Evidentiary Extrapolations in California Class Actions:

Guidance from Brinker

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When the Supreme Court issued its opinion in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, many class action attorneys anticipated a landmark ruling on the use of evidentiary extrapolations — from representative testimony, expert survey evidence, and/or expert statistical sampling evidence — as a method of common proof in class litigation.

The expectation was not unjustified. The plaintiff workers had proffered such evidence as a means of adjudicating certain of their meal period, rest break, and off-the-clock theories class-wide, and as a way to manage any individualized questions that might arise in litigating those theories. The Court of Appeal addressed the issue in its opinion (holding that any expert survey and statistical evidence that plaintiffs could present

would be insufficient as a matter of law). The parties' merits briefs covered it in depth, and the press had taken note. (*E.g.*, Ernde, *Sleeper issue buried in Brinker: Plaintiffs' lawyers seek to use statistics and surveys to prove claims*, S.F. Daily Journal (Oct. 17, 2011).)

Interest in the use of evidentiary extrapolations had been further heightened by *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, in which the U.S. Supreme Court examined this type of evidence in the context of Federal Rule of Civil Procedure 23, and by the Court of Appeal's opinion in *Duran v. U.S. Bank National Association* (2012) 203 Cal.App.4th 212, review granted May 16, 2012, S200923, which suggested that such extrapolations may be permissible for determining class-wide damages but not for establishing class-wide liability.

While *Brinker* does not address the issue in depth, the majority and concurring opinions do provide some useful guidance for future cases.

Justice Werdegar's — Concurrence and the — Importance of Manageability

Justice Werdegar wrote the majority opinion in *Brinker*. She is also the author of *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, a leading decision on predominance under Code of Civil Procedure section 382. The first place to look for guidance on evidentiary extrapolations is her concurring opinion in *Brinker*, which was joined by Justice Liu.

As explained in the majority opinion, predominance hinges on "whether the elements necessary to establish liability are susceptible of common proof or, *if not*, whether there are *ways to manage effectively proof of any elements that may require individualized evidence.*" (*Brinker, supra*, 53 Cal.4th at p. 1024, italics added, citing *Sav-on, supra*, 34 Cal.4th at p. 334.) Put another way, even if some elements of a claim cannot be established with common proof, and thus require individualized evidence, class certification can nonetheless be granted. The relevant question from a predominance standpoint is whether the individualized evidence can be *managed*. (See *ibid.*; see also *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1105-1106 (maj. opn. of Werdegar, J.) [certification of any type of claim is potentially proper, "so long as any individual issues the claims present are manageable"].)

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One way of making individualized questions manageable is to extrapolate class-wide conclusions from evidence found to be representative of members of the class. Evidentiary extrapolations can be drawn from the testimony of a subset of class members, a formal survey devised and conducted by a qualified expert, statistical sampling of records, and the like. In her concurring opinion, Justice Werdegar emphasized the Supreme Court's "historic endorsement of a variety of methods that render collective actions judicially manageable." (*Brinker, supra*, 53 Cal.4th at p. 1052 (conc. opn. of Werdegar, J.).) These methods are core to the class action process because they "enable individual claims that might otherwise go unpursued to be vindicated," and "avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts." (*Id.* at p. 1054.)

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In particular, in class litigation, "[r]epresentative testimony, surveys, and statistical analysis all are available as tools" to make individualized questions manageable and common questions predominant. (*Brinker, supra*, 53 Cal.4th at p. 1054 (conc. opn. of Werdegar, J.), citing *Sav-on, supra*, 34 Cal.4th at p. 333 & fn.6; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 749-755; *Dilts v. Penske Logistics, LLC* (S.D. Cal. 2010) 267 F.R.D. 625, 638.) Justice Werdegar described these as "settled principles" of California class action jurisprudence. (*Id.* at p. 1055.)

Justice Werdegar's choice of supporting citations is significant. In *Bell*, expert statistical extrapolations were found admissible and probative to establish the employer's liability for unpaid overtime wages and the amount of wages owed. (*Bell, supra*, 115 Cal.App.4th at pp. 749-755; see *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1208 [employee misclassification, standing alone, is not unlawful; liability attaches upon employer's failure to pay earned overtime].) *Dilts* held explicitly that "[a]s to liability, the use of statistical sampling, at least when paired with persuasive direct evidence, is an acceptable method of proof in a class action." (*Dilts, supra*, 267 F.R.D. at p. 638.)

The same holds true when it comes to affirmative defenses that may raise individualized issues. Such affirmative defenses "pose no per se bar" to class certification. (*Brinker, supra*, 53 Cal.4th at pp. 1053-1054 (conc. opn. of Werdegar, J.), citing *Sav-on*, 34

Cal.4th at pp. 334-338; *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1235.) Again, class certification "will hinge on the *manageability* of any individual issues." (*Id.* at p. 1054, emphasis added.) Defenses that "hinge liability *vel non* on consideration of numerous intricately detailed factual questions" are distinct from, and will be managed differently than, defenses that "raise only one or a few questions and that operate not to extinguish the defendant's liability but only to diminish the amount of a given plaintiff's recovery." (*Ibid.*)

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Accordingly, there can be no doubt that Justice Werdegar — author of five of the Supreme Court's nine leading class certification opinions since 2000 — accepts what the Supreme Court already recognized in Sav-on: that evidentiary extrapolations from representative evidence, including expert survey and statistical evidence, may be freely used as a method of common proof and as a way to manage any individualized questions that the claims or substantial defenses may present in a class action.

Signposts in the Majority Opinion

The majority opinion, likewise, contains a series of signposts on the kinds of evidentiary extrapolations that are permissible in California class actions.

The workers in *Brinker* had identified several distinct theories of liability against the employer for its rest-break violations, one of which was that, due to understaffing and resultant workload pressures, the employer systematically failed to meaningfully "authorize and permit" its workers to take rest breaks, in violation of the Industrial Welfare Commission's Wage Orders. (See *Brinker, supra*, 53 Cal.4th at pp. 1018-1020.) Because missed rest breaks are not recorded, the workers had proposed using a survey designed and conducted by a qualified expert, and had retained a statistician to analyze the survey results and extrapolate those results across the class of restaurant workers. This evidence, accompanied by representative testimony of a selected group of class members, would establish the frequency and number of missed breaks, and coupled with other common evidence of the employer's policies and practices, would thereby establish liability and damages on a class-wide basis. The workers proffered this evidence in support of their class certification motion under the authority of *Sav-on*.

The trial court implicitly accepted the proffer, and granted class certification of the rest break claim as a whole. The Supreme

Court affirmed that ruling in toto, without drawing a distinction between violations. The record contained evidence of a common, uniform rest break policy under which workers on an eight-hour shift would be allowed one, rather than two, rest breaks, and that evidence, the Court determined, was sufficient to affirm the order certifying the entire rest break claim for class treatment. (See *Brinker, supra*, 53 Cal.4th at p. 1033.)

> *'For unknown reasons, the Court did not mention or consider the proffered expert testimony, but the opinion nonetheless provides guidance for those seeking to establish such a "systematic company policy" in future cases.'*

In so holding, the Supreme Court declared that "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the [law] are of the sort routinely, and properly, found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at p. 1033 (maj. opn. of Werdegar, J.), citing *Jaimez v. DAIHOS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299-1305; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal. App.4th 1524, 1533-1538; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal. App.4th 1193, 1205-1208.)

Although the court did not mention the proffered statistical and survey evidence, Justice Werdegar's selection of case cites is once again significant. In *Jaimez, Ghazaryan*, and *Bufil*, the appellate courts all reversed orders denying class certification. In *Jaimez*, in particular, the court acknowledged the propriety of evidentiary extrapolations in class cases, drawn both from representative testimony and from expert sampling: "[Plaintiffs] could attest to the typical amount of overtime time they worked each day, *even in the absence of time records*.... The possible use of survey evidence or testimony from a random and representative sampling of class members can certainly be explored to facilitate the necessary calculations." (*Jaimez, supra*, 181 Cal.App.4th at pp. 1302-1303, italics added, cited with approval in *Brinker, supra*, 53 Cal.4th at p. 1033.)

The workers in *Brinker* also claimed damages for off-the-clock work, arguing that the employer unlawfully required employees to work while clocked out for meal periods. (*Brinker, supra*, 53 Cal.4th at pp. 1019, 1051.) They once again proffered expert survey and statistical evidence as a way of establishing the frequency of such work. The trial court certified this claim for class treatment, but the Supreme Court reversed, finding the workers had not "presented substantial evidence of a systematic company policy to pressure or require employees to work off the clock." (*Id.* at p. 1051.) The workers' theory that they were in fact clocked out "cre-

ates a presumption they are doing no work," and "[n]othing before the trial court demonstrated how this [presumption] could be [rebutted] through common proof, in the absence of evidence of a uniform policy or practice." (*Id.* at pp. 1051-1052.)

For unknown reasons, the Court did not mention or consider the proffered expert testimony, but the opinion nonetheless provides guidance for those seeking to establish such a "systematic company policy" in future cases.

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The opinion highlights three cases against Wal-Mart "in which off-the-clock classes [were] certified," *Salvas v. Wal-Mart Stores, Inc.* (Mass. 2008) 893 N.E.2d 1187, 1210-11; *Hale v. Wal-Mart Stores, Inc.* (Mo. App. 2007) 231 S.W.3d 215, 220, 225-28; and *Iliadis v. Wal-Mart Stores, Inc.* (N.J. 2007) 922 A.2d 710, 715-16, 723-24. (*Brinker, supra*, 53 Cal.4th at p. 1051.) In each of those cases, the appellate courts either affirmed class certification (*Hale*) or reversed denial of certification (*Salvas* and *Iliadis*); the *Brinker* opinion conspicuously did *not* cite the cases against Wal-Mart (relied on by the employer) in which class certification was denied. In *Hale*, particularly, the court held that "a random sampling of the class" coupled with "statistical analysis" of the sample results was a permissible way to manage "individual issues including injury in fact and proximate cause" in a classwide trial. (*Hale, supra*, 231 S.W.3d at p. 228.)

The types of evidence considered and found sufficient in *Hale, Salvas*, and *Iliadis*, as well as in *Jaimez, Ghazarian*, and *Bufil*, may provide useful guidance for litigants in future proceedings given their favorable citation in *Brinker*.

While the Supreme Court's *Brinker* decision may not have been the watershed decision many anticipated, the opinion nonetheless provides helpful guidance on the use of evidentiary extrapolations in class litigation. Further guidance is in the offing. The Supreme Court has just granted review in *Duran*, in which the central issue, according to the docket, is "the use of representative testimony and statistical evidence at trial of a [wage and hour] class action." (*Duran, supra*, review granted May 16, 2012; S200923.)

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