California Supreme Court Should Use *Sav-On v. Superior Court* to Validate Wage and Hour Class Actions

By Michael D. Singer

Should employees depend on self-sacrificing corporate employers to guarantee proper entitlement to overtime wages, or should class actions be available to keep employers in check?

If the number of recent wage and hour class settlements is any indication, the answer is a no-brainer. Yet the future of these cases may rest in the balance of *Sav-On v. Superior Court (Rocher),* argued before the California Supreme Court last Tuesday.

Twisting in the appellate wind after class certification was reversed on writ to the Second District Court of Appeal in an unpublished decision, ordered published, then depublished by the grant of review by the State Supremes, employers, employees and wage and hour class action attorneys are eagerly awaiting the Supreme Court's decision in *Sav-On*. Plaintiffs allege Sav-On wrongfully failed to pay overtime wages to a certified class of 600 to 1,400 current and former operating managers and assistant managers of 300 Sav-On retail stores.

The wage and hour class action revolution took off right where it has wound up. The Supreme Court's 1999 decision in *Ramirez v. Yosemite Water Co*., 20 Cal.4th 785, ruled that salaried employees must be "primarily engaged" in exempt duties to be exempt from overtime pay. In other words, managers must really manage more than 50 percent of the time or be paid premium overtime wages. By one estimate, there were 100 wage and hour lawsuits that preceded *Ramirez* and 1,000 since.

In California, employers settling overtime cases include companies ranging from retail chains such as Home Depot, Radio Shack, and Mervyns to restaurant chains such as McDonald's and Taco Bell and large corporations Pacific Bell and Bank of America, to name a few.

Bell v. Farmers Ins. Exchange, 115 Cal.App.4TH 715 (2004), the only case litigated through trial on damages, resulted in the largest recovery of any of these cases, over $90 million in wages owed to a certified class of insurance claims adjustors. That decision became final last month when the Supreme Court declined review.

Ramirez, a non-class case, stated that determining an overtime exemption is a "fact-specific" inquiry. Employers seized on this language, arguing that overtime classes can't be certified because those facts must be analyzed separately for each employee.

The Sav-On plaintiffs submitted evidence that the duties of the misclassified managers are "virtually identical from region to region, area to area, store to store, and employee to employee." Declarations of six managers covering 40 stores stated that managers did not manage more than 50 percent of the time. They attempted to demonstrate the central class action requirement of a "predominance of common questions of law or fact" by showing the operations of Sav-On retail stores were "standardized" and that a class should be certified because Sav-On had treated the employees as a class and not engaged in any individual inquiry in designating them exempt.

As employers do in these cases, Sav-On determined that the filing of the class action made it a good time to argue that the individualized inquiry it failed to engage when it classified its employees was now required. Its lawyers chanted the rallying defense mantra of "separate mini-trials," required verbiage in any opposition to class certification. To support their cause, Sav-On found 51 willing declarants stating they did manage more than 50 percent of the time.

The trial court assessed the conflicting declarations and determined that the exemption could be decided on a class basis. The Court of Appeal re-examined the declarations and ruled there was no substantial evidence to support class certification.

One of the primary questions posed by attorneys and judges critical of the decision was how the Court of Appeal could substitute its evidentiary analysis for that of the trial court under a deferential standard of review. The larger question looming was whether *Sav-On* would be the death knell for overtime class actions. Since they would have to overrule *Bell v. Farmers* after declining review instead of granting and holding pending *Sav-On*, that result now seems unlikely.

Here's how the Supreme Court described the issue under review: In a class action challenging an employer's failure to pay overtime wages, did the trial court err in certifying as a class all employees designated by the employer as salaried managers exempt from the overtime wage laws?

The employees are represented by the San Francisco firm of Righetti & Wynne. Brad Seligman, who successfully argued the Supreme Court's landmark decision in *Cortez v. Purulator Air Filtration Products Co*., 23 Cal.4th 163 (2000), extending the Unfair Competition Law to wage cases, argued on behalf of the class.

He stressed that the trial court's certification order was supported by substantial evidence the employees were not primarily engaged in managerial duties. Seligman also argued that implicit in the Court of Appeal's reversal was an improper policy declaration that overtime cases in general are inconsistent with or undesirable as class actions because of individual issues. With an impressive command of class certification procedure and substantive labor law principles, he reminded the Court that individualized issues regarding proof of overtime damages do not predominate over exemption liability questions that are subject to proof on a class-wide basis through representative or statistical evidence.

The first question of the day is generally a good indicator of the Court's focus and direction. Chief Justice Ronald George went directly to the standard of review question, asking "to what extent do we accord the sound discretion of the trial court or do we second guess its decision?" That was a softball, enabling Seligman to refer again to the evidence supporting the trial court ruling, which may not be second guessed on appeal.

Justice Marvin Baxter asked whether each employee would have to support claims with individual evidence. Another softball — employers have a duty to keep records of overtime hours. If they fail to do so, they cannot argue their non-compliance as a defense to class certification.

Yet just as things were going swimmingly for the plaintiffs, Justice Joyce Kennard asked the toughest question the parties face: "The issue is the nature of the tasks performed and the percentage of time spent on these jobs by 600-1,400 class members. Why would that not require individual fact-finding proceedings?" Without directly answering this question, Seligman referred the Court to the presumption that workers are entitled to overtime, with the burden of proof on the employer to establish an exemption. He stressed that the issue could be determined commonly because of the similarities in job descriptions and functions despite differences in the size of the stores. Sav-On had also made a global classification of exempt status without individual fact finding.

Justice Carlos Moreno asked whether this meant the company had already treated the employees as a class. Seligman agreed and pointed out that the trial court had determined that Sav-On's litigation declarations were not entitled to great weight because superiors did not rely on that type of information in making the original exempt classification. Moreno appeared to be intrigued that Sav-On had re-classified the Assistant Managers as non-

exempt in 1999. Baxter put the timing of this decision together with the Court's 1999 *Ramirez* ruling. The indication was that the trial court was probably correct in its assessment of the evidence as supporting class certification.

George opened the questioning to Sav-On attorney Rex Heineke, of Akin, Gump, Strauss, Hauer & Feld with the same focus on standard of review. "How would you characterize the degree of discretion accorded the trial court?"

Moreno asked, "didn't the Court of Appeal really re-weigh the evidence rather than deferring to the trial court's finding?"

Heineke argued that determining liability, not damages, could not be accomplished without individual analysis. He meant to say "separate mini-trials" but probably forgot. He attempted to argue that the declarations were conclusory, but Justice Kathryn Werdeger corrected him that some were descriptive of the duties performed at the Sav-On stores.

Apparently not wanting to see his meal ticket revoked, Heineke surprised the courtroom by admitting that better findings by the trial court might be less susceptible to reversal and stating that Sav-On was not seeking a ruling that overtime class cases could never be certified, just not this time.

Understandably, that sentiment does not pervade the business community. Instead of taking appropriate action through human resources training on wage and hour compliance, business interests cry for class action "fairness." Their hope is to inhibit enforcement of violations rather than promote fair labor practices.

The Chamber of Commerce views employee rights cases like the Trevor Law Group's section 17200 abuses, carping that plaintiffs' lawyers have discovered a "pot of gold." Yet it is the employers who are protecting their "pot of profits," saving overtime costs to hold overhead down and increase profit margins.

Overlooked is the fact that most of these cases settle for millions of dollars in wages paid to employees because the employers know they're flouting the law. They settle to clear their books for the four years or more encompassed in these actions.

Forgotten in the corporate outcry for class action reform is that the focus is not to remove the right of the public to sue as a class, but to ensure that someone benefits besides lawyers. In overtime suits, employees are generally entitled to 75 percent of the settlement, or more. Unlike mass consumer actions with coupon or nominal cash recoveries, misclassified employees generally receive back-pay awards of thousands of dollars which they should have been paid in the first place.

The Court of Appeal decision ignored years of appellate precedent by substituting its own reasoning and characterizing the trial court's review of evidence as "unreasonable" and "incredible." The Supreme Court's task is to right the ship by reaffirming that to the extent there is conflict in the evidence presented by each side, the issue is not whether one side's evidence is more persuasive but that substantial evidence supports the finding of the trial court. That would permit wage and hour class actions to proceed in the cases where the judges handling them find them proper.

A final opinion should be issued within 90 days.

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