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By Laura Hautala
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Finally, clarity after years of waiting. At least, that's what employment attorneys thought when the state Supreme Court ruled in 2012 that employers are under no obligation to require their workers take legally mandated lunch and rest breaks. But just how much each side has won or lost in the much-watched case has been at issue ever since.

Plaintiffs' lawyers had pushed for strict requirements on companies. But defense attorneys argued employers couldn't be forced to make sure workers took each and every meal and rest break.

Now, almost 10 years since the original class action was filed in San Diego County Superior Court against Brinker International Inc., the parent company of Chili's and other restaurants, lawyers are still seeking insight into the issue by watching how the Court of Appeals applies the Supreme Court decision, and whether the state Supreme Court reviews or depublishes those appellate opinions.

So far, the majority of published appellate decisions have reversed

lower courts that threw out class certification or upheld class certification. As a result, plaintiffs' attorneys such as Kimberly Kralowec of The Kralowec Law Group say the pendulum of appellate decisions has swung in their clients' direction.

Kralowec argued *Brinker* before the Court of Appeal and shared arguments before the state Supreme Court with Michael Rubin of Alshuler Berzon LLP.

She said appellate decisions favor class certification if there is a blanket policy on employee breaks that doesn't square with the law. "It doesn't matter that it may have been applied differently, affected class members differently, or not

affected some plaintiffs at all," she said.

In the raft of published appellate decisions that apply *Brinker*, six favored class certification, and two did not. The state Supreme Court denied review on all of them. What's more, the high court depublished three appellate cases that favored the defense in early 2013.

"When I read the [*Brinker*] decision, I was delighted, and I really expected it to play out the way it has," said L. Tracee Lorens, who filed the *Brinker* case on behalf of restaurant workers in 2004.

The high court's decision sent the workers' case against their employer back to the trial court. The

Class actions alive after *Brinker* decision

Continued from page 1

restaurant workers won class certification in September. Lorenz is still involved, but handed the case off to Debra Hurst, another plaintiffs' attorney in San Diego, after winning class certification.

However, plaintiffs' attorney Michael Singer said the recent appellate victories come with caveats. The successful cases involved companies that enforced break policies that were plainly illegal, or that didn't make the argument that each experience varied too greatly to certify them all as a class.

"*Brinker* gave us some instructions on what is a certifiable claim and what is not a certifiable claim," he said.

Singer added that if a trial court certifies a meal and rest break class, it's because the judge has thought about whether trial makes practical sense.

"A trial judge is the one that has to think to herself, can I manage this?" he said. Particularly important is whether plaintiffs can prove liability and

damages for all the absent class members. If the judge greenlights a trial, "the Court of Appeal is unlikely to reverse that."

Felix Shafir, an appellate expert at Horvitz & Levy LLP in Los Angeles, agreed that *Brinker* supports class certification when meal and rest break laws are being violated the same way across a whole class.

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This can be seen in the two cases that did not favor class certification, Shafir said, in which the alleged violations varied too much among employees.

"The variations are so troubling that the courts won't allow class certification," he said.

Paul W. Cane, an employer-side attorney with Paul Hastings LLP, said some of the recent appellate decisions are worrisome for multiple reasons.

"Some courts are glossing over the fact that members of the putative class are not similarly situated," he said. "If some class members have valid claims and others don't, the

class should not be certified."

What's more, he said, some courts were willing to certify a class even when the plaintiffs' attorneys used suspect legal theories in their arguments. That approach defers arguments against the legal theories

until summary judgment or trial.

Cane echoed the complaints of many defense attorneys who say class actions deprive them of defenses they could apply individually to employees.

Indeed, these are the very issues that prompted the U.S. Supreme Court's landmark decisions in *Wal-Mart v. Dukes* and *Comcast v. Behrend*, both of which dealt with preserving individual defenses against class claims.

Shafir, the appellate expert, predicted that if courts in the state Court of Appeal overlook variation in classes too much, their rulings might run afoul of *Dukes* and *Comcast* in an appeal to the U.S. Supreme Court.

Granting class certification without attending to such problems in a plaintiffs' case first is unfair to employers, Cane said.

"This puts compelling pressure on the employer to settle even cases that the employer eventually would win."

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