Employment class action: The year in review

Take heart! New cases have reached the California Supreme Court to answer questions on class certification and enforcement of arbitration agreements

By Christina Molteni

In the wake of *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 and *Dukes v. Wal-Mart* (2011) 131 S.Ct. 2541, employment class-action practitioners faced a hot and contested year in 2014. New cases have reached the California Supreme Court testing the waters to answer class certification issues and enforcement of arbitration agreements in the employment context in California. This article will show a few thoughts on developments this past year and what may be coming ahead.

Duran and manageability of the class action

The case, *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, was brought by business banking officers – loan officers – against U.S. Bank (USB), who claimed that they were misclassified as outside salespersons exempt from California's overtime laws and were denied overtime pay. The trial court certified a class of 260 plaintiffs and a year after certification, the parties presented competing trial management plans. The trial court decided to proceed with its own trial plan, taking testimony from 20 randomly selected class members in addition to the two named plaintiffs and bifurcated the trial in a liability phase and a damages phase. The trial court found that the entire class had been misclassified and then, in the damages phase, rendered a verdict of about $15 million.[1]

The Supreme Court ultimately decertified the class and reversed the judgment because the trial court's implementation of the trial plan – mainly sampling, prevented USB from proving relevant affirmative defenses and showing that some class members were exempt and not entitled to recovery.[2] Nonetheless, the Court confirmed core principles vital to preserving the class-action procedure as a mechanism for courts to efficiently adjudicate the claims of large groups of people.

After some discussions of the statutory frame of the outside salesman exemption, the Supreme Court thoroughly explained class certification principles, highlighting the relevance of manageability, to the point of equating it to a showing of commonality. ("In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class." *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 29.) The Supreme Court addressed the trial's court obligation to consider individual issues and manageability while certifying a class.

Whereas the Court has encouraged innovation on trial courts while managing class actions – by using representative testimony, sampling, or other procedures employing statistical methodology; the innovative approach must allow defendants to litigate their affirmative defenses. In this specific case, the sui generis trial plan should have permitted the defendant to introduce its own evidence, both to challenge the plaintiffs' showing of liability and to reduce the amount of restitution. ("Procedural innovation must conform to the substantive rights of the parties." *Duran*, *supra*, 59 Cal.4th at p. 40.) Statistical sampling is one of the means of proving liability and damages in class-action litigation. However, reliance on statistical proof cannot be used to bar the presentation of valid defenses to liability or damages, even though those defenses are to be adjudicated on an individual level. The Court held that here, the trial court relied on statistical sampling; however, it failed to develop the trial plan with expert input and refused to allow the defendant to impeach the plan. (*Id.*, at p. 16.)

The Court clarified that notwithstanding the presence of individualized issues in addition to common ones, class certification may be granted. However, the main issue is whether those individualized issues can be properly managed. (*Duran*, 59 Cal.4th at p. 29.) A class-action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when those defenses turn on individual questions; however, class-action defendants do not have an unfettered right to present individualized evidence in support of a defense. (*Id.*, at p. 64.)

This case answered difficult questions about how individual issues can be successfully managed in a complex class action. Yet, it was Justice Liu's concurrence

that provided much needed guidance in certification of misclassification cases. First, his concurrence advised to inquire whether the substantive law governing the plaintiffs' claims renders those claims amenable to class treatment. The main consideration is to inquire into the realistic requirements of the job, not only by observing how the employee actually spends his time, but by also observing the employer's realistic expectations. If realistic expectations of the employer and realistic requirements of the job are likely to prove susceptible of common proof, the case is amenable to class treatment.[3] However, that is not the only consideration. In certifying a class action, the trial court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. In fact, any sampling or similar statistical approach should take into consideration individual issues, if present.

In spite of *Duran* being reversed, it did not become the end of class actions as extolled by the defense bar. Instead, it alerted class-action practitioners about the significance of the manageability of a class action as one of the requirements to certify a class and the careful crafting of a trial plan to prove that manageability. Moreover, a plaintiff's proactive approach while moving to certify a class should consider defendant's affirmative defenses at the class certification stage.

Iskanian and class actions waivers in PAGA cases

This case, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, has been closely followed by class-action practitioners because it addressed the enforceability of class and representative actions waivers – mostly on Private Attorneys General Act (PAGA)[4] cases. Arshavir Iskanian was employed as a driver by CLS Transportation Los Angeles (CLS) and during his employment he signed a "Proprietary Information and Arbitration Policy/Agreement."[5] He filed a class and representative action complaint against CLS, alleging that the company failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner.[6] Shortly after, the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 174, overruling California law regarding class-action waivers in commercial contracts. CLS renewed its motion to compel arbitration. The trial court granted the motion and the Court of Appeal affirmed.

The California Supreme Court had to decide whether *Concepcion* overruled *Gentry v. Superior Court* (*Circuit City Stores, Inc.*) (2007) 42 Cal.4th 443 with respect to contractual class-action waivers in the context of non-waivable labor law rights and whether an arbitration agreement requiring an employee as a condition of employment to give up the right to bring a representative PAGA action in any forum was contrary to public policy. As an ancillary issue, the class-action waiver was discussed under the National Labor Relations Act (NLRA).

First, the California Supreme Court concluded that the U.S. Supreme Court's decisions in *Concepcion* and *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304 abrogated the rule in *Gentry*, rejecting some class-action waivers in employment contracts. In fact, *Concepcion* had invalidated *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 – a California precedent holding unconscionable and unenforceable a class arbitration waiver in a consumer contract of adhesion – based upon the Federal Arbitration Act (FAA), remarking that a class waiver was not invalid even if an individual proceeding would be an ineffective means to prosecute certain claims, because class proceedings interfered with fundamental attributes of arbitration (*AT&T Mobility LLC v. Concepcion*, *supra*, 131 S.Ct. at p. 1753).

The California Court also rejected the argument that the class arbitration waiver was unlawful under the NLRA of 1935. While recognizing FAA's liberal federal policy favors arbitration, the Court found that the NLRA does not represent a contrary congressional command overriding the FAA's mandate. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 371.) Although the California Supreme Court partially agreed with the United States Court of Appeals for the Fifth Circuit in *D.R. Horton, Inc., v. NLRB* (2013) 737 F.3d 344, it rather distinguished it because CLS's arbitration agreement was less restrictive than the one considered in Horton: the arbitration agreement did not preclude employees from filing joint claims in arbitration, did not restrict the capacity of employees to discuss their claims among themselves, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims. *D.R. Horton, Inc.* (2012) 357 NLRB 184.

Finally, on deciding the PAGA issue, the Court held that a waiver of a representative action under the arbitration agreement was not allowed under California law for public purpose reasons.[7] Moreover, the FAA did not preempt California law prohibiting such waiver because a PAGA claim is not a dispute between an employer and an employee arising out of their contractual relationship. Conversely, it is a dispute between an employer and the state which deputizes aggrieved employees to seek civil penalties on behalf of the state. ("[A]n action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties" *Iskanian v. CLS Transportation, LLC*, *supra*, 59 Cal.4th 348, 371.) Therefore, it is "a type of qui tam action" where 75 percent of the penalties will go to the state's coffers. (*Id.*, at p. 387.)

Although the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement, there is no indication that the FAA

was intended to govern disputes between the government in its law enforcement capacity and private individuals. (*Iskanian*, 59 Cal.4th at 385.)[8] California's public policy prohibiting waiver of PAGA claims – whose sole purpose is to assert the state's and its agency's interest in enforcing the Labor Code, does not interfere with the FAA's goals of promoting arbitration as a forum for private disputes. (*Id.*, at p. 89.) In sum, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.

Even though *Iskanian* allowed class-action waivers in some employment contracts while abrogating *Gentry*, California law still requires arbitration agreements to not be unconscionable. Whereas the defense bar have been drafting careful arbitration agreements for employers, plaintiff attorneys will likely assert only PAGA representative claims where employee arbitration agreements and class action waivers are present.[9]

Ayala looks at misclassification test and right of control

Four newspaper carriers, among them Maria Ayala, sued on behalf of a putative class of individual carriers, against Antelope Valley Newspapers, Inc. (Antelope) contending that they had been misclassified as independent contractors, rather than employees, and thereby were deprived of overtime, meal and rest periods, reimbursement of business expenses, and other protections to which they were legally entitled (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522). Plaintiffs moved to certify a class based, among other common evidence, on the contents of the standard contract entered between Antelope and all its carriers.

The trial court denied class certification because plaintiffs did not show that common questions predominate. The trial court anticipated that to resolve the carriers' employee status, the court should heavily inquire into the defendant's control over the individualized carriers' work. The Court of Appeal disagreed with the trial court and held that while overtime and meal and rest period claims were too individualized, the trial court should have certified the remaining claims due to the newspaper's right of control.

While analyzing the substantive law applicable to the case, the California Supreme Court ruled that the misclassification test looks at the right of control, not how it is exercised. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533.) For purposes of certification, it did not matter how much variation exists in how the company actually exerted control from individual to individual. The relevant question was whether the scope of the right of control, whatever it might have been, is susceptible to classwide assessment. (*Id.*, at p. 534.) Although the written contract between the carriers and Antelope might not have been conclusive if other evidence was present, it was a necessary starting point. If the newspaper had the same right to control the work of all the carriers, then class certification might have been appropriate, regardless of whether the actual exercise of that control varied from carrier to carrier. (*Id.*, at p. 535.) The Supreme Court finally remanded the case to the trial court with instructions to re-analyze the suitability of class certification based on whether the company's right of control varied from individual to individual, and whether those variations were manageable and not whether their exercise of control varied for each carrier. (*Id.*, at p. 540.)

For class-action practitioners, the *Ayala* holding continued the path set by *Duran* and stressed the relevance of effective manageability of the proof of individual issues and how the manageability of a class affects its certification. The Court exhaustively emphasized that individual issues do not render class certification inappropriate so long as such issues may effectively be managed, and it should not be overlooked while moving to certify a class.

What is next?

Manageability of the class and class-action arbitration are issues that will also be present this coming year. Employers will keep raising a myriad of individualized facts and courts will continue to diligently answer the crux question to certify a class: whether the theory of recovery advanced by the proponents of certification is likely to prove amenable to class treatment. See *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, as modified on denial of reh'g (Dec. 3, 2014.) *Duran* and *Ayala* will help advocates to navigate manageability issues to address in the class-certification motion and trial plans.

The issue of whether the court or the arbitrator decides whether an arbitration agreement contemplates class arbitration will be reviewed by the California Supreme Court. (*Sandquist v. Lebo Automotive,* No. S220812, Nov. 12, 2014)[10] There is a clear split on who should decide the issue of class arbitration. On one side, courts have held that the issue was for the arbitrator to decide (See *Sandquist*, *supra; Bergiadis v. Fred Loya Insurance Agency, Inc.* (No. B249276, 2014 WL 5469743). On the other side, courts have held that the courts should decide the issue of class arbitration. (See *Network Capital Funding Corp. v. Papke* (2014) 230 Cal.App.4th 503 and *Garden Fresh Restaurant Corp. v. Superior Court* (2014) 180 Cal.Rptr.3d 89.) The issue will be contested and litigated until the California Supreme Court resolves it.

Lastly, plaintiffs and their attorneys are gearing up to file PAGA claims on behalf of the California Labor and Workforce Development Agency; however, whether *Iskanian* will be taken by the U.S. Supreme Court and will survive FAA preemption remains to be seen.[11]

Molteni

Cristina Molteni is a member of Albert G. Stoll, Jr. Law Corporation, *focusing her practice on representing mostly monolingual Spanish-speaking clients in wage and hour class actions in the construction industry. Before joining AGS, Cristina worked in other labor and employment firms in the San Francisco Bay Area, handling numerous wage and hour class action cases. Cristina is a graduate from Facultad de Derecho, Universidad de Buenos Aires (Argentina) and Faculdade de Direito, Universidade de São Paulo (Brazil) and she was a clerk in the National Labor Court in Buenos Aires, Argentina, and a tenured professor of Employment and Labor Law in Universidade Cândido Mendes, Rio de Janeiro, Brazil.*

Endnotes

[1] Plaintiffs had dismissed their claims under the Labor Code and proceeded solely on a claim for equitable relief under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.)

[2] The majority decided that on remand, the trial court may entertain a new class certification motion and a new trial will be required for both liability and restitution. (*Duran v. US Bank National Assn.*, *supra*, 59 Cal.4th at p. 50.) Justice Liu's concurrence specifically indicated that if the case were to proceed as a class action on remand, the trial court "must start anew by assessing whether there is a trial plan that can properly address both common and individual issues." (*Duran*, *supra*, at p. 58.)

[3] The two types of evidence must be considered and weighed alongside each other, and more broadly, they must be considered and weighed together with the full range of evidence bearing on the ultimate issue, including the employer's job description, company policies, industry customs, and testimony of supervisors or managers who monitored, evaluated, or otherwise set expectations for employees in the class. (*Duran*, *supra*, at p. 57.)

[4] California Labor Code section 2698, et seq. This statute authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.

[5] The arbitration agreement provided that "any and all" employment-related disputes would be submitted to binding arbitration and contained a waiver of the right to bring claims on behalf of a class or as a representative of others.

[6] CLS moved to compel arbitration and the trial court granted CLS's motion. Shortly after the trial court's order, the California Supreme Court decided *Gentry* (*Gentry v. Superior Court* (2007) 42 Cal.4th 443), and CLS voluntarily withdrew its first motion to compel arbitration. The class of drivers was eventually certified in 2009.

[7] The unwaivability of certain statutory rights derives from two statutes that are themselves derived from public policy, Civil Code sections 1668 and 3513. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-383.)

[8] In *EEOC v. Wafflehouse, Inc.* (2002) 534 U.S. 279, the U.S. Supreme Court held that an arbitration agreement did not prevent the Equal Employment Opportunity Commission (EEOC) from suing the employer on behalf of the employee. (*Id.*, at p. 296.)

[9] As of this writing, a petition for a writ of certiorari is pending in *Iskanian* before the Supreme Court.

[10] In *Sandquist*, the Court of Appeal reversed the trial court order dismissing the class claims and the matter was remanded with directions to enter a new order submitting the issue of whether the parties agreed to arbitrate class claims to the arbitrator. (*Sandquist v. Lebo Automotive*, 2014 WL 3590152.)

[11] A number of federal courts in California have lately rejected the *Iskanian* holding regarding PAGA. See *Fardig v. Hobby Lobby Stores* (C.D. Cal. Aug. 11, 2014, 2014 WL4783618); *Langston v. 20/20 Companies, Inc.,* (C.D. Cal. Oct. 17, 2014, 2014 WL5335734); *Chico v. Hilton Worldwide, Inc.* (C.D. Cal. Oct. 10, 2014, No. 2:14-cv-05750); and *Ortiz v. Hobby Lobby Stores, Inc.* (E.D. Cal. Sept. 30, 2014 No. 2:13-cv-01619). On those cases, the PAGA claims proceeded in arbitration.