

Appellate Reports and cases in brief

Cases of interest to members of the plaintiff's bar

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Duran v. U.S. Bank National Association

(2014) __ Cal.4th __ (Cal.Supreme)

Who needs to know about this case: Lawyers handling class actions; lawyers interested in using statistical sampling to prove or defend claims.

Why it's important: Creates new rules for dealing with statistical sampling in class-action litigation.

Synopsis: Plaintiffs filed a class action against their employer, US Bank, claiming that the bank misclassified them as exempt employees and failed to pay them overtime. The plaintiffs were employed as "business banking officers" (BBOs), who sell bank products, including loans and credit lines, to small businesses. The bank classified BBOs as exempt under the "outside salesperson exemption," which applies to employees who spend more than 50 percent of the workday engaged in sales activities outside of the office.

After certifying a class of 260 plaintiffs, the trial court devised a plan to determine the extent of USB's liability to all class members by extrapolating from a random sample. In the first phase of trial, the court heard testimony about the work habits of 21 plaintiffs (the representative witness group, or RWG). USB was not permitted to introduce evidence about the work habits of any plaintiff outside this sample. Nevertheless, based on testimony from the small sample group, the trial court found that the *entire* class had been misclassified. After the second phase of trial, which focused on testimony from statisticians, the court extrapolated the average amount of overtime reported by the sample group to the class as a whole, resulting in a verdict of approximately $15 million and an average recovery of over $57,000 per person. Reversed.

The trial court's approach contained several fatal flaws. The sample size was too small to allow an accurate projection liability for the entire class. Nor was the sample entirely randomly chosen, since 10 percent of the sample (the 2 named plaintiffs) were selected by class counsel. The court also refused to allow the defendant to present any evidence that concerned employees not in the RWG, essentially preventing the bank from showing that a substantial number of BBOs were properly classified. The trial court's award found the bank liable to the entire class, but the plaintiffs' own statistical expert calculated that the 13 percent margin of error would mean that 13 percent of the class was properly classified as exempt. The trial court's computation of the number of hours that each class member worked was subject to a 43 percent margin of error. These rates were unacceptably high.

The Supreme Court's opinion discusses the law concerning the outside-salesperson exemption, and the law concerning class certification in misclassification cases. In discussing the use of statistical evidence, the Court made the following points:

- If sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling. Statistical methods cannot entirely substitute for common proof, however. There must be some glue that binds class members together apart from statistical evidence. While sampling may furnish indications of an employer's centralized practices, it cannot be a substitute for evidence of commonality.
- If statistical evidence will comprise part of the proof on class-action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts should obtain such a plan before deciding to certify a class action. And decertification must be ordered whenever a trial plan proves unworkable.
- In general, when a trial plan incorporates representative testimony and random sampling, a preliminary assessment should be done to determine the level of variability in the class. If the variability is too great, individual issues are more likely to swamp common ones and render the class action unmanageable. No such assessment was done here. With no sensitivity to variability in the class, the court forced the case through trial with a flawed statistical plan that did not manage, but instead ignored individual issues.
- While class-action defendants may not have unfettered right to present

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individualized evidence in support of a defense, a class-action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions. The trial court's decision to extrapolate classwide liability from a small sample, and its refusal to permit any inquiries or evidence about the work habits of BBOs outside the sample group, deprived the bank of the ability to litigate its exemption defense, violating its due-process rights.

• A class-action trial may determine that an employer is liable to an entire class for misclassification if it is shown that the employer had a consistently applied policy or uniform job requirements and expectations contrary to a Labor Code exemption, or if it knowingly encouraged a uniform de facto practice inconsistent with the exemption. In such a case, the evidence for uniformity among class members would be strong, and common proof would be sufficient to call for the employer to defend its claimed exemption. But any procedure to determine the defendant's liability to the class must still permit the defendant to introduce its own evidence, both to challenge the plaintiffs' showing and to reduce overall damages.

• Any class-action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses. Hence, if a defense depends upon questions individual to each class member, the statistical model must be designed to accommodate these case-specific deviations. If statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resorting to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties.

• Assuming that sampling may be an appropriate means of proving liability or damages in a wage-and-hour class action, the sample relied upon must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness. These conditions were not satisfied here.

Chaudhry v. City of Los Angeles

(9th Cir. 2014) __ F.3d __

Who needs to know about this case: Lawyers handling wrongful-death cases and federal civil-rights cases under 42 U.S.C § 1983.

Why it's important: Holds that California's bar on recovery of damages for the pain and suffering of the decedent does not apply to 1983 actions, and that an estate's wrongful-death case under California law was not duplicative of its 1983 excessive-force claim.

Synopsis: Los Angeles Police Officer Joseph Cruz shot and killed Mohammad Usman Chaudhry ("Usman") in March 25, 2008. Usman was 21. He was autistic and often wandered far from home. Officer Cruz and his partner, Officer Romo, saw Usman sleeping in front of an apartment building. Suspecting that Usman might be a drug user, they stopped their police cruiser and approached him. Cruz asked Usman to show his identification. Usman complied. Cruz gave the identification to Romo, who returned to the cruiser to check for outstanding warrants. Cruz testified at trial that, while Romo was at the cruiser, Usman lunged at Cruz with a knife. Cruz drew his gun and fired four shots, three of which struck Usman in the chest and abdomen. Usman died at the scene.

Usman's estate, and his family, filed a lawsuit against various City and County defendants. The case went to trial on the Estate's excessive-force claim under 42 U.S.C. § 1983 claim against Officer Cruz, the Estate's assault and battery claim against the City, and the family's wrongful-death claim against Cruz and the City. At trial, the Estate and the family presented evidence contradicting Cruz's version of events, including evidence that Romo did not hear Cruz yell "knife"; that Usman's DNA was not on the knife with which he allegedly attacked Cruz; that the knife was a "boot knife," a kind of knife typically carried by police officers; and that the pattern and trajectory of Cruz's gunshots showed he shot Usman while Usman was collapsing to the ground, rather than while he was advancing toward Cruz. The jury found for the Estate and the family. It found that Cruz used excessive force, that the excessive force caused Usman's death, and that Cruz acted "reckless[ly], oppressive[ly], or malicious[ly]." The jury awarded $700,000 to the family on their wrongful death claim under state law, and $1 million, based on Usman's pain and suffering, to the Estate for its excessive force claim under § 1983. The district court struck the pain-and-suffering award because California law does not allow a recovery for the decedent's pain and suffering. (Code Civ. Proc., § 377.34.) Reversed.

Under California's survival statute (Code Civ. Proc., § 377.20), Usman's section 1983 claim survived his death. In survival actions, however, section 377.34 precludes a decedent's estate from recovering for the decedent's pre-death pain and suffering. Because federal law is silent on the measure of damages in section 1983 actions, California's disallowance of pre-death pain and suffering damages governs unless it is inconsistent with the policies of section 1983. The district court held that section 377.34 is not inconsistent with section 1983.

The Ninth Circuit disagreed. One of Congress's primary goals in enacting section 1983 was to provide a remedy for killings unconstitutionally caused or acquiesced in by state governments. The policies underlying section 1983 include compensation of persons

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injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.

The practical effect of section 377.34 is to reduce, and often to eliminate, compensatory damage awards for the survivors of people killed by violations of federal law. Section 377.34 limits damages in survival actions to the victim's pre-death economic losses. In cases where the victim dies quickly, there often will be no damage remedy at all under section 377.34. Even in cases of slow death where pre-death economic damages might be available, section 377.34's limitation will often be tantamount to a prohibition, for the victims of excessive police force are often low-paid or unemployed. The same is likely to be true for prisoners whose death is caused by the deliberate indifference of jail or prison officials in violation of the Eighth Amendment. Following the precedent in three other circuits, the court held that California's prohibition against pre-death pain and suffering damages limits recovery too severely to be consistent with section 1983's deterrence policy. Section 377.34 therefore does not apply to section 1983 claims where the decedent's death was caused by the violation of federal law.

Short(er) takes

Class-action settlement objections; due process violations: *Litwin v. iRenew Bio Energy Solutions, LLC* (2014) __ Cal.App.4th __ (2d Dist., Div. 1)

Plaintiffs filed a class-action lawsuit against defendant for false advertising and unfair competition. The case settled, and the trial court approved the settlement. The notice sent to absent class members informed them that, in order for the court to take their objections into account, they had to be presented personally or through counsel appearing at the final settlement-approval hearing. Reversed. There was no need to require objectors to the settlement to appear personally at the hearing, or to go to the expense of hiring counsel to do so. Requiring the objectors to present their objections in person or through counsel at the hearing violated their due-process rights.

Employment law; change of liability theory at trial; disparate impact vs. disparate treatment: *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) __ Cal.App.4th __ (2d Dist., Div. 3.)

Plaintiff, a teacher at a private school, sued the school for age discrimination. Her complaint was based on a disparate-treatment theory. But just before opening statement at trial, she filed a brief suggesting she intended to proceed on a disparate-impact claim. The trial court precluded her from proceeding on the new theory. The jury returned a defense verdict, and she appealed. Affirmed. "Disparate treatment" is intentional discrimination against one or more persons on prohibited grounds. A claim of "disparate impact" differs from a claim of disparate treatment in that a plaintiff is not required to prove discriminatory motive when claiming disparate impact. Disparate impact exists where, regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on members of the protected class. Rosenfeld's complaint pled only disparate treatment, that is to say, that the school intentionally discriminated against her based on her age. She did not plead disparate impact, i.e., that the school had a facially neutral practice or policy that bore no manifest relationship to job requirements but which, in fact, had a disproportionate adverse effect on older employees. Her case management statement was consistent with her pleadings. The facts that she (a) sought to continue the school's summary judgment motion to obtain discovery for her statistical expert; (b) proposed a CACI instruction on disparate impact; and (c) filed a trial brief on the disparate-impact issue did not provide timely notice to the school that she intended to proceed on a disparate-impact theory at trial.

Removal; Diversity of Citizenships; National Banks; Wells Fargo *Rouse v. Wachovia Mortgage*, FSB, 747 F.3d 707 (9th Cir. 2014)

Robert and Victoria Rouse, California residents, filed suit against Wells Fargo Bank, NA and its Wachovia mortgage division in the Superior Court of California, asserting claims under state and federal law pertaining to their home loan and deed of trust. Wells Fargo's principal place of business is California, but its designated "main office" is in South Dakota. Wells Fargo removed the case to federal court based on federal questions and diversity of citizenship. After the district court dismissed their federal claims and the Rouses amended to state only state-law claims, the district court remanded the case to state court, finding that Wells Fargo was a citizen of both the state where its main office was located and where its principal place of business is located. The bank appealed. Reversed.

Unlike state-chartered banks or other corporations whose citizenship is governed by 28 U.S.C. § 1332, the citizenship of nationally chartered banks is governed by 28 U.S.C. § 1348, which provides in pertinent part: "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located." In *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 314-17 (2006), the Supreme Court held that national banks were not

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citizens of every state in which they did business. While that case did not address whether national banks are also citizens of the state which is their principal place of business, the majority held that its reasoning suggested that a national bank is "located" where it has its main office. Hence, there was complete diversity and removal was proper. Judge Gould dissented.


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