KILPATRICK TOWNSEND

November 14, 2018

Split Ninth Circuit Cements Circuit Split on Admissibility of Class Certification Evidence

by Jon Michaelson

Takeaway: A fractured Ninth Circuit has rejected the opportunity to re-visit a panel decision allowing inadmissible evidence to be considered in ruling on a motion for class certification. This ruling solidifies a glaring split with at least four other circuits and invites Supreme Court review. If the Supreme Court elects to take the case, the Ninth Circuit will likely come out on the losing side of the issue.

In *Sali v. Corona Regional Medical Center*, 889 F.3d 623 (9th Cir. 2018), a Ninth Circuit panel reversed a district court decision denying class certification on typicality, adequacy, and predominance grounds. In particular, the district court found the Rule 23(a) typicality requirement had not been met because plaintiffs had not submitted admissible evidence demonstrating typicality. Plaintiffs submitted a declaration from a paralegal who had reviewed the class defendant's payroll records, prepared spreadsheets containing payroll data, and made calculations of allegedly uncompensated time by analyzing the impact of the employer's clock-in and clock-out time policies. The district court found this declaration to be inadmissible because the paralegal could not authenticate the data and could not represent that the spreadsheets accurately reflected the information. Moreover, the paralegal's conclusions constituted expert opinion testimony which the paralegal could not render. The district court also rejected as untimely curative evidence submitted by plaintiffs on reply.

Without addressing directly the district court's admissibility determination, the Ninth Circuit panel glossed over the issue: "Inadmissibility alone is not a proper basis to reject evidence in support of class certification." *Id*. at 632. Instead, the district court's "rigorous analysis" of the Rule 23 requirements must be tempered by the recognition that class certification rulings are "preliminary" and "tentative," rather than a final determination on the merits. *Id*. at 631. The panel also asserted the district court should have assessed the likelihood that the evidence contained in the paralegal's declaration could have been presented in admissible form at trial. *Id*. at 633.

The *Sali* panel claimed the issue at hand had not been decided previously in the Ninth Circuit, and also that rulings on the subject in the Third, Fifth, and Seventh Circuits could be distinguished. And the panel characterized an Eighth Circuit case on which it did rely as fully supportive of its holding.

In our May 21 post concerning this case (*Ninth Circuit deepens Circuit split by holding inadmissible evidence can be considered in resolving class certification*), Jay Bogan noted that the panel decision in *Sali* not only ran afoul of rulings in at least three other Circuits, it also ignored strong signals from the Supreme Court – such as

dicta in *Wal-Mart Stores, Inc. v. Dukes* – suggesting that *Daubert* standards should be applied at the class certification stage. 564 U.S. 338, 354 (2011). We also observed the *Sali* panel's reasoning ignored "the realities of modern class action practice," given the discovery available to plaintiffs at the certification stage and the resultant ability to develop admissible evidence to satisfy the typicality and other Rule 23 requirements.

Although the Ninth Circuit refused to re-hear *Sali* en banc, five Ninth Circuit judges dissented from the denial of rehearing and articulated similar concerns with the ruling of the *Sali* panel. These judges decried the missed opportunity to correct "our own errors." *Sali v. Corona Regional Medical Center*, -- F.3d --, No. 15-56460, 2018 WL 5660330, at *1 (9th Cir. Nov. 1, 2018) (Bea, J., dissenting from denial of rehearing en banc). The dissenting judges continued: "Rather than do that, we have established a rule that undermines the purpose of the class certification proceeding. . . . This doesn't pass the straight-face test." 2018 WL 5660330, at *1.

Judge Bea, joined by Judges Bybee, Callahan, Ikuta, and Bennett, pointed to multiple errors in the panel decision. First, he noted that the panel had misread the Ninth Circuit's decision in *Ellis v. Costco Wholesale Corp*., 657 F. 3d 970 (9th Cir. 2011), to sustain the notion that evidence supporting a Rule 23 requirement need not be admissible. To the contrary, *Costco* stands for the proposition that admissibility alone is not enough; the evidence must also be persuasive. *Id*. at *4 n.7. Interpreting *Costco* to mean that admissibility can or should be ignored "distorts its basic holding." *Id*.

Second, Judge Bea confirmed the *Sali* panel "puts us on the short side of a lopsided circuit split." *Id*. at *5. In addition to the three contrary Circuit decisions which the panel cited and attempted to distinguish, he also cited a Second Circuit case and unpublished cases from the Sixth and Eleventh Circuits. As for the Eighth Circuit opinion cited by the panel in support of its view, *In re Zurn Pex Plumbing Prod. Liab. Litig*., 644 F.3d 604 (8th Cir. 2011), that ruling still reflected an assessment of certification evidence more specific and more rigorous than condoned in *Sali*.

Finally, Judge Bea viewed the *Sali* ruling as defying "clear Supreme Court guidance on this issue." *Id*. at *4. Beyond *Dukes*, "[a]t least one other Supreme Court case counsels against the panel's holding here. In *Comcast Corporation v. Behrend*, 569 U.S. 27 (2013), the Supreme Court discussed again the evidentiary standard at the class certification stage … The Court reaffirmed … that Rule 23 demands more than a 'mere pleading standard' and that a plaintiff must 'affirmatively demonstrate' – that is, 'prove' – that he '*in fact*' has complied with Rule 23. . . . Although it failed to address directly whether evidence must be admissible at the class certification stage, the Court held that 'satisfy[ing] *through evidentiary proof* at least one of the provisions of rule 23(b)' is a prerequisite to class certification." *Id*. at *6 (emphasis in original; citations omitted).

Under this standard, of course, the paralegal declaration would not have been considered. "[T]o have a party's paralegal opine on the extent to what the plaintiff was underpaid by allowing the paralegal to choose various time-entries without explaining his methods is no different than a lawyer interviewing a client and choosing only favorable information to include in the client's pleading. And the Supreme Court has repeatedly recognized that

Rule 23 requires more than a mere pleading standard." *Id*. at *2 n.3 (citing *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011)).

If the *Sali* panel invited Supreme Court review, Judge Bea and his dissenting colleagues have now strongly encouraged that Court to reject the Ninth Circuit's ruling. But unless and until the Supreme Court addresses the issue, class action defense counsel in the Ninth Circuit must wrestle with arguing the continued vitality of *Costco* (which at least five judges of the Ninth Circuit interpret to require both admissible ***and*** persuasive evidence as to Rule 23 issues) and resisting application of the much broader standards of *Sali*. *See id*. at *4 n.7 (discussing conflict between *Costco* and *Sali*).