Client Alert.

April 13, 2012

Brinker v. Superior Court: What It Means for Class Action Defendants Generally

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Brinker v. Superior Court (*Hohnbaum*), No. S166360, 2012 WL 1216356 (Cal., April 12, 2012) likely will be remembered as the case in which the California Supreme Court gave welcome relief to a certain kind of California employment class action. If that were all *Brinker* accomplished, it would stand as a remarkable achievement. But *Brinker* also holds lessons for class action defendants generally. These are our "Cliff Notes" on the *Brinker* tutorial.

THE EMPLOYMENT HOLDING AS STARTING POINT

Most of the 54-page unanimous decision concerns itself with employment-related questions, which we leave for others. For our purposes—*Brinker*'s effect on California class action cases generally—we start with the "Meal Period" holding.

California law requires employers to provide meal periods to nonexempt employees. But must the employer merely make them available, or must it "ensure" that employees actually take them, on pain of suffering stiff penalties if they do not? That was the important "merits" issue facing the Supreme Court. The Supreme Court gave this sensible answer: employers do not have to police their employees to make sure that they're actually taking their meal breaks. It is enough that employers make meal periods available; they don't have to "ensure" that employees take them.

It is from this starting point of the *Brinker* holding that defendants in *non*-employment class action cases can draw instruction. We see four lessons to be learned.

THE FOUR OTHER LESSONS OF *BRINKER*

Lesson #1: An "Overbroad" Class Can't Proceed. *Brinker*'s most important lesson concerns what the Supreme Court called the "overbroad" class. An "overbroad" class is one in which the definition embraces large (but often unknown) numbers of class members who have no claim.

Having decided the "merits" issue in favor of the employer, the Supreme Court next had to figure out what to do about the "Meal Period Subclass" that the trial court had certified (whose order of certification the Court of Appeal reversed). After all, the new legal standard meant that the Meal Period Subclass swept in untold numbers of employees having no legal claim. The *Brinker* court remanded to the trial court to re-determine the issue of certification of the Meal Period Subclass in light of the class definition that would be necessary under the new "allow, not ensure" legal standard. (Slip opn., pp. 50-51.)

Why is this important if you're not a defendant in a "meal period" class action? Because the problem of the "overbroad" class arises in almost every class action case, yet, surprisingly, the California Supreme Court had never addressed it. Until now. Plenty of federal courts have denounced "overbroad" classes, and so too have at least two California appellate courts. *See e.g., Pfizer Inc. v. Sup.Ct.*, 182 Cal. App. 4th 622, 631 (Cal. App. 2010); *Sevidal v. Target Corp.* 189 Cal. App. 4th 905, 925 (Cal. App. 2010).

Brinker marks the first time the Supreme Court has weighed in on the issue. That matters. It means that companies facing class actions in which there is an "overbroad" class—persons with no claim—can cite *Brinker* for the common-sense proposition that an "overbroad" class cannot be certified or maintained.

Lesson #2: Merits May Be Considered at Class Certification and, at Times, *Must* Be. Class action plaintiffs, especially those with dubious cases on the merits, insist that consideration of the merits is flat-out improper at the class certification stage, citing earlier California Supreme Court cases that suggested in vague language that this might be so.

Brinker, however, begs to differ:

> We summarize the governing principles. Presented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. (Citations omitted.) Consequently, a trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision.

Slip opn., at pp. 13-14; *see also* p. 14 ("if the presence of an element necessary to certification, such as predominance, cannot be determined without resolving a particular legal issue, the trial court must resolve that issue at the certification stage.")

Notably, the *Brinker* opinion specifically mentions "reliance" as an example of a "merits" issue that may have to be considered at the class certification stage. *See* slip opn., p. 12. Thus, *Brinker* could help defendants (in employment and non-employment class actions alike) oppose class certification motions brought under California's unfair competition law (Cal. Bus. & Prof. Code § 17200 *et seq.*), in which class action plaintiffs argue that only the named plaintiff's reliance matters. In that sense, *Brinker* could be viewed as implicitly endorsing such cases as *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 981 (Cal. App. 2009) ("We see no language in *Tobacco II* which suggests to us that the Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification. On the contrary, the Supreme Court reiterated the requirements for maintenance of a class action, including (1) an ascertainable class and (2) a 'community of interests' shared by the class members").

Lesson #3: Homage to *Wal-Mart Stores v. Dukes?* Although *Brinker* was an employment class action, the opinion barely mentions the United States Supreme Court's landmark employment class action decision, *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S.Ct. 2541 (2011) and even then, only in passing and for an unremarkable proposition. Slip opn., p. 11. The absence of any serious mention of *Wal-Mart*—the legal equivalent of ignoring the "800-pound gorilla in the room"—is surprising. One might wonder if the *Brinker* court avoided *Wal-Mart* on purpose.

On the other hand, the *Brinker* court cites with approval the same law review article by Professor Nagareda that the majority in *Wal-Mart v. Dukes* cited with reverence, and which forever changed how the element of "commonality" in class

certification motions is to be viewed: "What matters to class certification ... is not the raising of common 'questions' … but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 131 S.Ct. at 2551 (citing R. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 131–132 (2009). *See Brinker*, slip opn. 9 n.5; 14 n.6.

In short, without mentioning *Wal-Mart*, the *Brinker* court did perhaps the next best thing: it cited with approval the law review article on which *Wal-mart* relied.

Lesson #4: Whither Statistical Sampling? An issue in *Brinker* was the use of statistical sampling and surveys as a means for showing commonality. As it happened, the *Brinker* court never mentions *Duran v. U.S. Bank N.A.*, 203 Cal. App. 4th 212 (2012), the recent Court of Appeal decision that curtails the use of statistical sampling to smooth over the rough edges of commonality, predominance, and awkward individual proofs.

The court's only mention of statistical sampling appears in the concurring opinion by Justice Werdegar in which only one other justice concurs. *See* slip opn., concurrence. There, Justice Werdegar merely notes that proof of common issues can take many forms, including "the use of surveys and statistical analysis." *See* slip opn., concurrence at p. 4. That Justice Werdegar not only wrote the majority opinion but also the concurring opinion suggests that it may have been part of the majority opinion initially, but that the other five justices couldn't be brought on board for even this lukewarm endorsement of statistical sampling.

CONCLUSION

There is much in *Brinker* that other California class action defendants can feel good about, not just employers who face meal and rest period class actions. These lessons from *Brinker* are important and should not get lost in the moment.

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