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Ninth Circuit Permits Use of "Inadmissible" Expert Testimony for Class Certification Purposes

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The U.S. Court of Appeals for the Ninth Circuit just denied a request to review en banc a panel ruling that authorizes trial courts to consider evidence that would be inadmissible at trial when deciding whether a class may be certified (*Sali v. Corona Regional Medical Center* (D.C. No. 5:14-cv-00985-PSG-JPR)). The decision was filed on Thursday, November 1 over a sharply critical dissenting opinion authored by Judge Carlos Bea. Bea, who was joined by four of his colleagues, wrote that the majority's decision "involves a question of exceptional importance and is plainly wrong."

In *Sali*, the plaintiffs sought to represent a series of seven classes of nurses claiming the Medical Center's time-rounding policy robbed them of several minutes of wages each time they worked. The plaintiffs' attempt to satisfy the "typicality" element of class certification under California state law was supported by a data analysis prepared by a paralegal of the law firm that brought the claim. The Medical Center argued that the analysis could not be considered by the trial court at the class certification stage because it would not be admissible at trial under the *Daubert* standard for expert analyses. The Federal District Court agreed, rejected the paralegal's analysis as inadmissible evidence and denied the motion for class certification.

Plaintiffs' appeal was considered by a Ninth Circuit panel, which found that the trial court had erred in declining to consider the paralegal's analysis, reasoning that inadmissibility is not a proper basis to reject evidence at the class certification stage. The Medical Center filed petitions for panel rehearing and for rehearing en banc, which a majority of the panel denied in its November 1 holding.

In his scathing, 13-page dissent, Judge Beas described the panel's holding that expert opinion testimony need not be admissible at the class certification stage as "undermin[ing] the purpose of the class certification proceeding." Judge Beas wrote:

[T]he panel has reduced the requirements of class certification *below* even a pleading standard. It has accepted the undisputedly inadmissible opinion of plaintiffs' *paralegal* – not even that of an attorney who is subject to certain pleading standards – that the plaintiffs have damages typical of the class sought to be certified.

This doesn't pass the straight-face test.

Id. at * 3 (citing Fed. R. Civ. P. 11) (emphasis in original).

The dissent also noted that the panel decision conflicts with decisions of four out of five other Circuit Courts that have considered this issue. The Second, Third, Fifth, and Seventh Circuits have required expert testimony to pass the typical admissibility standards at the class certification stage. Only the Eighth Circuit has held otherwise.

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