Classwide Determinations of Overtime Exemptions: The False Dichotomy Posed by *Sav-On* and a Suggested Solution

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I. Introduction

Collective actions under the Fair Labor Standards Act now exceed by a substantial margin the number of class actions filed in federal court under all the federal antidiscrimination statutes combined.[1] Generally speaking, these cases are of two types. The first are often referred to as "misclassification" cases, in which plaintiffs typically allege that they have been wrongly classified as "exempt" employees, and therefore have been denied overtime pay to which they legally are entitled. The second type are referred to as "off-the-clock" cases. In this category of cases, plaintiffs typically allege that although it is undisputed that they are covered by the overtime provisions of the relevant statute, nevertheless their employer has avoided paying them overtime by having them work "off-the-clock."

"Misclassification" cases also may be divided into two categories, although courts seldom do so expressly. The first category of misclassification cases are those in which the employees' job duties are well-specified and there is no dispute as to how employees in fact perform this work. The primary issue is whether the acknowledged duties and responsibilities the employer assigns to these employees qualifies their job for an exemption under the relevant overtime statute. The second category of cases raises issues that are far less straightforward. In these cases, the employees' job duties themselves are in dispute. Plaintiffs may attempt to draw a distinction between their nominal duties and responsibilities, as specified perhaps in their job descriptions, and the duties and responsibilities they contend actually define the job. These cases question, therefore, not whether the stated job description satisfies the statutory exemption, but whether the job as actually performed qualifies as exempt.

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1. Amy I. Stickel, *FLSA Suits Take Flight*, COUNSEL TO COUNSEL, March 2005, at 17 (citing statistics compiled by LexisNexis Courtlink).

This article is concerned with this last group of cases—those in which the employees' exempt status turns on their actual job duties, which must be gleaned from evidence regarding their actual job performance, rather than from an employer's written job description or a stipulated set of duties and responsibilities. Although both categories of misclassification cases frequently are certified as class actions, this article suggests they raise quite different issues. In particular, we question whether the notion of "virtual representation," which is the cornerstone of a collective or class action,[2] meaningfully can be applied when the class or collective consists of employees who share a job title but differ in their actual performance of their job duties.[3]

These issues recently were considered in a decision by the California Supreme Court, in *Sav-on Drug Stores, Inc. v. Superior Court.*[4] Although that court decided these issues with respect to California procedural rules, its decision is far-reaching. First, the case management issues raised by *Sav-on* are similar to those that arise under the FLSA. Second, the number of wage and hour class actions filed in California may exceed the number of FLSA collective actions filed nationwide. Thus, the court's analysis is likely to reverberate far beyond the state's borders. Therefore, we begin this article by reviewing the facts of that case and the evidence that was before the trial court. We then critically consider the California Supreme Court's decision, and in particular whether, in cases in which the actual job duties and responsibilities are in dispute, the claims of absent class members can be tried "virtually" by the class representatives.

II. Summary of the *Sav-on* Litigation

A. Proceeding in the Trial Court

In April 2000, Plaintiffs Robert Rocher and Connie Dahlin, "on behalf of themselves and others similarly situated," filed suit against Sav-on in Los Angeles County Superior Court.[5] Plaintiffs alleged that Sav-on had misclassified as overtime exempt, and therefore improperly denied overtime, to as many as 1,400 individuals who had worked for Sav-on as operating managers (OMs) and/or assistant managers (AMs)

2. Misclassification cases may be brought under both the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, which provides for an opt-in "collective action" under section 216(b), or one of the many state statutes with procedures corresponding to FED. R. CIV. P. 23. In most respects that are material to this discussion, these procedural distinctions are of little consequence. However, we have endeavored to note instances in which these procedural differences may matter.

3. *See, e.g.*, Wheatley v. Wicomico County, 390 F.3d 328, 332 (4th Cir. 2004) ("plaintiffs present a classic example of how one can have the same title and the same general duties as another employee, and still not meet two textual touchstones of the EPA—equal skills and equal responsibility").

4. 96 P.3d 194 (Cal. 2004).

5. *Id.* at 197.

at one of the company's 300 retail stores in California during the preceding four years.[6]

In fact, Sav-on had classified all of its OMs and AMs as overtime exempt until December 1999, at which time the company reclassified the AMs as nonexempt.[7] This change, which was ultimately used against Sav-on as evidence of wrongdoing, was admittedly made without any revision to either the AMs' job duties or their job descriptions.[8]

In 2001, the plaintiffs filed a motion for class certification on the theory that the OMs and AMs "had, on the basis of their title and job descriptions and without reference to their actual work, uniformly been misclassified by [Sav-on] as exempt employees."[9] Specifically, the plaintiffs alleged that:

> [t]he duties and responsibilities of the salaried Operating Managers and Assistant Managers [were] virtually identical from region to region, area to area, store to store, and, employee to employee. Further, any variations in job activities between the different individuals [were] legally insignificant to the issues presented by [their] action since . . . the class members performed non-exempt work in excess of 50% of the time in their workday. . . .[10]

Finally, the plaintiffs argued that Sav-on's store operations were "standardized" and that class certification was appropriate because the company considered all AMs and OMs, as a class, to be exempt employees.[11] In support of their motion, the plaintiffs submitted relevant job descriptions, some standardized forms Sav-on used to manage the putative class members and the declarations of one AM, one OM, and two general managers.[12]

Sav-on relied upon *Ramirez v. Yosemite Water Co.* for the proposition that whether any member of the alleged class was exempt or nonexempt depended primarily upon the tasks performed and the amount of time spent on those tasks.[13] No generalized conclusion could be reached on these issues, Sav-on contended, because of the considerable variation in the time spent on various tasks by managers in each store, which reflected differences in the store's location, size, physical layout, hours of operation, as well as each manager's previous experience and personal managerial style.[14] In support of its opposition, Sav-

6. *Id.* at 198–99.
7. *Id.* at 201 n.2.
8. Sav-on contended that the AMs were reclassified in order to ensure consistency after the merger of Albertson's and American Stores Company, Sav-on's parent corporation. Prior to the merger, Sav-on had three salaried store-level positions but Albertson's had only two.
9. *Sav-on*, 96 P.3d at 198.
10. *Id.*
11. *Id.*
12. *Id.* at 201.
13. Sav-on v. Rocher, 118 Cal. Rptr. 2d 792, 795 (Cal. Ct. App. 1999).
14. *Id.*

on submitted the declaration of a human resources manager and declarations of fifty-one AMs and OMs, all of whom described the nature of the work they performed, which Sav-on contended described exempt duties.[15]

Ultimately, the trial court agreed with the plaintiffs and certified the case as a class action on the ground that common issues of fact and law predominated and that the class action proceeding was superior to alternate means for a fair and efficient adjudication of the litigation.[16] Sav-on sought review by California's Second District Court of Appeal.[17]

B. Proceeding in the Court of Appeal

On April 4, 2002, the court of appeal ruled that the trial court had abused its discretion in certifying the class.[18] The appellate court concluded that Sav-on "showed that the stores and the circumstances under which the AMs and OMs operate are not identical but rather involve significant variations affecting their tasks and the amounts of time spent on those tasks."[19] Thus, the "evidence relating to the disputed issue in the litigation, whether members of the class spend more than 50 percent of their workweek on nonexempt tasks, would involve separate facts applicable only to each member of the class, rendering a class action inappropriate."[20] While acknowledging that the two AMs who submitted declarations on the plaintiffs' behalf had opined that the AMs at other Sav-on stores uniformly spent the majority of their time on nonexempt tasks, the court concluded those declarations were "not conclusive and [did] not compel upholding the trial court's ruling."[21] In fact, the appellate court concluded that "[p]laintiff's evidence to show that the work [was] so uniform as to justify class action litigation addressed irrelevant issues or was otherwise insubstantial, conclusory, or incredible."[22] The plaintiffs appealed.

C. The California Supreme Court Decision

In its decision, the court concluded that the appellate court had erred by reweighing the evidence submitted to the trial court.[23] While acknowledging that the evidence was disputed as to whether, and to what extent, there was uniformity in the way the class members performed their job duties, the seven justices unanimously concluded that the trial court was entitled to determine which evidence it chose to

15. *Id.*
16. *Id.* at 796.
17. *Id.* at 793.
18. *Id.*
19. *Id.* at 800.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Sav-on*, 96 P.3d at 207.

believe.[24] Thus, the trial court was entitled to credit the two or three declarations the plaintiffs submitted stating that class members' job duties were uniform throughout Sav-on's stores rather than the fifty-one declarations Sav-on submitted that stated otherwise.[25]

In evaluating the appeal, the court opined that the salient issue was "whether *the theory of recovery advanced by the [plaintiffs]*" was, "as an analytical matter, likely to prove amenable to class treatment."[26] Thus, the trial court's ruling could only be disturbed if it would be *irrational* for a court to conclude that, tried on plaintiffs' theory, questions of law or fact common to the class predominate over the questions affecting the individual members.[27] Because the plaintiffs had submitted some evidence "that deliberate misclassification was [Sav-on's] policy and practice" and that "owing in part to operational standardization . . . classification based on job descriptions alone resulted in widespread de facto misclassification," the appellate courts were not free to disturb the trial court's decision to grant certification.[28]

The evidence the plaintiffs submitted to establish that common job duties predominated among the class was as follows: (1) Sav-on relied only on job titles to classify its employees; (2) Sav-on made no attempt to study how the managers spent their time or to train the managers on the differences between exempt and nonexempt work; (3) no class member was ever paid overtime; (4) the policy of classifying the employees as exempt did not vary by store or employee; (5) Sav-on reclassified all its AMs from exempt to nonexempt in December 1999 without changing their job descriptions or duties; (6) the job descriptions were uniform but idealized; (7) Sav-on had no records of class members' actual work activities; (8) at least one declarant stated that standardized store operations forced managers to spend over 50 percent of their time doing the same work as their subordinates; and (9) several of the tasks that the OMs and AMs undertook were nonexempt as a matter of law.[29]

Although acknowledging that Sav-on was entitled to "defend against plaintiffs' complaint by attempting to demonstrate wide variations in the types of stores and, consequently, in the types of activities and amounts of time per workweek the OM's and AM's in those stores spent on different types of activities," and recognizing that individu-

24. *Id.* at 201.

25. *Id.* at 204 ("Evidence of even one credible witness 'is sufficient for proof of any fact.' (Evid. Code, § 411.) And questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve." (Thompson v. City of Long Beach, 259 P.2d 649, 655 (Cal. 1953)).

26. *Id.* at 200.

27. *Id.* at 201.

28. *Id.*

29. *Id.* at 200.

alized damage calculations might be necessary for each claimant, the court nonetheless denied that individual issues would predominate.[30] This was because there appeared to be some agreement between the parties about the universe of tasks the AMs and OMs actually performed.[31] The parties disagreed about which of those tasks were exempt or non-exempt, but the resolution of that dispute could be done on a classwide basis, the court believed, by simply having the trial court "assign each task to one side of the 'ledger' . . ."[32]

Nor was commonality destroyed, the court found, by the fact that the *Ramirez* case requires an examination of how each employee "actually spends his time" and whether the "employee's practice diverges from [the] employer's realistic expectations."[33] The "employer's realistic expectations" and "actual overall requirements of the job" are both susceptible of common proof.[34] More significantly, the court indicated that its

> observation in *Ramirez* that whether an employee is an outside salesperson depends "first and foremost, [on] how the employee actually spends his or her time," did not create or imply a requirement that courts assess an employer's affirmative exemption defense against every class member's claim before certifying an overtime class action.[35]

In other words, it is not a prerequisite to certification that plaintiffs "demonstrate [an employer's] classification policy was . . . either right as to all members of the class or wrong as to all members of the class . . ."[36]

III. A Logical Flaw

Class action litigation is premised upon the assumption that issues that are common to class members can fairly and efficiently be tried in a representative manner. Class actions permit juries to generalize findings to absent class members based upon the trial testimony of representative class members. As a result, in deciding the claims of the representative plaintiffs, the finder of fact decides the claims of the entire class as well. Thus, the class action in California, as elsewhere, evolved from the "equitable doctrine of virtual representation which 'rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice.'"[37]

The efficiency inherent in trying common claims in this fashion justifies departing from the general principle that each litigant must

30. *Id.*
31. *Id.* at 202.
32. *Id.*
33. *Id.* at 206.
34. *Id.* (quoting *Ramirez*, 978 P.2d at 790).
35. *Id.* at 207.
36. *Id.*
37. Daar v. Yellow Cab Co., 433 P.2d 732, 739 (Cal. 1967) (quoting Bernhard v. Wall, 194 P. 1040, 1048 (Cal. 1921)).

establish the merits of his or her own claim. However, class actions fill this role only if there is a common question for the jury to decide (assuming no common questions of law dispose of the case). If a jury must decide questions specific to each class member, then inevitably the class action devolves into the series of mini-trials the class action was designed to obviate. Although the supreme court certainly is correct that at the class certification stage plaintiffs need not demonstrate that the employer's classification scheme is either all right or all wrong, for that goes to the merits of the case, plaintiffs should be required to demonstrate that their claims *ultimately* can be decided in such a categorical fashion or a class action makes no sense.

Courts require a "community of interest in questions of law and fact" to ensure that a common answer meaningfully can be provided to the question or questions (if there are subclasses) that will be posed to the finder of fact. "The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants."[38] Accordingly, whether the trial court abused its discretion depends upon whether it had before it sufficient evidence to conclude that there is a common answer to whether the claimed exemption applied to each member of the class.

Plaintiffs, and the supreme court, seized upon the fact that Sav-on had adopted a common (exempt) classification for its AMs and OMs, and made no individualized inquiry into the actual duties of each manager.[39] Thus, whether Sav-on was right or wrong in this blanket determination was deemed to be a common question that could be answered uniformly with respect to the class. This reasoning is erroneous, however, because it excludes the possibility that Sav-on was correct with respect to some class members but incorrect as to others. Therefore, it poses a false dichotomy.

For example, suppose Sav-on had contended that each of its managers is right-handed. The fact that this blanket assertion is proven wrong hardly establishes that each of its managers must be left-handed. The problem, of course, is that a third possibility remains—that some managers are right-handed and others are left-handed. This example illustrates another logical proposition, the "law of the excluded middle."[40] The case of a single plaintiff who challenges the overtime exemption satisfies this property. That is, the employer either carries

38. Collins v. Rocha, 497 P.2d 225, 228 (Cal. 1972).

39. *Sav-on*, 96 P.3d at 203.

40. The law of the excluded middle, or *tertium non datur*, holds simply that either one proposition, or the negative of that proposition, must be true. W.V. QUINE, PHILOSOPHY OF LOGIC 83–87 (1970).

its burden of proving that the exemption applies, in which case the employee is not entitled to overtime pay, or the employer fails to make that proof and the employee is found to be nonexempt. There is no middle ground.

The same is not necessarily true of classwide claims. In cases such as *Sav-on*, the difficulty is that an employer who claims that a category of employees is exempt may be correct with respect to some, but wrong with respect to other employees. Yet, if a jury is asked categorically: "Has the employer proved by a preponderance of the evidence that its OMs satisfy a statutory exemption of the California Labor Code?" having been instructed on the exemptions' requirements, it must provide just one answer for the entire class. Unless the court is persuaded that the class is sufficiently homogeneous that a single answer must apply, i.e., that the law of the excluded middle pertains, a jury may not be able to answer this question meaningfully.

Sav-on, in opposing class certification, submitted the declarations of fifty-one managers who described their job duties in a way that presumably would qualify them as exempt. Suppose a jury finds each of these witnesses to be credible, and reasonably concludes, based on the duties they describe and the time they devote to them, that in fact each is exempt. What if the plaintiff responds with testimony from fifty-two managers, all of whom describe their job duties as nonexempt? How then can the jury answer the question posed above? Must it find that all managers are nonexempt, by a score of fifty-two to fifty-one? Alternatively, must it divine which group is credible and which is not, ignoring the possibility that both groups are truth-tellers who merely perform different job duties?

As absurd as it would be to constrain a jury to find all of the 103 witnesses to be either "all exempt" or "all nonexempt," it would compound the absurdity to generalize this answer to absent class members. Putting aside the ambiguous trial testimony, there is no logical basis for generalizing any findings reached regarding these witnesses to the absent class members. Our previous example is helpful once again. Suppose one party adduces testimony from fifty-one managers that they are right-handed, and the other presents testimony from fifty-two who are left-handed. There is no basis on which to extend the jury's finding, however it may reconcile the conflicting testimony, to determine the dominant hand of the *absent managers*. There simply is no way to know whether the left-handed managers who testify at trial, believable or not, are the totality of left-handers within the company, or merely the tip of the iceberg.

IV. Why the Random Sampling of Testimony Is Not the Answer

The *Sav-on* court references several decisions in which courts have approved the use of statistical sampling to place in evidence represen-

tative summaries of the larger body of evidence gleaned from the entire class.[41] Yet, if the *Sav-on* class, and similar classes, truly differ in terms of their duties, then sampling will permit the court only to determine the *parameters* of the distribution of job duties that describe the class—it cannot *homogenize* an otherwise diverse class of managers.[42]

Consider a hypothetical in which a court approves a sampling design that results in a representative group of witnesses appearing before the jury. If the class truly differs in its job duties, then the testimony of this randomly selected group will differ as well. If the court submits a question to the jury that requires it to respond "yes" or "no" to the question of whether the class is exempt, this jury faces the same dilemma, caused by the absence of an excluded middle, as the jury faced with nonrandom testimony.

A question that can be answered meaningfully by a jury provided with random testimony, which cannot be answered by the jury hearing nonrandom testimony, is "what fraction of the class satisfies the overtime exemption?" Thus, for example, a jury might determine that 40 percent of the class is exempt. If this is based upon testimony from a random sample of class members, it would be reasonable to extrapolate this answer to the absent segment of the class as well. Consequently, random testimony potentially provides the court with the means to determine the number of class members who are nonexempt and therefore entitled to backpay.

However, random testimony still does not permit the court to identify *which* members of the class are exempt from the overtime law. Although the jury may conclude with confidence that only 40 percent of the class satisfies the exemption, and that 60 percent have been denied overtime pay, it is not constrained to agree regarding the exempt status of any particular class member. In fact, there may be *no* employee about whose status the jury agrees, although they may agree about the *percentage* of exemptions within the class. Thus, this procedure may deprive the employer of its right to have a jury determine the exempt status of *particular* employees.[43] In a more pragmatic vein, were a court to credit the jury's percentage finding, it still would not know which absent class members are entitled to backpay and which are not.

Courts have held that an employer is entitled to a jury determination of merely the aggregate amount of backpay owed to the class,

41. *Sav-on*, 96 P.3d at 205 n.6 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337–40 (1977) (statistics bolstered by specific incidents "are equally competent in proving employment discrimination"); Lockheed Martin Corp. v. Superior Court, 63 P.3d 913 (Cal. 2003) ("well sampling and other hydrological data" about "the pattern and degree of contamination" could, but was insufficient to, support "a theory that a defendant's negligence has necessitated increased or different monitoring for all, or nearly all, exposed individuals")).

42. *Sav-on*, 96 P.3d at 207–08.

43. *Id.* at 209.

rather than a determination of the amount owed to each individual class member.[44] The backpay owed to the class typically is derived from the testimony of nonexempt employees regarding the hours they claim to have worked. However, only the testimony of nonexempt employees is relevant to this question. Yet, if a jury is required to agree only on the percentage who are nonexempt, but not on the identity of the particular individuals, it will have no basis for determining whose testimony on time worked is relevant to that question.

V. Why Questionnaires Are Not the Answer

The *Sav-on* court alludes to various procedural or evidentiary devices that may permit this case to be adjudicated on a classwide basis. Among these devices are questionnaires administered to class members or opt-ins. Often the questionnaire is drafted by experts and presented to the court in the form of expert testimony from social scientists trained in this methodology. In this fashion, one or the other party presents the court with streamlined summaries of the testimony of absent class members regarding the tasks they regularly perform and the time spent on each.

Questionnaires have been utilized in other class actions, but rarely to determine liability, and with good reason.[45] Expert testimony based upon questionnaires is admissible, if at all, as an exception to the hearsay rule.[46] The absent class members are out-of-court declarants who respond to questions posed by the expert. The expert, in turn, testifies to the results. The rule against hearsay, of course, protects a party from the testimony of out-of-court declarants who are unavailable to be cross-examined.[47] The exceptions to this rule exist principally because the circumstances that give rise to the hearsay statement minimize concerns regarding the credibility of the out-of-court declarant.[48] For example, a "spontaneous utterance" is admissible because the circumstances are deemed to preclude the thoughtfulness and guile that are likely to cause the declarant to lie.[49] Similarly, a "dying declaration" may be admissible because, given the circumstances, courts generally

44. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 (1975); Segar v. Smith, 1982 U.S. Dist. LEXIS 12253, at *4 (D.D.C. Feb. 17, 1982).

45. *See* O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 327 (C.D. Cal. 1998) (use of medical questionnaire to determine who should be excluded from class of persons who have been diagnosed with disease attributable to exposure to radioactive contaminants); Rodriguez v. McKinney, 156 F.R.D. 118, 119 (E.D. Pa. 1994) (use of financial aid questionnaire to determine class membership).

46. FED. R. EVID. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence . . .").

47. U.S. v. Cardascia, 951 F.2d 474, 486–87 (2d Cir. 1991).

48. U.S. v. Alexander, 331 F.3d 116, 122–23 (D.C. Cir. 2003).

49. *Id.*

recognize that the declarant has little motivation to speak falsely.[50] The safeguard that applies to expert testimony, which permits the expert to rely on evidence that otherwise would be inadmissible, inheres in the expert's scientific methodology.[51]

A court should admit expert testimony based on questionnaires only if it is satisfied that the expert's methodology is such as to guard against the bias one normally expects from interested parties. In effect, if the court is to deprive the employer of its right to cross-examine individual class members, and instead limit the employer to cross-examining the expert who surveyed the class, the court must first satisfy itself that the expert's methodology is calculated to produce trustworthy responses from the interested class members. This indeed is a tall order.

A threshold concern in survey research, the branch of social science concerned with this issue, is how to design the survey so as to elicit unbiased responses. As with other forms of scientific research, the "gold standard" is the "double-blind experiment."

> To ensure objectivity in the administration of the survey, it is standard interview practice to conduct double-blind research whenever possible: both the interviewer and the respondent are blind to the sponsor of the survey and its purpose. Thus, the survey instrument should provide no explicit clues (e.g., a sponsor's letterhead appearing on the survey) and no implicit clues (e.g., reversing the usual order of the yes and no response boxes on the interviewer's form next to a crucial question, thereby potentially increasing the likelihood that *no* will be checked) about the sponsorship of the survey or the expected responses. . . . When interviewers are well trained, their awareness of sponsorship may be a less serious threat than respondents' awareness.[52]

Experts typically survey absent class members under circumstances that are far removed from this ideal. Absent class members are likely either to have opted into the proceeding or received prior notice of the class action. Additionally, they may have been contacted by attorneys and informed about the issues in the case and the grounds alleged for recovery. Accordingly, it is highly likely, if not certain, that class members responding to the survey know the sponsor, and to take things but a small step further, know how their answers will affect their own recovery.

Under these circumstances, questionnaire responses more closely resemble the testimony of interested parties, submitted as declarations

50. *See* Lilly v. Virginia, 527 U.S. 116, 126 (1999).

51. FED. R. EVID. 703. *See* Daubert v. Merrill Dow Pharm. Inc., 509 U.S. 579, 592 (1993).

52. Shari S. Diamond, *Reference Guide on Survey Research*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 266 (2d ed., 2000) (internal citations omitted).

in support of, or in opposition to, summary judgment.[53] The fact that an expert interprets these declarations and offers summaries to the court does little to make this testimony more trustworthy, or admissible, than the declaration of an interested witness in the trial of a single-plaintiff case.

This is not to say that surveys never can capture testimony of absent class members in an unbiased way, however, to do so would require extraordinary measures. For example, a court may wish to restrict communication with class members by either party prior to administering the questionnaire. Alternatively, the accuracy and consistency of questionnaire responses could be tested against undisputed evidence regarding each class member, such as records regarding dates of employment, or against alternative phrasing of a given inquiry. Absent such pristine conditions and the pretesting of questions and answers, questionnaires are no more "scientific" than declarations, notwithstanding that the questionnaire results may be compiled by an expert. Certainly, a court would view skeptically the testimony of an expert who purported to interpret the out-of-court declaration of a party, and there is no principle of law that enhances the admissibility of this evidence when it is proffered in mass quantities.

VI. A "Pattern and Practice" Theory Does Not Solve the Problem

The *Sav-on* opinion notes at various points that the plaintiffs allege that Sav-on either intentionally or *de facto* engaged in a standard practice of misclassifying its employees.[54] Borrowing a page from Title VII litigation, specifically *Teamsters v. United States*, one might suppose that an interrogatory could be submitted to a jury asking whether Sav-on engages in a pattern and practice of misclassifying its employees.[55] As in *Teamsters*, an affirmative answer might then create a rebuttable presumption that each class member was misclassified, which the employer would be permitted to dispute in a series of individual determinations.[56] However, this scenario too is flawed.

A "pattern and practice" is proved by establishing that the unlawful conduct is the employer's standard operating procedure, its usual way of doing business.[57] In a discrimination case, it is a reasonable possibility that all class members, even those who have fared exceedingly well, were subject to this unlawful policy or practice. Those class

53. Indeed, declarations offered as summary judgment evidence must be subject to the penalty of perjury. *See* 28 U.S.C. § 1746 (2005). The same generally is not true of questionnaire responses.

54. *See generally Sav-on*, 96 P.3d 194.

55. Teamsters v. United States, 431 U.S. 324, 334 (1977).

56. *Id.* at 359.

57. *Id.* at 336.

members who have done well under that discriminatory regime presumably would have done even better were there no discrimination at all.

This dimension is absent in a misclassification case. That is, it is meaningless to suggest that an employee who is performing exempt duties would have been even more exempt had the employer not engaged in the standard practice of misclassification. Further, because the employer already bears the burden of establishing that each employee qualifies as exempt, nothing is accomplished procedurally by litigating the pattern and practice claim. The employer still must prove, class member by class member, that the particular employee qualified as exempt.[58]

Additionally, how many instances of misclassification make for a standard practice? Returning to the example involving Sav-on's fifty-one declarations describing exempt duties, how many rebuttal witnesses must the plaintiff present to support a jury determination that a standard practice of misclassification exists, notwithstanding those fifty-one witnesses? Do fifty-two witnesses, a mere majority, suffice? Suppose it is proven that these fifty-two have spent part of their employment in a particular job performing exempt work and part performing the job in a nonexempt manner. Does a pattern and practice exist if the majority of employee-days in evidence describe an exempt position, although each of the employees testifies to some period of nonexempt employment? Thus, a pattern and practice theory appears to satisfy the requirement of an excluded middle—it permits the court to pose a dichotomous question to the jury, i.e., whether or not the pattern and practice exists. However, it provides no help to the jury in resolving the dilemma posed by the fact that substantial numbers of class members may be exempt and others nonexempt.

VII. A Proposed Solution

As an alternative to submitting an interrogatory to the jury regarding the fraction of the class that is nonexempt, consider a model in which the jury must decide, sequentially, a series of mini-trials with respect to randomly selected class members.[59] The jury would make an

58. Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521, 523 (5th Cir. 1999) (an employer claiming an exemption under the Fair Labor Standards Act, 29 U.S.C.S. § 201 *et seq.*, bears the burden of proving its exempt status, and exemptions are to be narrowly construed against the employer).

59. In principle, there may be no obstacle to permitting more than one jury to decide these mini-trials. This would not offend the Reexamination Clause of the Seventh Amendment because each jury would only decide the case of a particular plaintiff, and no jury would render a verdict regarding the overall pattern and practice, as explained below. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996) (The Reexamination Clause "entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts . . .").

express determination with respect to each class member who is in the sample, and similarly determine the amount of overtime regularly worked by each employee it finds to be nonexempt. Assuming the court has conditionally certified the class, it can rely upon these verdicts to determine (1) whether to decertify the class;[60] (2) whether to enter judgment for the plaintiffs or the employer on the misclassification claim; and (3) if judgment is entered for the plaintiffs, the aggregate amount of damages owed to the class. Here is how it would work.

A. Class Decertification

Although there is little case law discussing how courts have decided class certification when faced with conflicting evidence regarding the alleged practice of misclassifying employees,[61] surely a court must be satisfied, at a minimum, that the practice affects at least 50 percent of the putative class. If the practice is less pervasive, it is hard to see how it could be deemed "common," or how a plaintiff could be found "similarly situated" to other employees.[62] Because plaintiffs must prove the elements necessary for class certification, they must propose a trial plan that will adduce sufficient evidence to prove that no less than a majority of the class has been misclassified. The essence of that trial plan should be the proposed number of mini-trials a court must hold to confidently determine whether the proceeding is viable as a class action and, if so, to enter judgment on the class claims.[63]

For example, suppose misclassification is rather pervasive, enabling class members to win eight out of ten mini-trials. A court viewing these results, but having no other evidence of whether the practice applies classwide, might note that such lopsided results would occur

60. This proposal assumes a court has conditionally certified a class, subject to reconsideration in light of additional evidence. *See, e.g.*, Mielke v. Laidlaw Transp., Inc., 313 F. Supp. 2d 759 (N.D. Ill. 2004).

61. The California Supreme Court, in its *Sav-on* decision, viewed this as a question of credibility, which the trial court could decide by sizing up the competing witnesses: "But the trial court was within its discretion to credit plaintiffs' evidence on these points over defendant's, and we have no authority to substitute our own judgment for the trial court's respecting this or any other conflict in the evidence." *Sav-on*, 96 P.3d at 202. However, there is no indication as to what evidence the trial court considered as discrediting the employer's fifty-one witnesses (a difficult determination, given that it had only written declarations to go on), and, more importantly, the Court failed to consider the possibility that both the plaintiffs' and employer's declarants were truthful.

62. Thiessen v. GE Capital Corp., 267 F.3d 1095, 1102 n.3 (10th Cir. 2001). *See generally* Johannes v. Aerotek, Inc., No. 98-6153, 2001 U.S. Dist. LEXIS 25409 (C.D. Cal. June 25, 2001); Shushan v. Univ. of Colorado, 132 F.R.D. 263 (D. Colo. 1990); Basco v. Wal-Mart Stores, Inc., No. 00-3184, 2004 U.S. Dist. LEXIS 12441 (E.D. La. July 1, 2004).

63. *In re* Chevron USA, Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) ("A bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to a universe of claimants has as a core element representativeness—that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence . . .").

only one in twenty times if just a bare majority truly were nonexempt.[64] Based on this evidence, it could extrapolate these results to the entire class and be virtually certain that at least a majority are similarly situated to the sampled plaintiffs. Thus, a named plaintiff who believes that misclassification is pervasive could submit a trial plan proposing as few as ten mini-trials and feel confident that the court would not decertify the class based on the outcomes of these mini-trials.

But suppose misclassification is less pervasive? Specifically, suppose the named plaintiff suspects that the employer misclassifies just 70 percent of the class? The plaintiff might conclude, correctly, that he should win 70 percent of any number of mini-trials, but how many trials will permit him to defeat an anticipated motion to decertify the class? Ten mini-trials will be too few because an astute judge will recognize that, with reasonable frequency, plaintiffs fortuitously may win seven mini-trials even if less than 50 percent of the class is misclassified.[65] Therefore, a court might be unimpressed with the strength of a plaintiff's claim for class certification based on a record of "seven for ten," when the plaintiff's burden is to prove that more than 50 percent of the class is wrongly classified as exempt.[66]

In order to more favorably impress the court with a 70 percent winning percentage, plaintiffs must propose a greater number of mini-trials. In fact, if plaintiffs expect to win only 70 percent of all mini-trials, they should propose twenty-five, with expectation of winning seventeen, to provide the court sufficient evidence to reject the possibility that fewer than 50 percent are misclassified. As the expected win percentage goes down, because misclassification is less widespread, the number of mini-trials necessary to convince a court that at least a majority of the class is misclassified increases markedly. Thus, if plaintiffs expect to win just 60 percent of the mini-trials, they should propose to hold ninety-six, to prove to the court that this winning percentage is more than a chance result.[67] Thus, as common sense suggests, the less pervasive the alleged practice of misclassification, meaning that plaintiffs will win a smaller fraction of trials, the greater the number of mini-trials it takes to establish that the practice impacts a majority of the class and defeat a motion to decertify the class.

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64. This probability, as well as subsequent references to probabilities, are based on simple binomial probabilities that appear in any standard table.

65. In fact, this will occur 17 percent of the time.

66. Because courts generally are persuaded by statistical evidence having a margin of error of 5 percent or less, a plaintiff should be required to prove that the observed winning percentage would occur by chance only 5 percent of the time or less if misclassification occurred no more than 50 percent of the time. *See, e.g.*, W.G. Bennett v. Total Minatome Corp., 138 F.3d 1053 (5th Cir. 1998).

67. Of course, the court could enter judgment on each of the 96 verdicts; however, the question is whether these decisions properly can be extended to absent class members.

Similar arithmetic applies to the defendant employer. An employer may seek not merely to decertify a class but to prevail against the claims of all opt-in class members. For example, suppose the named plaintiff persuades the court to hold but ten mini-trials, but to his surprise the employer wins each one. This winning percentage establishes, as it would if compiled by the plaintiffs, that class members indeed are similarly situated with respect to the claimed exemption, although not as the plaintiff has alleged.

Thus, once a court determines the number of mini-trials, three results are possible. Plaintiffs can win a sufficient number so as to avoid decertification, employers can win a sufficient number, in which case they presumably would prefer not to decertify the class, or the winning percentage of neither the plaintiffs nor the employer is sufficient for the court to determine the plaintiffs are similarly situated. Accordingly, there now is an excluded middle because we have established a decision rule—decertify the class—for instances when neither "yes" nor "no" answers with sufficient uniformity whether there is a pattern and practice of misclassifying employees.

B. Judgment on the Merits

If the plaintiff wins a sufficient number of trials to avoid decertification of the class, the outcomes of the mini-trials also permit the court to decide the merits of plaintiff's claims. First, the court may enter judgment on the specific verdicts the jury returns in each of the mini-trials. In other words, the court has in hand the jury's determination of the exempt status of each of the randomly selected class members whose claim actually was tried, and it can query the jury regarding the backpay owed to each misclassified plaintiff. So far as it is concerned with the plaintiffs in these random mini-trials, the court's role is precisely as it would be in the case of any individual plaintiff.

However, the mini-trials also provide information from which the court can craft a judgment regarding the rest of the class. We have seen that plaintiffs can survive a motion to decertify the class only by winning the majority of mini-trials. In fact, they must win a fraction that is substantial enough to permit the court to conclude that the class is similarly situated. That being the case, it follows that the same fraction—the winning percentage that characterizes the mini-trials—also is the best estimate of the likelihood that any randomly selected member of the class will be nonexempt. For example, if a court holds twenty-five mini-trials, and plaintiffs win 75 percent, the court can conclude *both* that the class is similarly situated *and* that each class member has a 75 percent chance of being nonexempt. Given that likelihood, the court should find that the employer has not sustained its burden of proving that the class is exempt, and enter judgment for the plaintiffs.

The mirror-image of this scenario applies if the employer prevails in a sufficient majority of mini-trials. The court may refuse to decertify a class *either* because it finds that putative class members are similarly situated and they generally are nonexempt *or* because it finds that putative class members are similarly situated and they generally are exempt. In the latter case, the employer will not seek to decertify the class, but will move for judgment in its favor and against all opt-in plaintiffs.

C. Backpay Liability

If the plaintiffs prevail on their classwide claim of misclassification, class members are entitled to backpay, along with attorney fees and perhaps liquidated damages. The verdicts reached in the mini-trials provide sufficient information for a court to craft a classwide backpay remedy. The interrogatories submitted to the jury would ask it to determine the exempt status of each randomly selected plaintiff. This same jury also could be provided sufficient evidence from which it could determine the backpay owed to each plaintiff it finds to be nonexempt, and therefore misclassified. These interrogatories are no different from what one normally sees in single-plaintiff cases, and the jury's answers would be incorporated into the court's judgment in so far as it pertains to the randomly selected plaintiffs.[68]

The backpay owed the remaining class members should reflect the jury's verdicts with respect to the randomly selected plaintiffs. Suppose the jury decides ten cases and determines that $10,000 per year in backpay is owed to each of the eight plaintiffs it finds to be nonexempt. The total amount awarded to these ten individuals is $80,000 per year of employment, or $8,000 per class member. Therefore, in the simple case in which the same amount of backpay is awarded to each prevailing plaintiff, the aggregate amount per year of employment awarded to the remaining class members is simply the backpay awarded to each ($10,000), multiplied by the plaintiffs' winning percentage (80 percent), multiplied by the number of opt-in class members. In the more usual case, in which backpay liability to the randomly selected plaintiffs varies among them, the court can simply sum this liability, divide by the number of mini-trials both won and lost, and multiply by the number of opt-ins.

Various courts have opined that once an employer's aggregate liability to the entire class is determined, the employer has no stake in determining the amounts awarded to particular class members.[69] The

68. *See, e.g.*, Eleventh Circuit, *Pattern Jury Instructions (Civil)* § 1.71, at 127–30 (West 2000).

69. "[T]he allocation of that aggregate sum among class members is an internal class accounting question that does not directly concern the defendant . . ." 2 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS, § 4:26, at 233 (4th ed. 2002).

court then is free to resort to various administrative expedients to determine the precise allocation of this award among various class members. For example, the court may adopt various claims procedures or appoint a special master to administer the aggregate fund.[70]

VIII. The Problem with Mini-trials

The problem mini-trials pose for the court is that, at the end of the day, it may find that it has held a series of these only to conclude that it must dismiss the class allegation. In our example of ten mini-trials, unless either side goes at least "eight for ten," the court must dismiss the class allegations. Thus, in 60 percent of the possible outcomes the class will be decertified and the court will have accomplished merely the trial of ten individual cases. However, as the number of mini-trials is increased, the size of the excluded middle (the range in which the class is decertified) becomes smaller, in relative terms. That is, if the court holds twenty-five mini-trials, the excluded middle contains 56 percent of all possible outcomes; if the court holds ninety-six trials, the excluded middle contains only 21 percent of all possible outcomes.

The dilemma for the court is to balance the competing goals of finality and efficiency. The goal of efficiently resolving the litigation suggests minimizing the number of mini-trials. However, in so doing, the court risks accomplishing no more than decertifying the class, thereby defeating the goal of finality. On the other hand, holding a large number of mini-trials is more likely to achieve finality, but at considerable cost to the court's docket.

If plaintiffs must propose a trial plan in conjunction with their motion for class certification, or upon receipt of responses from opt-ins, part of that plan should specify the number of mini-trials they request the court to hold.[71] Although it may seem that the safest course for plaintiffs would be to choose the greatest number feasible, thus lowering the necessary win percentage, at some point the number of mini-trials will overwhelm the court's docket. At that juncture, the burden posed by trying a series of individual cases is no greater than the proposed class action, diminishing the chances the court will conditionally certify the class.[72] As a result, plaintiffs must weigh the probability of

70. *See, e.g.*, State of California v. Levi Strauss & Co., 41 Cal. 3d 460, 479, 715 P.2d 564 (Cal. 1986) (approving plan of distribution despite finding it lacking in safeguards against fraud).

71. The Texas Supreme Court has emphasized repeatedly that it will reverse courts that certify class actions without expressly including a trial plan in their order. State Farm Mut. Auto Ins. Co. v. Lopez, 156 S.W.3d 550, 555 (Tex. 2004); Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 430 (Tex. 2000).

72. Rule 23(b)(3) requires a court to consider whether the proposed class action is "superior to other available methods for the fair and efficient adjudication of the controversy" . . . and "the difficulties likely to be encountered in the management of a class

winning random mini-trials against the corresponding burden it will impose on the court if it requests a large number, which will diminish the likelihood that the class will be certified.

IX. Conclusion

When a particular question has a common answer that pertains uniformly to the class—for example, when an employer refuses to pay for time spent "donning and doffing" work clothes—the answer the jury reaches based on the testimony of trial witnesses is likely to correspond to the verdict it would reach if it could consider the testimony of absent class members as well. In such instances, which typically arise when employees challenge an express practice of the employer, a class action provides a fair and efficient vehicle for trying these claims. On the other hand, when the classwide application of any practice, and thus the existence of a common answer, is unproved except by cumulating the testimony of individual class members, then certifying a class action makes little sense, and can cause substantial harm, unless the court has devised a trial plan that expressly accommodates the possibility of diverse, but truthful, testimony about the employees' job duties. If the jury is compelled to decide an issue that purports to have but one of two answers, when there is no excluded middle and a multitude of answers are possible, the court has posed a false dichotomy and neither of the permitted responses may be supported by the evidence.

A series of randomly selected mini-trials offers a potential solution, however, it may impose a substantial burden on the trial court. The key ingredient is a trial plan proposed by the plaintiff that expressly requests a specified number of mini-trials. The court then must consider whether it can accommodate this proposal, weighing its interests in efficiently but finally adjudicating the case. Yet, this framework has the virtue of making the burden explicit and preserving the right of the defendant to have the jury decide the exemption with respect to each plaintiff whose job duties are presented to the court.

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action." *See, e.g.*, Franklin v. OfficeMax, Inc., CA No. 03-M-2056, slip op. at 6 (D. Colo. March 23, 2005) (observing that the court more easily could manage 143 individual actions than shoehorn a diverse set of claims into one class action).