Proving Up Wage-and-Hour Class Actions Post-*Parris*: Practical Solutions

Attorneys Can Communicate With Putative Class Members Regarding Class Issues With or Without Court Approval So Long as the Communication is Not Improper and Conforms to Professional Rules of Conduct Rule 1-400

By Jose R. Garay and Michael Singer

In wage-and-hour class actions, the most important and most difficult battle is class certification. It is at this stage that the case is often won or lost. In the recent case of *Parris v. Superior Court*, 109 Cal. App. 4th 285, 135 Cal. Rptr. 2d 90 (2003), the Second District Court of Appeal provided plaintiffs' counsel with a potentially powerful weapon in the war over certifying classes in wage-and-hour disputes. In short, the court cleared the way for pre-certification communications with potential class members by holding that these communications constituted speech protected by the First Amendment. **Id. at 292 - 300** This ruling helps to level the playing field in these cases by allowing plaintiffs' counsel to gather the evidence necessary to prove up the claims and establish the elements of class certification.

A. Standards for Class Certification

In all California class actions, class counsel must certify the class pursuant to California Code of Civil Procedure section 382 and establish that class members share common issues of fact and law. Thus, class certification motions generally turn on whether there is an ascertainable class and a community of interest in the questions of law and fact. Whether a class is ascertainable depends on the definition and size of the class and the means of identifying class members. *Miller v. Woods*, 148 Cal. App. 3d 862, 196 Cal. Rptr. 69 (1983). The existence of a community of interest turns on whether common questions of law and fact are sufficiently

pervasive to permit class adjudication. The community-of-interest requirement is satisfied if there are predominate questions of law or fact common to the class, the named plaintiff's claims are typical of those of the class, and the named plaintiff is an adequate representative. *Richmond v. Dart Industries Inc.*, 29 Cal. 3d 462, 174 Cal. Rptr. 515 (1983).

B. Class Certification Challenges in Wage-and-Hour Claims

In wage-and-hour class actions, not only do you face the challenge of proving a pervasive practice but also that common issues of fact and law dominate the alleged practice. In any employment litigation, the defense retains a distinct advantage due to its control over employees and documentary evidence. In these cases, class counsel must seek the anecdotal evidence of un-named class members whose identity is known only to the defendant employer, and these identities are often the subject of fierce discovery battles.

Interest in wage-and-hour class actions largely focuses on misclassification of executive (e.g., Starbucks) and administrative (e.g., Farmers Insurance Co.) employees. Restaurant chains, however, deserve a closer look. Before the enactment of Labor Code section 226.7, the restaurant industry typically ignored the legal requirement that hourly employees be provided 10-minute rest periods and 30-minute meal periods. The liability for failing to provide 30-minute meal periods can bankrupt most chain restaurants.

Consider a restaurant chain operating twenty restaurants in California. Your client, a food server, tells you that employees are not provided meal periods. Furthermore, your client complains that when a customer fails to pay the bill in full, the amount is deducted from her wages. She also says that employees regularly work "off the clock." Both of these practices

violate the California Labor Code. Your client tells you that each restaurant follows a strict business model delineated in manuals that instruct managers and employees on every aspect of the business from how quickly to serve customers to what managers may spend on labor. The fact that each restaurant employs about one hundred employees, ranging from hostesses to cooks, helps you to estimate damages, which can easily reach seven to eight digits. Filing a class claim makes sense under these circumstances.

However, first you must weigh the risks involved in attempting to certify a class when the prevalence of violations on a class-wide basis is uncertain. Unfortunately, your client provides no information concerning whether these violations exist at the other nineteen locations. In any chain business, Labor Code violations could be the product of one rogue manager or district manager thereby limiting the size of the class and raising certification issues. However, upper management may contribute to unlawful activity by pressuring local management to maintain or increase profits by squeezing labor. The practical result is employees must produce more and cut corners—such as work hours not reflected on the time card.

By asking the right questions, you may obtain the information required. First, you must consider which allegations can be proven through documents and which require testimonial support. Then, in light of the fact that class members are not clients until the class is certified, you must determine how written pre-certification notices can be used to investigate whether unlawful practices affect employees on a widespread basis.

C. <u>Some Labor Code Violations Can be Proven Through Documents</u>

Some violations, such as failure to provide a meal period, may appear in the defendant's records. Pursuant to Labor Code sections 226 and 1174, including Industrial Welfare Commission Wage Order 5 (regulation governing restaurants), the employer must maintain a record of when the meal period was actually taken. The records must also be stored for at least three years (I.W.C. Wage Order 5, section 7). Thus, you must first establish whether employees entitled to 30-minute meal periods clock out and back in for the meal period.

Second, you must confirm whether the employer uses a standardized time-keeping system throughout the restaurant. Typically, an employer utilizes basic record keeping such as time cards. The more sophisticated restaurants utilize a point of sale (or "POS") system. Some rely on a magnetized card system in which the employee slides a card or enters an employee ID. Sample time cards from each location are discoverable (including the computer hard disk if hard copies are unavailable).

Regardless of the system, if the employer does not make an entry when employees take a lunch (which is not required if operations cease during the meal period), meeting your burden of proof does not require employee testimony. Assuming the restaurant conforms to the same practice (not recording lunches) at all its locations, obtaining non-merits based certification has come within reach because even a random sampling of time-keeping records will unequivocally show whether employees took a lunch. It will be difficult, but not impossible, for the defendant to overcome the presumption that a meal period was not provided.

With respect to deducting cash shortages from wages, some restaurants will actually record the deductions on the employees' wage statements. Under these circumstances (similar to

meal period violations), written discovery should reveal whether a certifiable common practice predominates.

D. Proving Other Violations (Such as Unpaid Hours Worked) May Require Pre-Certification Communications With Employees

The most difficult violation to prove is "off the clock" or unpaid hours worked. The only way to establish that employees work unpaid hours is to speak with them. Unlike the proverbial overpriced can of soup whose price is a constant, wage-and-hour class actions often lack a consistent singular "pattern and practice" when the defendant operates a chain. This is due to the possibility that practices can vary from location to location.

For example, in *Sav-On v. Superior Court (Rocher)*, 97 Cal. App. 4th 1070, 118 Cal. Rptr. 2d 792, *review granted, Sav-On v. S.C.*, 54 P.3d 260, 125 Cal. Rptr. 2d 439 (2002), the defendant defeated certification on appeal by establishing that the putative class lacked common issues of fact. It did so by submitting conflicting declarations regarding the similarities and disparities in job duties of employees classified as exempt managers throughout the *Sav-On* drugstore chain. The employer produced 51 declarations stating that exempt managers performed non-exempt duties more than 50% of the time. Thus, according to the employer, managers were properly classified and overtime was not owed. Further, the employer argued that common issues of fact did not predominate due to the different size of each store, varying sales volume, employee make up and size, variance in store management style, and a host of other variable factors. The court of appeals agreed with the defendant and overturned the trial court's certification of the class.

However, because the employer-employee relationship inherently retains an element of subtle coercion, the credibility of employer-motivated declarations deserves attention. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). The Ninth Circuit expressed it best when stating, "[t]he danger of witness intimidation is particularly acute with respect to current employees…. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted." *NLRB v. Maxwell*, 637 F.2d 698, 702 (9th Cir.1981). Defendant-motivated declarations tend to be viewed with distrust, but declarations produced by prospective class members (employees) will carry great weight. Some defendants now produce favorable declarations administered by a third party in attempt to bolster the declarations and the methodology by which they were obtained. Under these circumstances, plaintiffs' counsel should alert the court about employees who refuse to offer testimony and who express fear of retaliation (with a protective order if necessary) because refusal to testify can illustrate the chilling effect the defendant holds over the workforce.

This is a fight that class counsel is obligated to wage. California law makes clear that class counsel and the named plaintiffs owe a fiduciary duty to the unnamed class members. *La Sala v. American Sav. & Loan Assn.*, 5 Cal. 3d 864, 97 Cal. Rptr. 849 (1971). The duty is general enough to require counsel to investigate the accuracy of such declarations and to prosecute the class action for the benefit of the un-named class members. Therefore, when alleging an "off-the-clock" claim, counsel must investigate and communicate with a representative sampling of employees at all or most locations.

E. ***Parris*** **and Pre-Certification Communications with Potential Class Members**

Prior to May 29, 2003, *Atari Inc. v. Superior Court*, 166 Cal. App. 3d 867, 212 Cal. Rptr. 773 (1986), significantly restricted pre-certification notices to putative class members. Under *Atari*, notices were permissible only if the trial court first examined their content and determined that the notices contained no specific improprieties. Therefore, a motion had to be filed which contained the notice and alerted the defense. The element of surprise was lost under *Atari*.

On May 29, 2003, the 2nd District Court of Appeal, in *Parris v. Superior Court*, 109 Cal. App. 4th 285, 135 Cal. Rptr. 2d 90 (2003), ruled that pre-certification communications with potential class members constitutes speech protected by the First Amendment. Therefore, even when class counsel wishes to send written pre-certification notices, prior court approval is not necessary.

The import of *Parris* is worth reviewing. The class representatives in *Parris* moved for orders permitting pre-certification notice to potential class members and for approval of the notice and method of dissemination. Concurrently, they moved to compel responses to interrogatories seeking names and addresses of current and former Lowe's employees, the potential class members to receive the notice. The purpose of the motion was to enable the plaintiffs, with the court's approval, to contact employees and gather corroborating information to confirm that other employees were affected by Lowe's "off the clock" practices, thereby establishing the uniformity sufficient to support a class-certification motion. The trial court denied the motions.

The Court of Appeal held that pre-certification communication with potential class members is speech protected by the First Amendment and the California Constitution, requiring no judicial approval. *Parris v. Superior Court*, 109 Cal. App. 4th 285 at 290. Consequently, the motion to approve the notice of the action was unnecessary and should have been denied on that ground. *Id. Parris* held that a court may impose restrictions on such communications only when the opposing party seeks an injunction, protective order or other relief and demonstrates "direct, immediate, and irreparable harm." **Id. at 300.** Nonspecific assertions that communications are "unfair," "inaccurate" or "misleading" are insufficient to justify limitations on protected speech in the form of a prior restraint. **Id.**

This is an important holding because, in the authors' experience, almost all motions opposing the discovery of names and addresses and pre-certification notices rely on the conclusory assertions disdained by *Parris. Parris* also provides, for the first time, direct guidelines for courts to follow in ruling on motions to compel pre-certification production of names and addresses of potential class members. This information often is the primary means of identifying and contacting absent class members to establish that the violation or practice at issue is affecting others on a widespread basis.

The *Parris* court also noted that "[a]lthough parties are free to communicate with potential class members before class certification, when they seek to enlist the aid of the court in doing so, it is appropriate for the court to consider 'the possibility of abuses in class action litigation.'" **Id. citing** *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) at p. 104, 101 S.Ct. 2193. *Parris* did not delineate any specific "abuses." It did, however, cite *Gulf Oil Co. v. Bernard*,

supra, which quoted from *Waldo v. Lakeshore Estates Inc.*, 433 F. Supp. 782 (E.D. La. 1977). *Waldo* describes abuses such as "heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding." The *Gulf Oil* court neglected to define "barratry," but the American Heritage Dictionary of the English Language (4th ed. 2000), defines it as "the offense of persistently instigating lawsuits, typically groundless ones."

As a practical matter, *Parris* reasonably facilitates the class-action process by distinguishing between efforts to drum-up participation in a lawsuit as opposed to compiling an accurate history of employment practices or other experiential information. It confirms the long-held notion that the parties have an absolute right to discovery prior to class certification. *See also Carabini v. Superior Court* (*King*), 26 Cal. App. 4th 239, 31 Cal. Rptr. 2d 520 (1994).

It is challenging for a party moving for class certification to document class-wide common conduct by locating and verifying the experiences of others who similarly are affected. The *Parris* right to communicate without prior approval provides counsel ready access to proposed class members for the purposes of collecting the evidence necessary either to support a class certification motion or to determine that disparities among potential class members indicate that common questions do not predominate.

In order to obtain certification to proceed with a wage-and-hour claim on behalf of employees of all stores, plaintiffs must demonstrate that the employees are, or have been, similarly treated companywide. Motions to compel production of names and addresses often are the key to this process. Once the plaintiffs have obtained contact information – through

cooperative discovery, by an order compelling production of names, addresses and telephone numbers, or through independent means – they can support a certification motion with declarations or deposition testimony documenting the employer's practices at other stores.

Even with this contact information, establishing that common issues of fact and law prevail from location to location can be problematic. For example, how does counsel know that the violations that his client who works in Orange County alleges also occur in a San Francisco location? One method is to hire a private investigator. The propriety of employing private investigators to interview potential class members presents a variety of obstacles. First, some defendants employ thousands of employees making an investigation impracticable, and the very size of the workforce might make a random sampling produce statistically insignificant results. Second, employees often work in unreachable workplaces, such as in a factory with blocked access. Third, even when employees are reachable (such as in a restaurant) they are too busy or unwilling to discuss violations and often are loyal to the employer. Fourth, in a misclassified exempt executive class action, counsel must tread carefully to avoid defense claims of improper communications under Rule of Professional Conduct 2-100. *But see* S*nider v. Superior Court (Quantum Productions Inc.)*, 113 Cal. App. 4th 1187, 7 Cal. Rptr. 3d 119 (2003). Fifth, the communication must not run afoul of *Parris* and California Rule of Professional Conduct 1-400 ("Rule 1-400"). Sixth, once the defense discovers class counsel's efforts, a motion for protective order is almost certain to follow as well as accusations of solicitation.

As a result of these, and other strategic and practical risks, sometimes it is best to communicate with potential class members with permission of the court and through a pre-certification notice. If there is any doubt as to the propriety of the communication, an ethics

expert should be retained, or at least consulted, to review and amend the communication to conform to *Parris* and Rule 1-400. Although Rule 1-400 excludes mailed notices and those protected from abridgement by the U.S. and California Constitutions, judges tend to be protective of the privacy rights of employees and view any pre-certification notice with distrust.

A pre-certification notice should describe in neutral terms that a class action has been filed, but not certified, and that potential class members may call your office with information regarding alleged violations. The notice can also be used to replace a class representative who, for whatever reason, is found to be inadequate. However, a pre-certification notice seeking to replace the named representative will draw closer scrutiny.

F. Conclusion

Parris' requirement that the defendant demonstrate "direct, immediate, and irreparable harm" to support a protective order should prevent defendants from disrupting investigative efforts absent true circumstances justifying an interference with free speech. Further, *Parris*' lifting of restrictions on pre-certification communications makes it easier to locate potential class members through dissemination of a pre-certification notice of a pending action, thus obtaining vital information supporting class certification. This is essential, particularly in light of the Supreme Court's recent ruling *Sav-On*.[1]

Each wage-and-hour class action presents its own unique set of challenges. When faced with employer-friendly declarations and the need to prove class allegations through the

[1] On August 24, 2004 the Supreme Court ruled on Sav-On. The Sav-On Court reconfirms the courts' discretion in making certification decisions based on an evidentiary record containing facts and circumstance of class members' job duties and underscores the need for pre-certification communication with class member prior to moving for certification. *Sav-On Drug Stores, Inc. v. Superior Court,* 118 Cal.Rptr.2d 792, 2 Cal. Daily Op. Serv. 3470, 2002 Daily Journal D.A.R. 4347 (Cal.App. 2 Dist. Apr 04, 2002) (NO. B152628)

testimony of current and former employees, class counsel should wield *Parris* and use pre-certification communications to overcome the employer's coerce-induced testimony.

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