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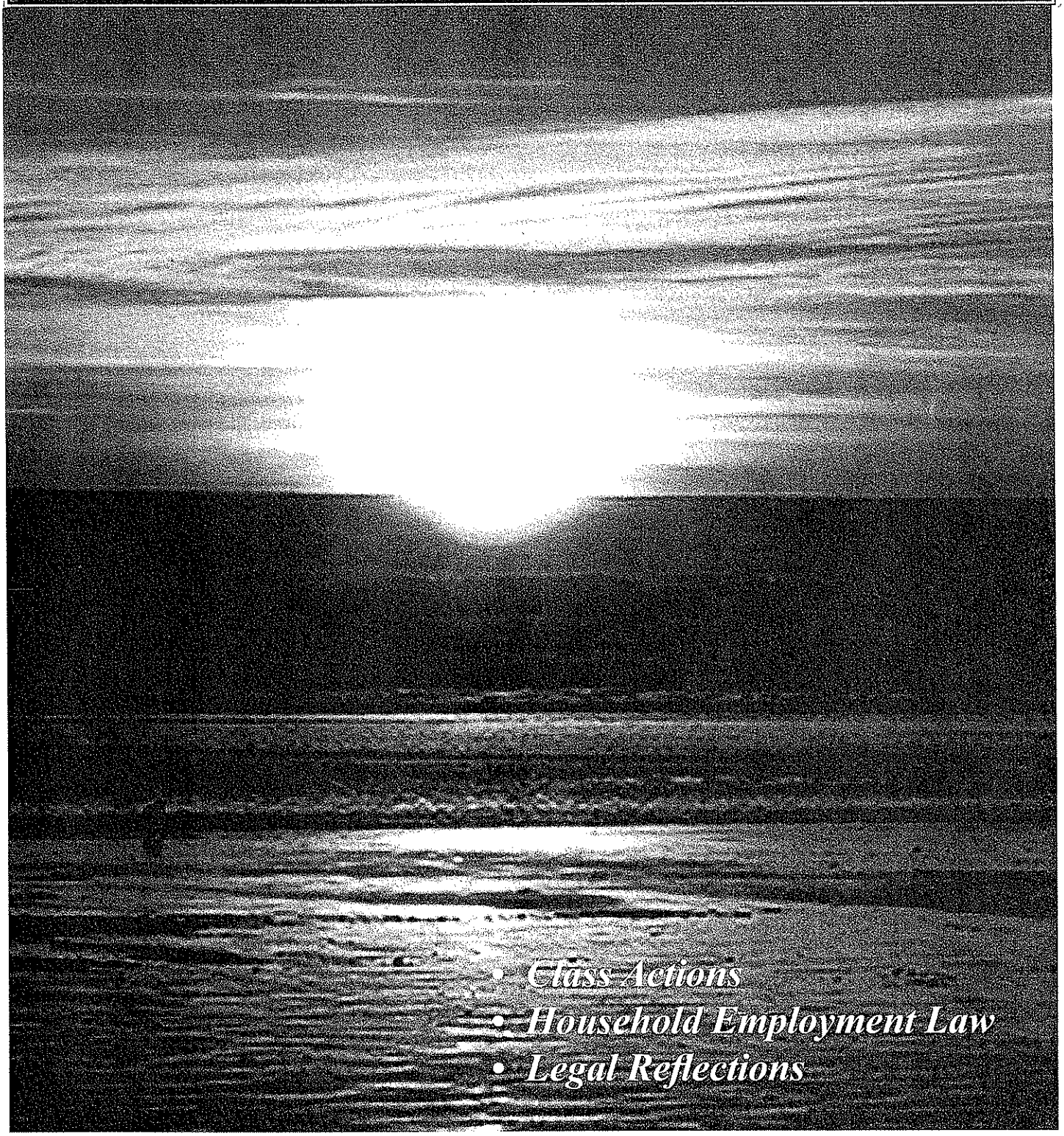

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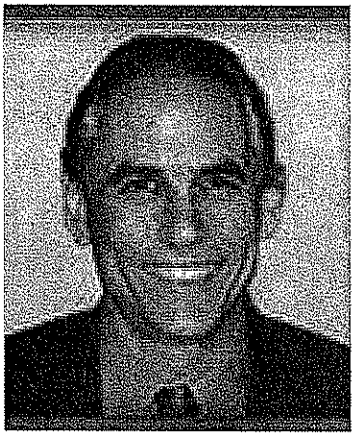
Class Actions

By Michael Singer and Ken Lynch



Michael Singer

Class Actions were devised to address increasingly complex litigation settings. These cases permit one or more class representatives to act as plaintiffs on behalf of a group of similarly-situated absent, nontestifying class members. In the field of employment law concerning wages and hours, the Fair Labor Standards Act has since 1938 permitted multiple-employee suits in "collective actions" against their employer for wage-based claims that impacted a large group without the need for individual and redundant adjudications arising from common factual scenarios, e.g., an employer's systematic failure to pay minimum wage or overtime wages. The standard for such a combined action requires primarily just that the employees be similarly situated.

The hallmark of a collective action is that an employee must affirmatively "opt in" after receiving notice of conditional certification in order to be included in the suit. The statute of limitations in such actions is not tolled until an employee has filed a notice of inclusion with the court.

By contrast, FRCP Rule 23 provides a mechanism for class certification with more rigorous standards, which operate to include all similarly situated employees unless they affirmatively "opt-out" of the case after the court certifies the class and notice is sent. In such cases, the person opting out will not participate in any judgment, preserving his/her individual ability to bring legal action based upon their individual facts. Everyone else who is sent notice of the class and who does not "opt out" is bound under principles of res judicata by whatever judgment is entered and cannot re-litigate the claim. This is the basis of F.R.C.P. Rule 23 and California Code of Civil Procedure Section 382.

I. BASICS OF INVOKING CLASS ACTION PROCEDURES

A. California Law

A class should be certified when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." Code Civ. Proc. § 382. Certification is appropriate when a party has demonstrated the existence of an ascertainable class and a well-defined community of interest in the subject matter of the litigation. Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319.

Ascertainability is determined by examining (1) class definition, (2) class size, and, (3) the means of identifying class members. Global Minerals and Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 849 (citation omitted). The class definition must be "precise, objective, and presently ascertainable." Manual for Complex Litigation, Sec. 30.14 (5th ed. 2009). The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims typical of the class; and (3) class representatives who can adequately represent the class. Sav-On, 34 Cal.4th at 326.

B. Federal Rule 23

In order to certify a class under Rule 23, a party must meet all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Rule 23(a) requires: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Wage and hour certification is typically sought under Rule 23(b)(3), requiring that the court finds that the questions of law or fact common to class members predominate over any ques-

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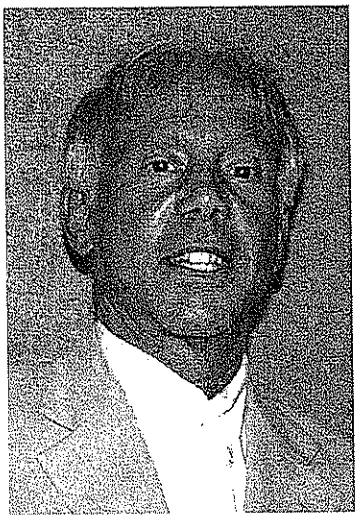

Kenneth Lynch

tions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23(a)

Numerosity and Ascertainability

A proposed class action must contain many members in substantially similar positions such that individual joinder is impracticable. Those members must be objectively ascertainable and finite, and usually can be deduced by dates, records, or some practical means of identification.

Class actions have been deemed appropriate in as few as 10-12 members, or many thousands. Generally, state rules will allow numerosity with 10+, while federal courts generally will require more than 20-25 member to be considered as a class action, though each case is considered on various grounds, with an eye toward whether the use of class action procedures will be serve goals of efficiency and prevent redundancy.

Commonality

Commonality under Rule 23(a) is a relatively low standard to meet, satisfied if there are common policies affecting a group of employees.

Adequacy of Representative and Proposed Class Counsel

If numerosity, ascertainability and commonality exist, then the Court is to consider whether the proposed named class representative Plaintiff is adequate, which involves generally a three (3) part test: (1) Are the claims of the class representative fairly typical of the other proposed class members in terms of common facts and circumstances?; (2) Does the class representative have any interests that would diminish his/her vigorous pursuit of the claim or that could be antagonistic to other class members (sell out the class)?; and (3) Has the class representative retained independent and competent class action counsel capable of trying the case and knowledgeable as to substantive law and class procedures.

Generally, this is satisfied, but can be complicated. Some employee claims that make good class claims could be consumed by the fact that the employee also wants to pursue wrongful termination, etc., which are entirely individual in nature. Also, class counsel must be competent and independent to make sure that absent class members interests are fairly represented and protected.

Rule 23(b)(3)

Predominance of Common Questions

Establishing under Rule 23(b)(3) that common questions of law or fact, and the ability to answer these questions with joint proof, predominate over individual questions is the key to winning or losing a class certification motion. The same is true in state court.

The heart of class action procedure is whether the proposed class is cohesive: whether the legal theories, common facts and the circumstances are similar enough that legal and factual determinations can be made that are fair, efficient and manageable to both parties. Variation as to circumstances for determining liability or causation tends to undermine commonality whereas common policies, practices and procedures having common impact tend to reinforce commonality.

Variation in individual damages does not undermine predominance as that can be determined on a rational basis to distribute any funds on a pro-rata share. A judge can oversee that any distribution formula is fair.

The key term here is "predominance" of com-

mon facts and issues. If common issues and facts "predominate" over individual issues, then class procedures can be appropriate.

Superiority and Manageability

The class proponent must also demonstrate that class adjudication is the superior remedy to separate individual actions and must present a methodology establishing a manageable trial with regard to common proof and adjudication of non-predominating individual issues.

Whether a class trial is manageable is addressed through discussion or presentation of representative evidence, common documents and scientifically valid statistical evidence. Thus, a clear plan must be envisioned in the motion for certification as to how the case will be tried, the manner and mode of proof, the common evidence, and whether bifurcation/trifurcation is anticipated.

Notice

If the class meets these requirements, then a Court may certify the case and appoint class counsel and the named plaintiff to serve as the class representative. Notice is to be mailed to each class member, if practicable, or in large cases/classes, reasonable means of notice may be given. As long as reasonable diligence is made to make sure written notice is delivered to all ascertained class members, unless they opt out, they will be deemed bound by any judgment entered, whether a win or a loss. Only those who specifically "opt out" preserve their rights to seek an independent adjudication as long as they timely assert their claims.

The FRCP and State rules for class certification in California are supposed to be very in-line with each other. Revisions to the California Rules of Court seem to make this clear. However, the determinations for invoking class procedures are highly dependent

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upon the trial judge and their openness to using the procedures.

> Courts have repeatedly certified classes of employees seeking compensation for Labor Code violations. (See, e.g., Sav-On, supra, 34 Cal. 4th at 327 [class certification of class of assistant and operating managers with unpaid overtime claims upheld]; Jaimez v. DAIOHS, Inc. (2010) 181 Cal. App.4th 1286 [reversing certification denial on overtime and related claims for employees classified as exempt and overtime, rest, meal period and related claims for non-exempt employees] ; Bell v. Farmers Insurance Exchange (2004) 115 Cal. App. 4th 715, 720 [certified class of insurance claims representatives with unpaid overtime claims]; Estrada v. FedEx (2007) 154 Cal. App. 4th 1[non-exempt employee's expense reimbursement claim]; Ghazaryan v. Diva Limousine (2008) 169 Cal. App. 4th 1524 [hourly workers' rest period claim]; Bufil v. Dollar Financial Group (2008) 162 Cal. App. 4th 1193[hourly workers' meal period claims]; Dilts v. Penske Logistics Corp. (S.D. Cal. 2010) 2010 U.S. Dist. LEXIS 40568 [rest, meal, and off the clock claims for non-exempt delivery drivers and appliance installers] Cruz v. Dollar Tree Stores (N.D. Cal.2009) U.S. Dist. LEXIS 46855 [certified class of retail managers for overtime claim]; Weigele v. FedEx Ground Packaging Systems, Inc. (S.D. Cal. 2008) US Dist. Lexis 10246 [certified class of sort managers and dock service managers for overtime, rest and meal period claims] [class decertified in March 2010]; Heffelfinger v. Electronic Data Systems Corp., (C.D. Cal. 2008) 580 F. Supp. 2d 933 [certified class of computer engineers for overtime claims]; Bibo v. Fed. Express, Inc.(N.D. Cal. Apr. 21, 2009) 2009 U.S. Dist. LEXIS 37597)[hourly employee's meal and rest period claims] Breeden v. Benchmark Lending Group, Inc. (N.D. Cal. 2005), 229 F.R.D. 623 [telemarketing loan officers]; Krzesniak v. Cendant Corp. 2007 U.S. Dist LEXIS 47518 (N.D. Cal. 2007) [car rental store managers]; Alba v. Papa John's USA, Inc., 2007 U.S. Dist. LEXIS 28079, 19-21 [salaried restaurant managers and hourly employees], Tierno v. Rite-Aid Corporation, 2006 U.S. Dist. LEXIS 71794 (N.D. Cal. 2006) [store managers], Whiteway v. FedEx Kinko's Office and Print Services, Inc., 2006 U.S. Dist. LEXIS 69193 (N.D. Cal. 2006) [store managers]; Romero v. Producers Dairy Foods, Inc., 2006 WL 1030222 (E.D. Cal.) [route sales drivers]; Rees v. Souza's Milk Transp., Co., 2006 WL 1096917 (E.D. Cal.) [truck drivers]; Wang v. Chinese Daily News, Inc. (C.D. Cal. 2005), 231 F.R.D. 602 [reporters and account executives]; Cornn v. United Parcel Serv., 2005 WL 588431 (N.D. Cal.) [driver class certified for meal and rest period claims]; Earley v. Superior Court (2000) 79 Cal.App.4th 1420, 1423-24 [class of bank employees seeking unpaid overtime certified]; Madera Police Officers Ass'n v. Madera (1984) 36 Cal.3d 403, 407 n.5 [class of police officers, sergeants and dispatchers with unpaid overtime claims certified]; Los Angeles Fire & Police Protective League v. Los Angeles (1972) 23 Cal.App.3d 67, 74 [upholding certification of class of police officers seeking unpaid overtime]; Bell v. Farmers Ins. Exch. ("Bell II") (2001) 87 Cal.App.4th 805 [certified class of insurance adjustors seeking overtime]; Stephens v. Montgomery Ward (1987)193 Cal. App.3d 411, 418 [class of employees alleging discrimination in managerial promotions]; see also, Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575 [demurrer reversed permitting class of employees seeking compensation for compulsory travel time to proceed]). Courts have also denied certification in misclassification cases. See Dunbar v. Albertsons (2006) 141 Cal. App. 4th 1422; Walsh v Ikon Office Solutions, Inc.148 Cal. App. 4th (2007) 1440, 1454;[decertifying class of outside salespersons for overtime claim]; Vinole v. Countrywide Home Loans, Inc. 571 F.3d. 953(9th Cir. 2009) [denying certification to class of outside salespersons for overtime claim]. Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006); Sepulveda v. Wal-Mart Stores, Inc., 237 F.R.D. 229, 246 (C.D. Cal. 2006), aff'd in relevant part, 275 F. App'x 672 (9th Cir. 2008).

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Because the stakes are so high in class certification, most cases settle before the certification motion is heard. Once certified, case value increases substantially with the absence of a class certification discount, though defendants are known to claim a "decertification" discount. A defendant can bring a decertification motion at any time, and replacement of the judge who certified the matter creates high peril for a certification order.

By some estimates, employees have filed upwards of 10,000 wage and hour class actions. Just 25 or so have gone all the way through trial, just one quarter of one percent.

III. HOT CLAIM AREAS

A. Meal and Rest Periods [Labor Code section 226.7]

Any employee who is not provided a paid ten minute rest period for every four hours of work and an uninterrupted, 30-minute meal period off duty and free to leave the premises is entitled to one hour of pay at the employee's regular rate of pay.

B. Failure to Reimburse Expenses [Labor Code section 2802]

Employers must reimburse all expenses necessarily incurred in the performance of job duties. Common claims include driving expenses, cell phones, business entertainment, and other job-related out-of-pocket costs.

C. Overtime Misclassification Cases [Labor Code section 1194]

Employees are presumed to be non-exempt and entitled to overtime pay. Simply paying a salary and calling an employee exempt as a manager, administrator, learned professional, or salesperson is not sufficient unless the requirements for these exemptions is established. The employer bears the burden of proof.

D. Off the clock Claims

Employees must be paid for all time they are under the control of their employer and suffered or permitted to work, provided the employer knew or should have known work was being performed. This includes time donning and doffing uniforms or protective gear, time spent sending work-related emails after hours, and work performed under any policy requiring employees to clock out first.

E. Vacation or Paid Time Off (PTO) Forfeiture

In California, paid vacation and personal time off constitute vested wages. Employers may not maintain a "use it or lose it" policy,

forfeiting unused vacation time that is not taken before the end of the year. Caps on accrued vacation are permissible.

Michael Singer is managing partner of Cohelan, Khoury & Singer. His partner, Timothy D. Cohelan, literally wrote the book on class actions, Cohelan on California Class Actions, used extensively in California by judges, practitioners, and law students.

Kenneth Lynch, Esq., Ph.D. is an attorney focusing on intellectual property law and teaching law to Marines at Camp Pendleton's Education Center; as a forensic psychologist, Lynch is a consultant helping the California Department of Disability Determination evaluate disability claimants.

NEWS!
Attention North County Civil Litigators:

We are bringing back the BANSDC Civil Litigation Section! Our first lunch program will be on October 20, 2010 at Noon at Hennessey's Tavern in Vista.

The Topic will be: *Get Your Money Back! Claims against Brokers and Financial Advisors: The View from Both Sides*
Speakers: For the Plaintiff – Brian Miller, Esq.
For the Defendant - Dennis Stubblefield, Esq.
MCLE Credit 1.0 General

It should be an interesting, lively and timely program. We will have monthly lunch programs on the third Wednesday of each month. I am working on programs for the coming months in the areas of trust/probate litigation, foreclosure litigation, wage claims, securities fraud and trade secrets/unfair business practices. I am trying to develop program topics in hot areas of litigation in California. If you have suggestions for proposed programs, please send them along. If you want to participate in the section and/or be included on the email list for section programs and events, send your contact information, including a current email address, to me at crosby@crosbyattorney.com.
Please plan to participate in the new, rebooted BANSDC Civil Litigation Section! Thanks.
Jim Crosby Chair, of the Civil Litigation Section.