

in this issue:

AUGUST 2004

The California Supreme Court recently held that the *Sav-on* trial court did not abuse its discretion in certifying a class action brought by managers and assistant managers of the drug retailer. This decision is sure to cause a major ripple effect across the state, and is likely to prompt a new and devastating wave of wage and hour class action litigation.

California Supreme Court Upholds Grant of Class Certification in Wage and Hour Class Action Case: *Sav-on Drug Stores, Inc. v. Superior Court*

By Rod Fliegel and Traci Beach

California will likely remain a hotbed of class action litigation against employers in light of the California Supreme Court's unanimous opinion in *Sav-on Drug Stores, Inc. v. Superior Court (Rocher)*, S106718, issued on August 26, 2004. The Supreme Court considered whether the trial court abused its substantial discretion in certifying as a class action a suit for the recovery of alleged unpaid overtime compensation due to 600 to 1,400 of *Sav-on Drug Stores'* "Operations Managers" ("OMs") and "Assistant Managers" ("AMs") in California. The Court held that the trial court did not abuse its discretion and reversed the Court of Appeal's decision to the contrary.

This decision will have widespread ramifications for employers in California and may be discouraging for employers on its face. However, there are several important limitations in the decision.

Factual Background

Plaintiffs Robert Rocher and Connie Dahlin sued *Sav-on Drug Stores, Inc.*, on behalf of themselves "and others similarly situated," alleging, among other things, that *Sav-on* misclassified its OMs and AMs as exempt from California's overtime laws. The lawsuit demanded alleged unpaid overtime wages for the Plaintiffs and putative class members.

Trial Court's Decision

In support of their motion to certify the lawsuit as a class action, Plaintiffs argued that class members had, on the basis of their titles and job descriptions, been misclassified as exempt employees. According to Plaintiffs, the OMs and AMs were non-managerial, non-exempt positions under California law. Plaintiffs argued, moreover, that *Sav-on's* store operations were "standardized," and thus, the duties and responsibilities of the OMs and AMs were similar in critical respects from region to region, area to area, and store to store. Plaintiffs claimed that class members generally performed non-exempt work in excess of 50% of the time in their workday, and their workday routinely included work in excess of eight hours per day and/or 40 hours per week.

Plaintiffs' evidence was fairly limited. It consisted of job descriptions, *Sav-on's* form for conducting performance reviews of "management associates," *Sav-on's* memoranda detailing scheduling, compensation and training programs for AMs and OMs, and the declarations of two AMs, two OMs and two general managers.

In opposing certification, *Sav-on* argued that whether any individual member of the class is exempt or non-exempt depends on which tasks that person *actually performed* and the amount of time he or she *actually spent* on those tasks.

These tasks and amounts of time, Sav-on contended, varied significantly from store to store and individual to individual, based on several factors, including store location and size, physical layout, sales volume, hours of operation, management structure and style, experience level of managers, and number of hourly employees requiring supervision. Accordingly, no meaningful generalizations could be made about the employment circumstances concerning the AMs and OMs. Sav-on's evidence included the declaration of a human resources manager describing Sav-on's stores, its written policies and procedures, and declarations from over 50 current AMs and OMs describing their work.

Weighing the evidence, the trial court concluded that Plaintiffs had established by a preponderance of the evidence that the class action proceeding was superior to alternate means for a fair and efficient adjudication of the litigation. The trial court judge placed particular emphasis on Plaintiffs' evidence of a class-wide policy that applied across the board to all Sav-on stores.

Court of Appeal's Decision

Sav-on sought a writ of mandate commanding the trial court to vacate its order granting certification and enter a new order denying class certification. Presiding Justice Charles Vogel, in an unpublished opinion, agreed with Sav-on that class action treatment was inappropriate because the proper characterization of each affected employee as exempt or non-exempt would depend on facts specific to that person.

The Court of Appeal stated: "The fact that defendant has a common policy of treating all OMs and AMs as exempt does not necessarily mean the common policy, when challenged in court, is either right as to all members of the class or wrong as to all members of the class." The Court of Appeal cited numerous declarations

submitted by Sav-on from class members, which the Court of Appeal felt showed substantial variances in actual duties. Under the requirements of the Industrial Welfare Commission, the Court noted that a worker in the mercantile industry is exempt from the overtime laws if more than one half of the employee's work time is spent on tasks that are intellectual, managerial, or creative and which require the exercise of discretion and independent judgment.

The Court of Appeal concluded that the evidence submitted by Sav-on in the trial court showed that its stores varied greatly in size, location, sales volume, hours of operation, and number of employees. The Court of Appeal agreed that these variations could affect the classification of employees because in small stores managers spend more time on non-managerial duties, whereas in stores with many employees, managers spend a great deal more time interviewing, hiring, supervising and training. The Court of Appeal concluded that the evidence submitted by Plaintiffs showed that the managers did perform some "mundane" work, but did not establish that those experiences were common to all OMs or AMs. Accordingly, the Court of Appeal issued a writ to the trial court to vacate the class certification order.

California Supreme Court's Decision

The Supreme Court's Opinion Was Driven by Extreme Deference to the Trial Court

The main issue before the Court was whether the trial court "abused its discretion" in certifying the proposed class. The Court emphasized this highly deferential standard throughout its opinion. Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, the Court explained, they are to be afforded great discretion in granting or denying certification. Where a certification

order turns on inferences to be drawn from the facts, the Court continued, the reviewing court has no authority to substitute its decision for that of the trial court. Moreover, the Supreme Court was willing to affirm the trial court's decision because it could not say that the trial court's finding was "irrational." As long as a "reasonable court" could conclude that Plaintiffs' theory was viable, the trial court's determination could not be disturbed on appeal. The Court of Appeal erred to the extent it engaged in any "reweighing" of the evidence presented to the trial court.

The Supreme Court did not express any opinion regarding the credibility of the evidence. Rather, the Court deferred to the trial court on that issue stating, "We need not conclude that plaintiffs' evidence is compelling, or even that the trial court would have abused its discretion if it had credited defendant's evidence instead."

The Supreme Court Emphasized the "Substantial Evidence" Test

According to the opinion, as long as there is "substantial evidence" to support a trial court's decision on class certification, it must be upheld. The reviewing court is not free to reevaluate or reweigh the evidence. The only issue is whether the evidence is "substantial."

In the trial court, Sav-on submitted declarations from more than 50 current employees describing their work. Apparently It was of no significance to the Court that that evidence was "disputed" so long as it was "substantial." In an unfortunate misstep, Sav-on conceded that one declaration described a Sav-on employee's duties as an AM in a manner that might permit certification had Plaintiffs marshaled more such declarations. The Supreme Court summarily rejected Sav-on's argument. According to the Supreme Court, evidence of even one credible witness "is sufficient for proof of any fact."

Manageability of the Case as a Class Action and Judicial Economy were Important Considerations to the Supreme Court

Notions of judicial economy have been a paramount motivation for the certifications of class actions. Certainly the Supreme Court did not pass up the opportunity to express its unequivocal support for that notion here. Class action treatment is proper, in part, where maintenance of a class action would be “advantageous to the judicial process and to the litigants.” According to the Supreme Court, the relevant comparison lies between the costs and benefits of adjudicating the plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions – *not* between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceedings whatsoever. The Supreme Court expressed concern that if this case was not tried as a class action, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony, resulting in a multiplicity of trials conducted at enormous expense.

Throughout its opinion, the Supreme Court also repeatedly emphasized the “manageability” of the case as a class action. Based on the nature of the dispute and the record before it, the Supreme Court concluded that the trial court was acting well within its discretion to determine that case could be managed as a class action. Although the case involved a relatively large class of 600 to 1,400 OMs and AMs, the Supreme Court agreed with the trial court that managing the case was not the “daunting task Sav-on sought to portray.” According to the Supreme Court, individual issues may not render class certification inappropriate so long as the trial court can “effectively” manage such issues.

It should be noted, however, that driving

this result was in part what the Supreme Court perceived to be overwhelming “standardization” of operations and the job duties of the OMs and AMs. In fact, more than 10 times in its opinion, the Supreme Court referred to “operational standardization” and/or “uniform policies and practices” at Sav-on which enabled the trial court to conclude that common issues predominated and that common evidence could be presented at trial.

For example, the Supreme Court was troubled that titles and job descriptions were doled out by Sav-on without reference to the actual work performed by its managers. Particularly, the opinion expressed concern that employers would make employees exempt from overtime “solely by fashioning an idealized job description that had little basis in reality.” Here, the Supreme Court was persuaded that Sav-on’s use of standardized job descriptions was illustrative of its potential overall misclassification of its OMs and AMs.

No Good Deed Goes Unpunished

One fact that the Supreme Court held against Sav-on was that in December of 1999, after the litigation started, it voluntarily reclassified all of its AMs from exempt to non-exempt, without changing their job descriptions or duties. Without discussing the principle of “subsequent remedial measures,” a doctrine in California that generally precludes evidence of subsequent remedial measures to prove non-compliance on a prior occasion, the Supreme Court considered this as evidence of Sav-on’s “pattern or practice” of misclassifying its managers. According to the opinion, the trial court “could rationally have regarded the reclassification as common evidence respecting both [Sav-on’s] classification policies and the AMs’ actual status during the relevant period.”

The Supreme Court’s Opinion Has Several Important Limitations

While seemingly sweeping on its face, the case is not unlimited in its scope. The opinion has several key limitations. First, the Court never decided one way or another whether the OMs and AMs were misclassified. The opinion specifically affirms that it was only considering the issue of predominance, *not* the underlying merits of the case.

The Supreme Court looked closely at the record on appeal and was required to view the evidence in the light most favorable to plaintiffs. It *only* upheld the certification of the class in light of this evidence. Of particular importance was the Supreme Court’s concurrence with the trial court that class treatment would be “manageable.” The Supreme Court focused on the widespread “standardization” (which is not present in every case). Moreover, the Supreme Court indicated that even where a class has been certified, but then it becomes apparent that class treatment is not “manageable,” decertification is a proper remedy. The Supreme Court further encouraged trial courts to adopt “innovative procedures” for dealing with class actions. What exactly the Court meant by “innovative procedures” remains to be seen.

Second, the Supreme Court only considered the issue of *commonality*. In order to obtain class certification, there are still other elements a plaintiff must prove about which the Supreme Court was silent. For example, in order to obtain class certification, the class representatives must still prove, by substantial evidence, among other things, that there is an ascertainable class, that the class representatives have claims or defenses typical of the class, and that the class representatives can adequately represent the class. The Supreme Court itself acknowledged in the opinion that commonality is only “one of many relevant considerations.”

Further, the case does not hold that class treatment is appropriate in every wage and

hour case (or any other type of employment case for that matter). The decision addresses only the managerial exemption, and is arguably of limited use in class actions in any other contexts or decided under any other overtime exemption.

Finally, the case is highly deferential to the determinations made by the trial court. In its opinion, the Supreme Court affirmed the very broad discretion of trial courts to determine for themselves based on the record presented whether a class should be certified. In fact, the only place where the Supreme Court departed from the Court of Appeal is where it felt that the Court of Appeal did not afford proper deference to the trial court.

Lessons From Sav-on / Important Points

Several important lessons can be gleaned from the opinion:

- Employers should regularly engage in studies or audits of how their exempt employees spend their time and what tasks they perform.
- Employers should educate their exempt employees about exemptions from overtime and what type of work is exempt and non-exempt under California and federal law. It was significant to the trial court in Sav-on that no training had been provided to its managers.
- Employers must not solely rely on job descriptions or job titles as the full measure of whether employees are exempt.

Full text of the opinion can be found at <http://www.courtinfo.ca.gov>.

Littler Mendelson's class action and wage and hour experts are preparing an essential briefing for all employers on the implications of the Sav-on decision. The focus of these Breakfast Briefings will be

new compliance strategies and innovative litigation defense procedures. Littler Mendelson is preparing a comprehensive analysis of the Sav-on decision in an Employer Insight that will be available shortly.

Rod Fliegel is a shareholder in Littler Mendelson's San Francisco office. Traci Beach is an associate in Littler Mendelson's Los Angeles, California office. If you would like any further information, please contact your Littler attorney at 1.888.Littler, email at info@littler.com, Mr. Fliegel at rfliegel@littler.com or Ms. Beach at tbeach@littler.com.
