorize class arbitration); *Jock v. Sterling Jewelers Inc.* (2nd Cir. 2011) 646 F.3d 113 (same); *Fantastic Sam's Franchise Corp. v. FSRO Ass'n Ltd.* (1st Cir. 2012) 683 F.3d 18, 26 (arbitrator decides permissibility of class arbitration). But, see *Reed v. Florida Metropolitan University, Inc.* (5th Cir. 2012) 681 F.3d 630.)

Also this year, the NLRB decided *D.R. Horton,* holding that – though the FAA prohibits discrimination against arbitration agreements, preempting state law, the NLRA prohibits barriers to employees (union or non-) engaging in concerted activities for their mutual aid and protection, and the Norris-LaGuardia Act restricts the power of federal courts to issue injunctions to prohibit certain associational activities. These are *not* preempted by the FAA. Thus, federal law under *D.R. Horton* prohibits class-action waivers, according to the NLRB, and *Concepcion* has nothing to say about it.

Courts have divided on how, if at all, *D.R. Horton* must guide their decision-making. Compare *Herrington v. Waterstone Mort. Corp*, 2012 WL 1242318 (W.D. Wisc. Mar. 16, 2012) (*D.R. Horton* guides District Court) and *Owen v. Bristol Care, Inc.*, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) (same), with *Morvant v. P.F. Chang's China Bistro, Inc.,* 2012 WL 1604851 (N.D.Cal. May 7, 2012) (Gonzalez Rogers, J.) (*Concepcion* trumps *D.R. Horton* and requires compelling arbitration with class waiver) and *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115 (declining to follow *D.R. Horton*).

Despite the significant good news for plaintiffs' advocates in the aftermath of *Concepcion* and *Stolt-Nielsen*, the vote is still out on how, ultimately, the cases will impact wage/hour class litigation in California. In *Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, the Court of Appeal compelled arbitration with a class waiver, and in so doing, rejected *Brown v. Ralphs* (carving out PAGA and leaving untouched *Gentry*'s holding that arbitration class waivers are unconscionable in the employment context), holding that *Concepcion* effectively overruled *Gentry.* Iskanian petitioned for review of the Court of Appeal's decision, and as of the time of this writing, the Supreme Court has not yet decided on the petition. If the Supreme Court takes up *Iskanian*, it may be the defining case about the effect of *Concepcion* and *Stolt-Nielsen* on California laws protecting workers. If the Supreme Court does not grant review, then we will be left scratching our heads about the state of California law on class-action waivers in arbitration agreements, with Court of Appeal authority heading in every direction.

How *Wal-Mart v. Dukes* is affecting class certification

The intensive merits analysis in *Wal-Mart v. Dukes* at the certification stage worried many plaintiffs' advocates that the first law of class certification – that Rule 23 and California Code of Civil Procedure section 382 elements are decided, but merits are not – had lost currency. But the California Supreme Court and numerous federal courts have largely restored order in this regard. The *Brinker* court, acknowledging that some "peek" at the merits would be necessary at certification to ensure the predominance of common questions, reinforced that – even post-*Wal-Mart v. Dukes* – such merits-based inquiries are "closely circumscribed" and "limited to those aspects of the merits that affect the decisions essential to class certification." (*Brinker,* 53 Cal.4th at 1024 (citations omitted).) In rejecting the *Brinker* Court of Appeal's notion that courts must first decide upon the applicable law and resolve legal issues surrounding each element of a proposed class claim before deciding on certification, the Supreme Court expressly condemned a "free-floating merits inquiry" and eschewed resolution of most factual and legal issues at the certification stage. (*Id.* at 1025.)

Post-*Wal-Mart v. Dukes,* Federal courts have likewise held that, as the Seventh Circuit put it, "the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." (*Messner v. Northshore University Health System* (7th Cir. 2012) 669 F.3d 802, 811. See also *Sullivan v. DB Investments, Inc* (3rd Cir. 2011) 667 F.3d 273, 305-306 (*en banc*) (merits inquiries very limited); *In re Whirlpool Corp. Front Loading Washer Products Liability Litig.* (6th Cir. 2012) 678 F.3d 409, 417 (underlying merits no impact on propriety of class action).

Likewise, federal courts have continued to uphold class certification or reverse certification denial under Rule 23. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (7th Cir. 2012) 672 F.3d 482, the noted conservative Judge Posner reversed a class certification denial in a disparate impact discrimination case, explaining that the exercise of subjectivity

by managers with respect to company policies did not defeat certification, but resulted in a disparate impact. (See also *Sullivan,* 667 F.3d at 338 (common factual issues predominated among 184 million purchasers, despite variation between state laws at issue); *In re Whirlpool*, 678 F.3d at 420 (finding predominance and superiority where there were common alleged design flaws, and where small individual recovery would discourage vindication on individual basis); *Chen-Oster v. Goldman, Sachs & Co.,* 2012 WL 2912741 (S.D.N.Y. July 17, 2012) (alleged "common mode of exercising discretion" warranted denial of motion to strike class allegations, distinguishing *Wal-Mart v. Dukes*).) Meanwhile, in *Sanchez v. Sephora USA, Inc.*, 2012 WL 2945753 (N.D. Cal. July 18, 2012) (Armstrong, J.), the Northern District of California held that *Wal-Mart v. Dukes* reasoning is inapplicable to Fair Labor Standards Act (FLSA) collective action certification under 29 U.S.C. sec. 216(b).[1]

Misclassification of exempt workers

Class wage claims based upon misapplication of exemption defenses to discrete groups of employees are surviving, but the universe of employees who might assert such misclassification claims is narrower after several recent decisions. For example, the professional exemption became more robust after the Ninth Circuit's decision in *Campbell v. PriceWaterhouseCoopers, LLP* (9th Cir. 2011) 642 F.3d 820 and the parallel state decision in *Zelasko-Barrett v. Brayton-Purcell, LLP* (2011) 198 Cal.App.4th 582, which held that non-licensed individuals practicing in the Wage Order's recognized professions (*e.g.,* law clerks and junior non-licensed accounting employees) could still be exempt from overtime.

Likewise, the outside sales exemption has become more powerful after *Christopher v. SmithKline Beecham Corp*. (2012) 132 S.Ct. 2156 (pharmaceutical sales representatives subject to outside sales exemption) and the Ninth Circuit's *In re Wells Fargo Home Mortg. Overtime Pay Litig.* (2009) 571 F.3d 953 (outside sales calculus in loan officer case too individualized to permit class action) decision from several years ago.

On the other hand, the administrative exemption has remained a fruitful battleground for wage/hour class-action plaintiffs' counsel both in California and federal courts. One should still consider arguing the "administrative/production dichotomy" (first embraced in *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805 (often called "*Bell II*")) – *i.e.,* whether the group of employees are primarily administering policies directly related to and of substantial importance to the management or operations of the overall business (exempt) or whether they are principally engaged in helping generate the businesses' end product (non-exempt). (See *Harris v. Superior Court* (*Liberty Mutual Insurance*) (2011) 53 Cal.4th 170, 181.) In *Harris,* the Supreme Court did not toss out the *Bell II* framework, but held that the administrative/production worker dichotomy was not a dispositive test as it had been applied in that case, requiring the Court of Appeal on remand to undergo a qualitative and quantitative review under the current Wage Order. (*Id*. at 190.) However, on remand, re-granting summary adjudication on the administrative exemption defense and rejecting a decertification motion, the *Harris* Court of Appeal reiterated that the class members (claims adjusters) were not "primarily engaged in work that is directly related to management policies or general business operations" and as such, were not administrative employees under the Wage Order's exemption. (*Harris v. Superior Court* (2012) 207 Cal.App.4th 1225. See also adopting the administrative/production dichotomy federally, *Davis v. J.P. Morgan Chase & Co.,* 587 F.3d 529 (2nd Cir. 2009) (mortgage loan underwriters were production employees).)

Anticipating the Supreme Court's next blow

On June 25, 2012, the U.S. Supreme Court granted certiorari in *Symczyk v. Genesis HealthCare Corp.* (3rd Cir. 2011) 656 F.3d 189, which stands for the fairly obvious premise that an employer cannot moot an FLSA collective action simply by making an offer of full relief under Fed.R.Civ.P. 68 to the lone named plaintiff. Citing the Supreme Court's seminal FLSA decision in *Hoffmann-La Roche, Inc. v. Sperling* (1989) 493 U.S. 165, 170-171, the Third Circuit held:

> When a defendant's Rule 68 offer arrives before the court has had an opportunity to determine whether a named plaintiff has satisfied his burden at this threshold stage [of first-tier FLSA conditional certification], and the court has therefore refrained from overseeing the provision of notice to potential party plaintiffs, it is not surprising to find the offer has also preceded the arrival of any consent forms from prospective opt-ins. If our mootness inquiry in the §216(b) context were predicated inflexibly on whether any employee has opted in to an action at the moment a named plaintiff receives a Rule 68 offer, employers would have little difficulty preventing FLSA plaintiffs from attaining the "representative" status necessary to render an action justiciable notwithstanding the mooting of their individual claims.

(*Symczyk*, 656 F.3d at 198-199.)

Unfortunately, the Supreme Court's grant of cert. does not bode well for the future of FLSA actions, except in cases where plaintiffs and their counsel are fortunate enough to have a group of plaintiffs and opt-ins willing to step forward from the outset. Clearly, assuming the Supreme Court decides to undermine its prior *Hoffman-LaRoche* precedent (why else would it have granted cert.?), savvy employers will offer several thousand dollars as soon as a suit is filed to knock off any solo-named plaintiff with an offer of full, individual relief,

and avoid notice to a class of those similarly-situated.

Brinker, *Duran* and the future

Last but not least, we return to *Brinker* and *Duran*. In *Brinker,* the Supreme Court reversed and remanded in large part the Court of Appeal, in a unanimous opinion by Justice Werdegar holding that employers must comply with stringent obligations to provide both meal and rest periods to employees or face paying premiums under California Labor Code section 226.7.

The Court of Appeal in *Brinker* had held that because an employer's duty was merely to "provide" meal periods to employees, employers could avoid class liability with a compliant published policy. The Court of Appeal wrote, in language that would have been devastating to wage-and-hour class actions had it been upheld by the Supreme Court: "The evidence in this case indicated that some employees took meal breaks and others did not. For those who did not, the reasons they declined to take a meal period require individualized adjudication. Further, plaintiffs' statistical and survey evidence does not render the meal break claims one in which common issues predominate. While time cards might show when meal breaks were taken and when there were not, they cannot show *why.*" (80 Cal.Rptr.3d at 810.) The Court of Appeal had engaged in similar reasoning to reject rest break claims. If that reasoning had prevailed, plaintiffs would seldom, if ever, have been able to show that personal motivations for missing meal and rest periods were sufficiently common to justify class certification.

The Court remanded on meal periods. Its holding that the "employer need not ensure that no work is done" during meal periods is really an employee victory, because of the reasoning behind it: "[T]he 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." (*Brinker,* 53 Cal.4th at 1038-1039.) In other words, *Brinker* reasoned that employers cannot police employees to make sure that no work is performed because employers may exercise *no* control over employees during their meal periods. If an employer has a policy restricting employees' activities during meal periods, that may now clearly be the basis for a meal period class action.

On rest periods, the Supreme Court outright reversed the Fourth District Court of Appeal, explaining: "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not – if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required – it has violated the wage order and is liable." (*Id.* at 1033.)

As to the latter, rest break claims can no longer be considered throwaway claims after *Brinker* – and the proof is in the pudding. In July 2012, Los Angeles County Superior Court Judge John Shepherd Wiley awarded $90 million to security guards for ABM in connection with rest breaks during which they were required to remain on-call. Brinker Restaurant Corporation's own rest break liability will likely reach the eight-figure range.

The Supreme Court leaned heavily on *Sav-On*, and cited other key employee-friendly decisions: *Dilts v Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Cal. 2010); *Bono Enterprises, Inc. v Bradshaw* (1995) 32 Cal.App.4th 968; *Ghazaryan v Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524; *Bufil v Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193; and *Jaimez v Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286. These decisions now provide a roadmap to certification of meal/rest class actions, post-*Brinker*. Moreover, over the next year or two, five additional decisions granted review and held pending *Brinker,*[2] which have all now been remanded to Courts of Appeal, will be decided, fleshing out the meal and rest period standards in the post-*Brinker* era.

Perhaps most significantly going forward, the *Brinker* court held: "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." (53 Cal.4th at 1033.) Where there is a policy at issue, wage/hour class actions are still available. The *Brinker* concurrence, authored also by Justice Werdegar, rejects the Fourth District's notion that "the question why a meal period was missed renders meal period claims *categorically* uncertifiable" (*Id.* at 1052), and goes on to cite *Sav-On* and *Bell,* 115 Cal.App.4th 715 ("*Bell III*") and embrace "a variety of methods" of proof of class certification, liability, and damages, including "[r]epresentative testimony, surveys, and statistical analysis…." (*Id.* at 1054.)

Duran's thrust was the opposite: "that when liability for unpaid overtime depends on an employee's individual circumstances, employer defendants retain the right to assert the exemption defense as to every potential class member," precluding the use of such methods of class-wide proof as were embraced in *Sav-On*, *Bell III,* and the *Brinker* concurrence. (*Duran,* 137 Cal.Rptr.3d at 426.)

In *Duran,* the trial court allowed selection of 20 representative class members (out of 260) to provide trial testimony and determined class-wide liability on the basis of such. (137 Cal.Rptr.3d at 428.) Whether or not this particular trial plan was optimal, it remains to be seen to what degree if any *Duran*'s sweeping rejection of sampling and representative testimony will prevail on review. Certainly, the *Brinker* concurrence gives reason for optimism in the plaintiffs' Bar. (See also *Romero v. Florida Power & Light Co.*, 2012 WL 1970125 (M.D. Fla., June 1, 2012) (affirming use of representative testimony).)

In sum, paraphrasing Mark Twain, reports of the death of wage/hour class litigation were greatly exaggerated. The wage-and-hour class-action war wages on.


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Endnotes

[1] This year also saw the final demise of the defense argument circulating for several years asserting that FLSA and state wage law class claims are "inherently incompatible" in the same action because of the different procedural mechanisms (opt-in FLSA collective actions and opt-out class actions) – an argument that had been roundly rejected by all but a few District Courts (the latter mostly within the Third Circuit). Now, the Third Circuit itself finally rejected "inherent incompatibility." (See *Knepper v. Rite Aid Corp.* (3rd Cir. 2012) 675 F.3d 249, 262 ("We join the Second, Seventh, Ninth, and D.C. Circuits in ruling that this purported 'inherent incompatibility' does not defeat otherwise available federal jurisdiction.").)

[2] *Brinkley v. Public Storage* (Supreme Court Case No. S168806); *Bradley v. Networkers International LLC* (S171257); *Faulkinbury v. Boyd & Associates* (S184995); *Brookler v. Radioshack Corporation* (S186357); *Tien v. Tenet Healthcare* (S191756). Shortly before this edition went to press, *Hernandez v. Chipotle Mexican Grill* (S188755), *Lamps Plus Overtime Cases* (S194064), and *Muldrow v. Surrex* (S200557), on remand, were all decided against the employees by California Courts of Appeal. Each can be distinguished on its facts, if you have a case involving a policy or practice restricting meal and rest period usage. See *Lamps Plus,* 2012 WL 3587610, at **8, 11 (Cal.App. 2 Dist. August 20, 2012) (citing "overwhelming evidence that Lamps Plus's policies allowed and encouraged meal periods," "that Lamps Plus had a meal and rest period policy conforming to the applicable laws and wage orders, and that Lamps Plus disciplined its employees for failing to comply with the policy"); *Hernandez,* 2012 WL 3579567 (Cal.App. 2 Dist. Aug. 21, 2012) ("The only evidence of a *company-wide policy and practice* was Chipotle's evidence that it provided employees with meal and rest breaks as required by law." (emph. in orig.)). In *Muldrow,* 2012 WL 3711553, *11 n.17 (Cal.App. 4 Dist. Aug. 29, 2012), the employees conceded that the *Brinker* court "answered [their claim on appeal] in the negative," so that case is readily distinguishable, too, where you will not so concede.