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California High Courts Clash Over Statistical Sampling

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It's rare to see the highest state and federal courts in a state clash directly over standards governing a form of expert testimony. Nonetheless, that is the present state of affairs in California as the courts dispute the issue of using statistical sampling to prove liability or damages in class actions.

We have previously written about the California Supreme Court's decision in *Duran v. U.S. Bank N.A.*, 325 P.2d 916 (2014), which sharply criticized one trial court's implementation of statistical sampling to prove liability and damages in an overtime class action as profoundly flawed. While the California Supreme Court declined to hold that statistical sampling could never be used to prove liability in a class action, the court appeared to erect higher barriers to class certification based on statistical sampling.

Less than four months later, on September 3, 2014, the Ninth Circuit issued its decision in *Jimenez v. Allstate Insurance Company*, 765 F.3d 1161 (9th Cir. 2014), affirming a ruling by the United States District Court for the Central District of California and granting class certification in an overtime case. Among other things, the lower court had held that class treatment was a superior form of adjudication because "statistical sampling of class members could accurately and efficiently resolve the question of liability."

On appeal, Allstate argued that the use of statistical sampling violated its due process rights under recent United States Supreme Court decisions by limiting Allstate's ability to raise affirmative defenses at trial with respect to whether (i) class members work only de minimis amounts of overtime off-the-clock, (ii) knowledge of any substantial off-the-clock overtime could reasonably be imputed to managers, and (iii) class members unreasonably failed to pursue compensation for off-the-clock overtime. As readers may recall, one of the issues on appeal in Duran was that the trial court barred the defendant from offering evidence supporting its affirmative defenses. Things are starting to sound familiar…

The Ninth Circuit rejected Allstate's arguments, holding that "statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." Thus, to the extent that the lower court rejected the plaintiff's motion to use statistical sampling and representative testimony during the damages phase, it preserved Allstate's right to raise any affirmative defenses it might have had at that point.

Clearly sensitive to the higher bar against statistical sampling erected by the California Supreme

Court inDuran, the Ninth Circuit sought to distinguish that decision as narrowly as the California Supreme Court did based on the flaws with the trial court's unusual implementation of statistical sampling. ("A sample of 20 names [was] drawn from a hat without evidence showing that the number of names chosen or the method of selection would produce a result that could be 'fairly extrapolated to the entire class.'") The Ninth Circuit further observed that the California Supreme Court did not categorically reject the use of statistical sampling to prove liability in class actions.

Be that as it may, class action lawyers on the defense side have fairly universally hailed Duran and pannedJimenez, thus indicating that they're reading Duran's application more broadly than the Ninth Circuit was willing to concede. It appears there may yet be another Supreme Court decision on the subject of statistical sampling and representative testimony to provide further clarity on the boundaries of what comports with the due process rights of defendants.

Can you reconcile the two decisions? If not, which one do you feel was wrongly decided and why?

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