Employment class action: The year 2015 in review

A year of perseverance and creativity by plaintiffs' counsel

By Christina Molteni

Last year, we had anticipated that manageability of the class and class-action arbitration would be present in 2015.[1] We were not wrong. However, through perserverance and creativity, we have been able to overcome hurdles such as class-action waivers, representative PAGA waivers, and manageability of the class at the certification stage.

Manageability of class actions after *Duran*

The case, *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, has been one of the most important cases regarding class certification after *Brinker* (*Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004). The case had been brought by loan officers against U.S. Bank claiming that they were misclassified as outside persons exempt from California's overtime laws and were denied overtime pay. The trial court certified the class and it decided to proceed with its own trial plan, bifurcating the trial into liability and damages' phases and taking testimony from randomly selected class members. In a bench trial, the court decided that the entire class had been misclassified and came with a verdict of $15 million in the damages phase. The Supreme Court ultimately decertified the class and reversed the judgment. In its decision, the Supreme Court confirmed core principles of the class-action procedure; however, it made clear that the trial plan should permit an employer or defendant to prove relevant affirmative defenses.[2] The novelty of the case was that the manageability of a class action came as one of the most important showings in certifying a class. ("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.) After *Duran*, manageability of the class claims has been present in almost every class certification motion, as shown below.

In *Safeway v. Superior Court Los Angeles* (*Esparza*) (2015) 238 Cal.App.4th 1138, store-level hourly employees brought a complaint claiming that Safeway and its sister company, Vons, did not pay statutory meal break premiums.[3] The trial court certified that claim, although it did not expressly refer to the statutory scheme supporting the certified claim (Unfair Competition Law ("UCL"), Private Attorney General Act ("PAGA") or Labor Code.) The employer filed its petition for writ of mandate, based on the UCL and the Court of Appeal denied the petition on the ground that a UCL claim may be predicated on a uniform practice of never paying appropriate meal break premiums and the class should not have to prove each instance of a meal break violation or to prove the precise amount of premium pay owed. The court based its analysis on *Duran* and stated that the key issue was whether common issues predominate and whether the litigation of individual issues can be managed fairly and efficiently (*Safeway*, *supra*, at p. 1154.)

The court thoroughly examined plaintiffs' theory of liability under the UCL, inquiring into factual issues under which Safeway's failure to pay meal break premiums constituted an unlawful or unfair business practice under the UCL. Moreover, the court found that the UCL claim is independent of other statutes and it does not depend on an underlying claim for a Labor Code violation. (*Safeway*, *supra*, 238 Cal.App.4th at p. 1157.) The trial court's finding of a deep, system-wide error on Safeway's records was sufficient to reasonably infer that the employer never paid meal break premiums even though a significant number of employees had accrued them. Allowing the class to use statistical analysis of the time records and other data, it finally determined that class certification was appropriate in the case because Safeway's practice and damages were capable of common proof. (*Safeway*, *supra*, at p. 1160.)

In *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, patient care employees filed a class-action complaint against the owner and operator of two acute care psychiatric hospitals. Plaintiffs claimed that defendant regularly understaffed its hospitals and required employees to remain on duty instead of taking their meal and rest breaks as mandated by California law and to work off-the-clock, without proper overtime compensation. Plaintiffs moved to certify five subclasses, the meal period, the rest period, the overtime, the inaccurate wage statements, and the waiting time subclasses. The trial court denied class certification holding that the proposed subclasses lacked commonality and based its decision on plaintiffs' heavy reliance on anecdotal evidence to prove the systematic violation of wage and hour laws. Plaintiffs appealed.

The Court of Appeal reversed, stating that the trial court had relied on a series of improper threshold analyses. First, it relied on the inaccurate premise that employer's policy regarding wage and hour laws was facially legal, when it was not. Moreover, the court found that "the mere existence of a lawful break policy will not defeat class certification in the face of actual contravening policies and practices that, as a practical matter, undermine the written policy and do not permit breaks." (*Alberts*, *supra*, 241 Cal.App.4th at p. 406.)

Second, the trial court required plaintiffs to demonstrate a universal practice, instead of evaluating whether plaintiffs' theory of recovery was amenable to class treatment. ("The fact that some employees may have taken some breaks is an issue that goes to damages. It is not a proper basis on which to deny certification." (*Alberts*, *supra*, at p. 408).) Third, the court erred in refusing to consider plaintiffs' statistical evidence and considered only faulty statistical evidence provided by defendant. The court noted similar deficiencies not only on the certification of meal and rest periods, but on the certification of off-the-clock and overtime claims. However, it remanded the certification of subclasses for rest and meal break claims to the trial court because it was unclear from the record whether common issues predominated over individual ones. The derivative claims (waiting time penalties and itemized wage statements) which were predicated on the other claims were also remanded regarding predominance and manageability.

In *Mies v. Sephora U.S.A., Inc.* (2015) 234 Cal.App.4th 967, a retail specialist sought to represent a class of employees who worked in defendant's beauty stores, claiming that she and similarly situated store specialists were misclassified as exempt employees and Sephora failed to pay overtime wages, failed to provide meal periods or compensate for missed meal periods, failed to provide proper payment for accrued paid time off and derivatively failed to provide accurate wage statements. The plaintiff moved to certify a class of almost 100 retail specialists based on evidence showing that the duties of the specialist were shared by all Sephora's specialists; showing Sephora's surveys supporting the proposition that defendant's employees spent generally the same amount of time engaged in nonexempt tasks. Although plaintiff claimed that the court could look to statistical evidence, plaintiff did not propose any particular statistical method to determine liability on a class-wide basis. Conflicting testimonial evidence was presented by both parties and the trial court gave equal weight to both. The trial court denied certification and plaintiff appealed.

The Court of Appeal affirmed, noting that the trial court did not use any improper criteria or apply erroneous legal assumptions. The court revisited the trial court's decision and agreed that the central issue for trial was how the specialists spent their time and not whether a given task is exempt. (*Mies*, *supra*, 234 Cal.App.4th at 975.)

Furthermore, the court concluded that the trial court properly balanced the conflicting evidence presented by both parties and given the conflicting declarations on the subject and the lack of a viable plan for statistical evidence, the issue was not suited to class-wide treatment.

These cases bring some light on the manageability of a class action during certification. After *Duran*, it became clear that trial courts are looking for well-developed evidence showing the manageability of the class. Just enunciating that statistical sampling will be introduced in a trial plan is not sufficient and this may become the Achilles heel of a class-certification motion. For that reason, employment plaintiffs' counsel are advised to provide expert testimony and a viable trial plan, explaining how the manageability of the class will be tackled.

Enforceability of class-action waivers after *Iskanian*

Right after *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 174 and *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304, the landscape for California class-action practitioners representing plaintiffs was somber and hopeless. However, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 brought a renewed energy to the litigation landscape. Plaintiff, a driver, brought a class and representative action against CLS, alleging that he did not receive overtime pay, meal and rest breaks, business expenses reimbursements, accurate wage statements, and wages at termination. CLS moved to compel arbitration.[4] The California Supreme Court decided that the U.S. Supreme Court's decision in *Concepcion* had abrogated the rule in *Gentry*, rejecting some class-action waivers in employment contracts. However, 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.[5] Moreover, the Federal Arbitration Act ("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, but a dispute between an employer and the state which deputizes aggrieved employees to seek civil penalties on behalf of the state. (*Iskanian*, *supra*, at p. 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.)[6]

In early 2015, the U.S. Supreme Court denied CLS's petition for a writ of certiorari.[7] Albeit *Iskanian* allowed class-action waivers in some employment contracts while abrogating *Gentry*, California law still requires contracts and certainly, arbitration agreements to comply would not be unconscionable. The non-arbitrability of PAGA claims was swiftly adopted by state courts. (See *inter alia Montano v. Wet Seal* (2015) 232 Cal.App.4th 1214; *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947; and *Williams v. Sup. Ct.* (2015) 237 Cal.App.4th 642.) However, it took some time for the federal courts to accept it. Federal courts were adamant in applying the *Iskanian* holding. Some district courts found that the *Iskanian* rule against PAGA waivers frustrated the goals of the FAA. (*Ortiz v. Hobby Lobby Stores, Inc.* (E.D.Cal. 2014) 52 F.Supp.3d 1070; *Nanavati v. Adecco USA, Inc.* (N.D.Cal. 2015) 99 F.Supp.3d 1072, 1080.) Others found the *Iskanian* reasoning persuasive. (See *Hernandez v. DMSI Staffing, LLC*, (N.D.Cal. 2015) 79 F.Supp.3d 1054 and *Zenelaj v. Handybook, Inc.* (N.D.Cal. 2015) 82 F.Supp.3d 968.) The split of authority was speedily addressed and eventually solved in the Ninth Circuit in

Sakkab v. Luxottica Retail North America, Inc. (9th Cir. 2015) 803 F.3d 425.

In *Sakkab*, Shukri Sakkab, a former employee of LensCrafters (owned by defendant Luxottica) filed a wage and hour class-action lawsuit against Luxottica in state court claiming that the company failed to pay overtime compensation, failed to provide accurate itemized wage statements, failed to pay wages when due, and for unfair business practices. Luxottica removed the case to federal court and plaintiff filed a first amended complaint adding a representative claim for civil penalties under PAGA. The district court granted defendant's motion to compel arbitration, based on two arbitration agreements that Sakkab entered into during his employment. Those agreements expressly precluded the plaintiff from pursuing class, collective, or representative actions, whether in court or in arbitration. Sakkab did not dispute that the first claims pleaded were arbitrable; however, he argued that even if he was required to arbitrate his claims, he should be allowed to have a forum for his representative PAGA claim. At the time of the district court decision, the California Supreme Court was still to decide *Iskanian* and consider whether PAGA waivers were enforceable under California law. The district court based its decision on *Concepcion* and concluded that the FAA would preempt a state rule barring waiver of PAGA claims, dismissing Sakkab's class and representative PAGA claims.

After the district court entered its order, the California Supreme Court ruled that PAGA waivers are contrary to California public policy and as a result, unenforceable (*Iskanian, supra,* 59 Cal.4th at p. 384.) On appeal, after a detailed analysis of PAGA and its legislative history, the Ninth Circuit panel reversed, finding that the *Iskanian* rule is not preempted by the FAA. Moreover, the Ninth Circuit panel found that the *Iskanian* rule is a "generally applicable" defense to any state contract and falls within the ambit of 9 U.S.C. § 2 saving clause[8] provided it does not conflict with the purposes of the FAA. The panel further examined whether the *Iskanian* rule conflicts with the FAA's purposes. It does not. Based on the Supreme Court's FAA preemption jurisprudence and on the distinction between class actions and PAGA actions,[9] the panel found that the rule does not prevent the parties from agreeing to use informal procedures to arbitrate representative PAGA claims. (*Sakkab*, *supra*, 803 F.3d 425, 436.) To reach that conclusion, the panel considered that representative PAGA claims do not require any special procedures such as notices for unnamed aggrieved employees, inquiries into the named plaintiff's and class counsel's ability to fairly and adequately represent the unnamed employees, and numerosity, commonality or typicality. ("[b]ecause a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations." (*Ibid.*)

In sum, California employers have been drafting careful arbitration agreements; however, they will no longer be able to include the waiver of representative PAGA claims in employment contracts and rely on removing cases to federal court to avoid representative actions. Nonetheless, plaintiffs' attorneys should be alert and carefully weigh whether asserting only PAGA representative claims where employee arbitration agreements and class-action waivers are present. It will be useful to evaluate how those PAGA claims proceed as separate from the class certification standards in state courts. Finally, we anticipate more attacks to *Iskanian* and representative actions. Although the U.S. Supreme Court did not take *Iskanian*, new cases are reaching the higher courts to challenge any type of class action and representative claims.[10]

In the Watch List

Some cases have reached the California Supreme Court and class-action practitioners are eager to know their outcomes. As we mentioned last year, *Sandquist v. Lebo Automotive, Inc.* (S220812), will be reviewed by the California Supreme Court. The issue for review is whether the trial court or the arbitrator decide whether an arbitration agreement provides for class-arbitration if the agreement itself is silent on the issue. In addition, the definition of employee for class-certification purposes will be decided by the Court in *Dynamex Operations West, Inc. v. Sup. Ct.* (S222732) and attorneys' fees awards in class actions will be examined in *Lafitte v. Robert Half International, Inc.* (S222996)

Furthermore, the U.S. Supreme Court recently heard oral argument in *Tyson Foods, Inc. v. Bouaphakeo* (US14-1146). The district court certified a Rule 23 (b)(3) class action and an FLSA collective action for claims alleging that Tyson Foods had not paid its employees for donning and doffing protective gear[11] and a jury returned a verdict in the plaintiffs' favor. The Eighth Circuit Court of Appeals affirmed the judgment and Tyson filed a petition for certiorari. The Supreme Court granted certiorari to decide two questions: whether differences among individual class members may be ignored, and a class certified, when plaintiffs use statistical techniques that presume that all class members are identical; and whether a class may be certified if it contains hundreds of members who were not injured and have no right to damages. At oral argument, most of the justices' questions and comments appeared considerate to the workers.

For that reason, class-action practitioners representing plaintiffs are cautiously hopeful that a win for the workers will be issued this time, breaking a long string of U.S. Supreme Court decisions against plaintiffs in class actions during the last years. In due course, the developments in *Tyson Foods* will bring new issues to the forefront of class certification motions on employment cases that remain to be seen.


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Endnotes

[1] "Employment Class Action: The Year in Review" my article in Plaintiff January 2015, p. 24-30.

[2] At the time of this writing, class certification and decertification motions are pending before the trial court in *Duran*.

[3] Plaintiffs also brought claims for failure to provide rest periods and failure to provide itemized wage statements. Those claims were not certified.

[4] CLS moved to compel arbitration in two opportunities. The first time the motion was granted, but defendant voluntarily withdrew the motion after the California Supreme Court decided *Gentry v. Superior Court (2007)* 42 Cal.4th 443. CLS renewed its motion to compel arbitration right after *Concepcion* which was ultimately granted. (At that time, the class was already certified by the trial court.)

[5] 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.)

[6] It is worth reading *Iskanian* derivative case, *Kempler v. CLS Transportation Los Angeles, LLC* (2015) WL 6671917 (not officially published), whereby 61 members of the *Iskanian* class opted out of the case during its lengthy appeals. Class counsel filed individual arbitrations for those 61 class members. In an unexpected turn, the arbitration of 61 individual claims resulted more expensive for defendant than a class jury trial.

[7] *CLS Transportation Los Angeles, LLC v. Iskanian,* US14-341, petition denied on January 20, 2015.

[8] "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)

[9] "The class action is a procedural device for resolving the claims of absent parties on a representative basis (citation omitted) By contrast, a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer." (*Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 435.)

[10] Luxottica filed a petition for rehearing en banc on November 11, 2015. In addition, new cases have reached or attempted to reach the U.S. Supreme Court. In the appeal of the unpublished opinion in *Fowler v. CarMax Auto Superstores California, LLC* (B238426) CarMax filed a petition for a writ of certiorari (*CarMax Auto Superstores California, LLC v. Areso* US15-236). The issue presented was "[w]hether California's *Iskanian* rule, which categorically exempts representative PAGA actions from mandatory arbitration, is preempted by the FAA." The petition was denied on December 14, 2015. See also *DIRECTV, Inc. v. Imburgia* (US 14-462 12/14/15), a consumer class action regarding a *binding* arbitration provision with a class-action waiver, whereby the U.S. Supreme Court recently held that the arbitration agreement was enforceable because the application of California law was preempted by the FAA when the interpretation of an arbitration agreement was not comparable to the interpretation of all other contracts.

[11] It was undisputed that employees used different equipment and not all the employees were injured. (*Bouphakeo et al. v. Tyson Foods, Inc.* (8th Cir. 2014) 765 F.3d 791, 805 (not citable.))