

Litigation Alert: *Vinole v. Countrywide*

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The Ninth Circuit's recent opinion in *Vinole v. Countrywide Home Loans, Inc.*, – F.3d –, 2009 WL 1926444 (9th Cir. July 7, 2009), established precedent in this Circuit: A defendant may move to deny class certification before a plaintiff moves to have the class certified, and need not wait until the close of discovery to do so. The court also affirmed the denial of the certification at issue because individual issues of employees' eligibility for wage and hour exemptions predominated over common issues.

The key takeaways from *Vinole* are:

- Plaintiffs do not have complete control over the timing of class certification. Defendants may file "preemptive" motions to deny class certification, and may do so prior to the close of discovery or deadlines for pre-trial motions.
- In considering a defendant's motion to deny certification, courts are likely to evaluate whether plaintiffs (who have the burden on class certification) are procedurally prejudiced by the timing of the motion. A court is less likely to find prejudice if the plaintiff has had sufficient opportunity to conduct discovery on the certification issue.

Factual Background:

In October 2006, named plaintiffs Raymond Vinole and Ken Yoder filed a class action lawsuit against Countrywide Home Loans ("Countrywide") for its uniform classification of External Home Loan Consultants as exempt outside salespeople, who are not entitled to overtime and related wages. An "outside salesperson" is defined as someone "who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities." I.W.C. Wage Order 4-2001, § 2(M). Countrywide removed the case to federal court in January of 2007.

Seven months later, on August 7, 2007, Countrywide filed a motion to deny class certification. Countrywide's filing was approximately three months prior to the close of discovery and four months before the pretrial motion deadline. Plaintiffs opposed Countrywide's motion by arguing that (1) the motion was not ripe and was procedurally improper because plaintiffs had not yet filed a motion to certify, and (2) class certification was substantively warranted based on the evidence provided, which included nine declarations that previewed the evidence and arguments upon which plaintiffs' motion for class certification would be based. The United States District Court for the Southern District of California granted Countrywide's motion to deny certification. The court concluded that the motion was procedurally proper and that the class should not be certified because plaintiffs had not met their burden of demonstrating that common issues would predominate.

After granting plaintiffs the opportunity for an interlocutory appeal, the Ninth Circuit addressed the issues of the procedural propriety of defendant's motion, and whether the district court's substantive determination on that motion was warranted.

Was the defendant's motion procedurally proper?

On appeal, the plaintiffs argued that there is a *per se* rule precluding defendants from filing motions to deny class certification. After analyzing the plain language of Federal Rule of Civil Procedure 23 and the case law cited by the plaintiffs, the Ninth Circuit concluded that nothing precluded defendants from bringing motions to deny certification of the class. Specifically, the court found that the only timing requirement of Rule 23 was that the certification issue should be resolved "[a]t an early practicable time." Further, contrary to plaintiffs' argument, the case law suggested that defendants' motions to deny certification have been deemed procedurally proper by other federal district and circuit courts. The cases relied upon by plaintiff did not dictate any *per se* prohibition on a defendant's right to file such a motion. Accordingly, Countrywide's motion to deny certification was not procedurally improper.

Were plaintiffs procedurally prejudiced by the motion?

The court next addressed plaintiffs' argument that it was "fundamentally unfair" for the court to consider Countrywide's motion because discovery had not yet closed, and thus plaintiffs had unfairly been denied the opportunity to present their own arguments based upon a full record. The court observed that the district court's consideration of defendant's motion would have been improper only if plaintiffs "could show some procedural prejudice from the timing of the consideration." Plaintiffs, however, had presented virtually no evidence of unfairness. Though the court acknowledged that "often[,] the pleadings alone will not resolve the question of class certification and that some discovery will be warranted," it found that plaintiffs' time to prepare for certification issues had been more than adequate. Indeed, the plaintiffs had nearly ten months to conduct both formal and informal discovery between the time they filed the initial complaint in October 2006 and when their opposition to defendant's motion was due.

In addition, the court specifically commented that:

- significant discovery had taken place and the plaintiffs had no intent to propound additional discovery regarding class certification;
- plaintiffs had made a strategic choice to not present the entirety of their evidence on class certification to the court in their opposition; and
- "[p]laintiffs' real complaint [was] not that they were deprived an adequate time in which to complete discovery, but that they 'didn't want to be on defendants' schedule.'"

Accordingly, plaintiffs had not demonstrated that they were procedurally prejudiced by the timing of Countrywide's motion.

Was certification properly denied on the merits?

Finally, the court addressed whether it was an abuse of discretion for the district court to have denied certification on the grounds that individual issues predominated the class. The court affirmed the denial, concluding that determining whether the

employees were properly characterized as exempt would require a highly factual, individualized analysis for each class member. The court would have to examine that individual's work performed and determine how much of that work was exempt, and evaluate whether the employee's work was consistent with the employer's realistic expectations. This type of individualized analysis rendered maintenance of a class action improper.

Conclusion

Setting precedent in the Ninth Circuit, the decision in *Vinole* provides defendants with the opportunity for strategic advantage in the class certification process. Defendants are not required to abide by plaintiff's certification schedule, and may exert control over the course of litigation (and the fees and expenses incurred). *Vinole* does suggest that there are certain limitations on defendants' rights. For example, a court will consider whether the plaintiff has been procedurally prejudiced by the timing of defendant's motion, and will specifically examine the amount of time a plaintiff has had to conduct discovery and prepare an opposition. But plaintiffs do not have *carte blanche* to claim prejudice without sufficient evidence. The Ninth Circuit specifically noted that the plaintiffs' strategy in *Vinole* had been to withhold certain evidence in their opposition—giving only a "preview" of what they claimed would be contained in their own motion—because they did not wish to be placed on Countrywide's litigation schedule. Because the court ruled that defendants have an unequivocal right to move for denial of certification, plaintiffs' plan backfired. Given the many factors influencing the appropriateness of moving to deny certification, clients should work closely with counsel in developing a defense strategy allowing them to exert control over the class certification process.

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