Case No.: _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSE ALVAREZ, et al.,
for themselves individually,
and as representatives of all similarly situated persons,

Plaintiffs and Appellants,

vs.

THE MAY DEPARTMENT STORES COMPANY,

Defendant and Respondent.

AFTER A DECISION BY THE
COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR
CASE NO. B184504

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROLF M. TREU, PRESIDING
LOS ANGELES SUPERIOR COURT CASE NO. BC 303042

PETITION FOR REVIEW

Service on Attorney General and District Attorney of Los Angeles County required
by BUS. & PROF. CODE § 17209 and CAL. RULES OF COURT, RULE 44.5(a)

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

This Petition addresses a significant question of first impression in California: whether the due process rights of absent putative class members are violated when the doctrine of collateral estoppel is used offensively by a defendant to preclude the assertion of class action allegations at any time after a prior lawsuit, brought by a different plaintiff but alleging any similar class-wide misconduct, was denied certification before another trial court.

Plaintiffs and Petitioners respectfully petition for review of the October 11, 2006 opinion of the California Court of Appeal for the Second Appellate District ("Second District"), affirming the Trial Court's Order sustaining a demurrer to class allegations on the ground that the doctrine of collateral estoppel precluded the assertion of class action allegations.

A copy of the published opinion of the Court of Appeal is attached hereto as Exhibit "1."

I.

ISSUES AND QUESTIONS PRESENTED FOR REVIEW

1. California Courts have implicitly recognized the fact that due process requires class certification before absent putative class members

are bound by the outcome. (*See, e.g., Johnson v. American Airlines, Inc*. (1984) 157 Cal.App.3d 427, 433 [203 Cal.Rptr. 638].) As the Second District explained, "Absent such notification no member of the class need be bound by the result of the litigation." (*Home Sav. & Loan Assn. v. Superior Court* (2nd Dist. 1974) 42 Cal.App.3d 1006, 1011 [117 Cal.Rptr. 485] ("*Home Savings*").) This due process consideration explains the "ascertainability" requisite to class certification, because ascertainability "is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Hicks v. Kaufman and Broad Home Corp*. (2nd Dist., 2001) 89 Cal.App.4th 908, 914 [107 Cal.Rptr.2d 761].) In light of this authority, did the Second District, creating a split of authority in California, err when it held, without limitation, that an order denying class certification can be asserted by the defendant as a collateral estoppel bar to preclude a putative class member's subsequent attempt to file and certify their own class action, irrespective of the fact that notice of the denial did not issue?

2. If an order denying class certification can *ever* be asserted by the defendant as a collateral estoppel bar to preclude a putative class member's subsequent attempt to file and certify their own class action, must that subsequent class action be identical in all respects to the proposed class affected by the denial order, or can the collateral bar operate on proposed classes that are only "similar" to the first?

3. It has already been conclusively determined "that that representation of different plaintiffs in different cases by the same attorneys is not a factor that justifies imposition of collateral estoppel to preclude litigation of an issue by . . . a non-party to the prior actions . . . ." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 93 [38 Cal.Rptr.3d 528].) In light of this authority, did the Second District, creating a split of authority in California, err when it held that the identity of counsel is a factor to be considered when applying collateral estoppel?

II.

WHY REVIEW SHOULD BE GRANTED

Cutting the legs out from under litigants, the California Court of Appeal for the Second Appellate District ("Second District") has added to the growing list of rulings that harm the class action device and prejudice the due process rights of litigants. (*See Pfizer Inc. v. Superior Court*, review granted November 1, 2006, S145775; *Tobacco II Cases*, review granted November 1, 2006, S147345; *Gentry v. Superior Court*, review granted April 26, 2006, S141502; *Jones v. Citigroup*, review granted April 26, 2006, S141753; *Pioneer Electronics v. Superior Court* (*Olmstead*), review granted July 27, 2005, S133794.) By severely restricting the ability of plaintiffs to pursue collective actions, the Second District has effectively limited access to our Courts, to the detriment of all Californians.

The Second District held:

1. When a class action is denied certification, that denial order may be used as collateral estoppel to bar a putative class member's subsequent effort to file their own class action, irrespective of the lack of notice, creating a new "virtual representation" doctrine in class actions that diverges from prior California decisions. (*Alvarez v. May Dept. Stores Co*. (October 11, 2006) 143 Cal.App.4th 1223, 1236 [49 Cal.Rptr.3d 892].)
2. The subsequent class to be precluded need not be identical to the first - it must only be "similar" to the first. (*Alvarez, supra,* 143 Cal.App.4th at p. 1237.)
3. The identity of counsel is a factor to be considered when applying collateral estoppel. (*Alvarez, supra*, 143 Cal.App.4th at p. 1237.)
4. Contrary to the holdings of *Home Savings*, *Frazier*, and others, notice is only required to bind absent class members *after* a class is certified. (*Alvarez, supra*, 143 Cal.App.4th at pp. 1238-1239.)

The Second District's Opinion directly conflicts with existing California decisions and interferes with the primary purposes of the class action device.

First, class actions provide a critical mechanism that protects a litigant's right to reasonable court access. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 156 [30 Cal.Rptr.3d 76].) In *Linder v. Thrifty Oil Co.*, this Court noted:

> "A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation."

(*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 446 [97 Cal.Rptr.2d 179], citing approvingly from Justice Tobriner's concurring opinion in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 388 [134 Cal.Rptr. 393].) The Second District's Opinion effectively closes the court house doors to absent and uninvolved class members if the first trial court to hear the certification question declines to certify a class.

Second, California Courts have recognized that due process requires class certification before absent putative class members are bound by the outcome. (*Home Savings*, *supra*, 42 Cal.App.3d at p. 1011; *Hicks*, *supra*, 89 Cal.App.4th at p. 914.) The Second District's Opinion, in attempting to distinguish those holdings, creates a split in what was several decades of uniform California authority.

Third, in the context of collateral estoppel, due process requires that the party to be estopped must reasonably expect to be bound by the prior adjudication. (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 720 [41 Cal.Rptr.3d 728].) However, if the Second District's Opinion stands, an absent class member, with no notice of that action or the denial of certification, will nevertheless be bound by it, even if the proposed class representative was found to be atypical or inadequate as a ground for denying certification.

Fourth, the Second District has created a split of authority with *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82 [38 Cal.Rptr.3d 528], concluding that the identity of counsel is a factor to be considered when applying collateral estoppel, where the prior rule indicated that identity of counsel was not an element of collateral estoppel.

Finally, the Second District, in derogation of its duties, ignored arguments presented by Petitioners that would have resulted in the reversal of the Trial Court's decision, including the argument that Petitioners' equitable claims should be certified under the Rule 23(b)(1) and/or (b)(2) standards of the Federal Rules of Civil Procedure. (*Bell v. American Title Ins. Co*. (1991) 226 Cal.App.3d 1589, 1608 [277 Cal.Rptr. 583] ("As a rule, 'class actions that qualify for class certification under subdivision (b)(1) or (b)(2) should not normally be certified under (b)(3),' even though (b)(3) is such a broad category that it would comprehend all class actions.")

If the Opinion of the Second District stands unchecked, it will serve to dramatically undercut the class action device as a tool of significance in areas of law that include, among others, employee rights and consumer protection. California must not abandon its leadership position in the field of employee and consumer protection, and California must not initiate a trend heralding the erosion of due process rights.

III.

STATEMENT OF THE CASE

A. Factual History Of The Action

1. The Alleged Misconduct Of Robinsons-May

Plaintiffs are former or current ASMs for Defendant Robinsons-May. (Plaintiffs' Appendix ("PLNTFS. APP."), at 505.) The TAC alleges violation of the overtime statutes (LAB. CODE § 1194, *et seq*.), conversion, violation of the UCL and violation of the Labor Code - Private Attorney General Act ("The Act", LAB. CODE §§ 2698-2699), for which Plaintiffs seek, amongst other things, to recover unpaid overtime wages. (*Ibid*.; *see*, PLNTFS. APP., at 295 – 334.)

As part of its ongoing, systemic pattern and practice of violating overtime laws, Robinsons-May:

- Effectively required ASMs to work more than 40 hours per week;
- Deemed each ASM exempt based upon their job title rather than any consideration of actual work performed;
- Paid no overtime wages to any ASM;
- Kept no detailed records of ASMs actual daily work activities;
- Conducted no studies of how ASMs spent their work time;
- Failed to train ASMs on the difference between exempt and nonexempt work;

- Provided a uniform job description for ASMs throughout its operations;
- Required ASMs, through standardized policies and procedures, to spend the large majority of their time engaged in tasks that, as a matter of law, were and are not exempt; and,
- Failed to disclose to prospective ASMs that they would not receive overtime pay, irrespective of whether they were properly classified as "exempt" under California's overtime laws.

(PLNTFS. APP., at 323 – 324.)

The job duties of those employees designated as ASMs by Robinsons-May, do not fit the definition of exempt executive or administrative employees because:

- Less than fifty (50%) of their work hours are spent on managerial or administrative (exempt) duties;
- More than fifty (50%) of the labor hours are spent performing non-exempt duties, including but not limited to; working inventory, cleaning and tidying sale areas, arranging merchandise according to detailed plans, stocking shelves, posting signs, processing freight, folding clothes, ringing up merchandise sales, filing out credit card applications, and other duties of a manual description. All of the above duties are also performed by Robinsons-May's non-exempt employees on a daily basis;

- Robinsons-May has a written policy that requires ASMs to be on the floor for set hours during the work day;
- ASMs do not have the discretion or independent judgment as defined by the Department of Labor Standards Enforcement in that they must follow exacting and comprehensive company-wide policies that dictate every aspect of the department operations, including, but not limited to, when, where and how merchandise will be displayed, receiving, inventory and stocking procedures, and when and where signs will be posted and sales area and cleanliness standards;
- ASMs cannot set wages of employees, have no authority to fire, cannot contract on behalf of the corporation, and cannot set policies or procedures which bind the corporation; and,
- ASMs cannot use discretion in placing employees on corrective action for violating any of Robinsons-May's policies. If an ASM fails to place an employee on corrective action for violating a policy, the ASM, himself or herself, will be placed on corrective action for failing to do so.

(PLNTFS. APP., at 315 – 316.)

2. The Prior Suits Against Robinsons-May

On July 15, 1997, Mark Gorman ("Gorman"), a former ASM, filed suit

against Defendant THE MAY DEPARTMENT STORES COMPANY, in a suit entitled *Gorman v. Robinsons-May*, Case No. BC 174606 ("*Gorman*"). (PLNTFS. APP., at 102 – 126.) Gorman sought certification of overtime wage claims and was denied. (PLNTFS. APP., at 127 – 139.) The plaintiff in the *Gorman* matter was found to be inadequate by the Trial Court. (PLNTFS. APP., at 130) Importantly, no attempt was made to certify a UCL claim, which, at that time, did not require certification to proceed as a "representative" action.[1] (PLNTFS. APP., at 127 – 139.) The order denying certification was final on February 20, 1999. (PLNTFS. APP., at 505.) *Gorman* was voluntarily dismissed. (*Ibid*.)

After *Gorman* terminated without a determination of the rights of ASMs, Janice Duran and Julia Ramos filed a class action suit against Defendant on September 9, 1999; the suit was entitled *Duran v. Robinsons-May*, Case No. RCV 42727 ("*Duran*"). (PLNTFS. APP., at 140 – 147.) Class certification was denied, the Court of Appeal affirmed the denial, and a remittitur issued on August 5, 2003. (PLNTFS. APP., at 148 – 154, 155 – 165, 166.) The plaintiffs in the *Duran* matter were found to be atypical. (PLNTFS.

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[1] This Court, in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116 [96 Cal.Rptr.2d 485], used the term "representative action" to refer to a UCL action, not certified as a class, in which a plaintiff seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff. (*Kraus*, at p. 126, n. 10.) Plaintiffs utilize that Court's terminology, referring to a non-certified UCL claim as a "representative" action.

APP., at 151). Importantly, no attempt was made to certify a UCL claim, which, at that time, did not require certification to proceed as a "representative" action. (PLNTFS. APP., at 148 – 154, 155 – 165, 166.) Relying upon Proposition 64, the Trial Court in *Duran* struck representative claims arising under the UCL. (PLNTFS. APP., at 505.) The Trial Court in *Duran* also denied those plaintiffs the opportunity to seek certification of the UCL claim on the ground that those plaintiffs had previously brought a certification motion in that action. The *individual* claims of Duran and Ramos are proceeding. (*Ibid*.)

B. Procedural History

Plaintiffs filed suit in the Los Angeles Superior Court against Defendant THE MAY DEPARTMENT STORES COMPANY on September 24, 2003. (PLNTFS. APP., at 1, 592.)[2] On September 27, 2004, Plaintiffs filed a Second Amended Complaint ("SAC"). (PLNTFS. APP., at 38, 590.)

Defendant Demurred to Plaintiffs' SAC, asserting various statutes of limitation arguments against various Plaintiffs. (PLNTFS. APP., at 64 – 98.) At the January 20, 2005 hearing of Defendant's Demurrer to Plaintiffs' SAC,

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[2] Respondent's Appendix identified two instances wherein Appellants' Appendix contained photocopy errors. Those errors were inadvertent and Petitioners apologize to the Court for any inconvenience caused by those errors.

Plaintiffs requested leave to amend the SAC to assert a Cause of Action under BUS. & PROF. CODE section 17200, *et seq*. ('Unfair Competition Law", or "UCL"). Defendant objected, and the Trial Court Ordered further briefing as to various issues.[3] (PLNTFS. APP., at 273, 505.)

On February 28, 2005, the Trial Court granted Plaintiffs' Motion for leave to file the proposed TAC, deeming the submitted TAC filed and served as of the date of the Trial Court's Order. (PLNTFS. APP., at 392.)

Defendant Demurred to Plaintiffs' TAC, asserting certain statutes of limitation. In addition, Defendant Demurred to Plaintiffs' class allegations, asserting that the denial of class certification in a different lawsuit, brought by different plaintiffs, precluded these Plaintiffs from alleging a class action in this matter. (PLNTFS. APP., at 394 – 416.)

At the May 19, 2005 hearing of Defendant's Demurrer, Plaintiffs argued extensively against the Demurrer to Plaintiffs' class allegations. (REPORTER'S TRANSCRIPT, May 19, 2005 proceedings, at 4-22.) The Trial Court took the matter under submission. (PLNTFS. APP., at 554.) Ultimately, the Trial Court sustained Defendant's Demurrer to Plaintiffs' class allegations set forth in the

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[3] Those issues included: (1) whether Plaintiffs should be permitted leave to amend in order to state claims arising under the UCL (as amended by Proposition 64); and (2) whether Plaintiffs can allege any set of facts which, if proven, would be sufficient to raise the equitable doctrine of "delayed discovery" and overcome Defendant's statutes of limitation Demurrers to portions of certain Plaintiffs' claims.

TAC. (PLNTFS. APP., at 560, 567 – 579.)[4]

Oral argument before the Court of appeal was held on August 11, 2006. At the hearing, the Second District ordered supplemental briefs on the following questions:

> Is there a due process right to be a class representative (as contrasted with the due process right to pursue a cause of action in one's own right)? How does the answer implicate the issues in this case?

The Opinion of the Court of Appeal issued on October 11, 2006. Petitioners filed a Petition for Rehearing. That Petition was denied by the Second District.

[4] The Notice of Ruling filed on August 3, 2005, was prepared at the request of the Clerk of the Court of Appeal. The Clerk rightly identified the fact that the May 19, 2005 Tentative Ruling of the Trial Court was not a part of the Court's file. (PLNTFS. APP., at 567 – 579.)

DISCUSSION

The Court of Appeal ruled that a decision by one trial court not to certify a class in an initial lawsuit binds all putative or related class members on collateral estoppel grounds in any subsequent lawsuit wherein "similar" class action allegations are asserted. This Court should grant review to correct the due process violations that will result from this decision.

IV.

THIS COURT SHOULD GRANT REVIEW OF THE SECOND DISTRICT'S OPINION BECAUSE IT VIOLATES FUNDAMENTAL PRINCIPLES OF DUE PROCESS AND STRIPS ABSENT CLASS MEMBERS OF THEIR MOST BASIC LITIGATION RIGHTS.

A. Collateral Estoppel May Not Be Invoked To Bar Claims By Persons Who Were Never Party To A Prior Suit.

1. The Second District's Ruling Has Diverged From And Created A Split With The Settled Rule That Notice Must Issue Before Absent Class Members Can Be Bound By Any Decision Rendered In A Class Action Lawsuit.

> Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

(*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* (1971)

402 U.S. 313, 329 [91 S.Ct. 1434; 28 L.Ed.2d 788].) Due process mandates adequate notice: "Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." (*Lambert v. California* (1957) 355 U.S. 225 [78 S.Ct. 240, 2 L.Ed.2d 228]; *People v. Swink* (1984) 150 Cal.App.3d 1076, 1079 [198 Cal.Rprt. 290].)

In the class action context, this due process requirement is satisfied through notice to the class. California Courts have implicitly recognized the fact that due process requires class certification before absent putative class members are bound by the outcome. (*See, e.g., Johnson v. American Airlines, Inc*. (1984) 157 Cal.App.3d 427, 433 [203 Cal.Rptr. 638].) As another panel of the Second District explained, "Absent such notification no member of the class need be bound by the result of the litigation." (*Home Sav. & Loan Assn. v. Superior Court* (2nd Dist. 1974) 42 Cal.App.3d 1006, 1011 [117 Cal.Rptr. 485] ("*Home Savings*").) This due process consideration explains the "ascertainability" requisite to class certification, because ascertainability "is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Hicks v. Kaufman and Broad Home Corp*. (2nd Dist., 2001) 89 Cal.App.4th 908, 914 [107 Cal.Rptr.2d 761].)

And more recently, one Court, commenting on class notices, explicitly rejected opt-in class actions in favor of opt-out classes, emphasizing the need for the fullest possible adjudication of claims and the reduction of individual litigation. (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1550 [27 Cal.Rptr.3d 839].)

Thus, the Second District created a split of authority on the necessity of notice to bind absent class members where no split previously existed. The Second District attempts to distinguish *Home Savings*/*Hicks* line of authority by limiting its application to post-certification rulings. But the rationale behind the notice requirement is based upon due process rights, which do not arise only by virtue of certification. Rather, due process rights are held by all absent class members, at all times. *Home Savings*, *Hicks* and others, do not limit themselves to post-certification orders, and the Second District offers no justification for imposing this limitation.

The result of the Second District's ruling will be the denial of access to one of the most significant tools available to large groups of civil litigants: the class action device. When absent putative class members have received no notice that their access to this tool is in jeopardy, they must be provided their own opportunity to establish the propriety of resolving claims on a classwide basis.[5]

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[5] In California, the denial of certification must be appealed within 60

2. The Second District's Ruling Has Eliminated The Due Process Protection That Limits Application Of The "Sufficiently Close" Relationship Concept Of Privity.

In California, "privity" has evolved and expanded over time into an amalgamation of diverse concepts. "Privity" traditionally indicated a transaction whereby a successor (purchaser, inheritor, etc.) acquired an interest in the subject matter of litigation from or under one of the litigants after rendition of judgment. (*Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 875 [151 Cal.Rptr. 285].) The concept of "privity" has since expanded to include special relationships, such as where a governmental body, acting on behalf of its citizens, obtains a judgment that in conclusive as to those citizens (*Clemmer, supra,* at p. 875, citing *Rynsburger* v. *Dairymen's Fertilizer Coop., Inc*. (1968) 266 Cal.App.2d 269 [72 Cal.Rptr. 102], and others), and, more recently, to situations in which the "relationship between the party to be

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days. (*Stephen v. Enterprise Rent-a-Car* (1991) 235 Cal.App.3d 806, 812 [1 Cal.Rptr.2d 130]; California Rules of Court, rule 2(a); *Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470 [174 Cal.Rptr. 515].) Under the Second District's result, absent putative class members would have to appeal the denial of class certification within 60 days of denial (despite having no notice of the denial), or they will face the prospect of having any "similar" class allegations barred at the pleading stage in any subsequent proposed class action that they file against the same defendant. Which begs the question of whether an absent putative class member in suit denied certification even has standing to appeal a denial of certification.

estopped and the unsuccessful party in the prior litigation . . . is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel."[6] (*Clemmer, supra,* at p. 875.)

"Notwithstanding expanded notions of privity, however, collateral estoppel may be applied only if due process requirements are met." (*Lewis v. County of Sacramento* (1990) 218 Cal.App.3d 214, 218 [266 Cal.Rptr. 678], citing *Clemmer, supra*, 22 Cal.3d at p. 875.) Succinctly stating this limitation, the *Lewis* Court held, "[D]ue process requires that the party to be estopped must have had a fair opportunity to pursue his claim the first time." (*Lewis, supra,* 218 Cal.App.3d at p. 218.)

Courts have considered various factors when determining whether due process concerns outweigh a finding of "privity." Reviewing those due process considerations, one Court said:

> "Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication . . . . [¶] A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance," for example, *by controlling it*. (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 948- 949, 119 Cal.Rptr. 139; accord, *Clemmer, supra,* 22 Cal.3d at p. 875, 151 Cal.Rptr. 285, 587 P.2d 1098.)

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[6] For example, "collateral estoppel was applied against a corporation which was the alter ego of an individual party in the first action." (*Lynch v. Glass* (1975) 44 Cal.App.3d 943, 949 [119 Cal.Rptr. 139].)

(*Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 464 [24 Cal.Rptr.2d 117] [emphasis added].) In this instance, the Second District disregarded the due process limitations on the concept of privity and created an absolute rule that absent class members are in privity with any plaintiffs bringing a class action, even when a trial court chooses not to certify the class. Review should be granted to correct this unconstitutional expansion of the privity doctrine.

3. The Second District Erred In Holding That The Identity Of Counsel Affects Collateral Estoppel

The Second District's opinion creates a direct conflict with *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82 [38 Cal.Rptr.3d 528].

First, *Rodgers* directly addresses the question of whether an identity of counsel has any impact on the question of whether privity exists between parties in two different lawsuits. (*Rodgers*, *supra*, 136 Cal.App.4th at 92-94.) *Rodgers* conclusively holds "that that representation of different plaintiffs in different cases by the same attorneys is not a factor that justifies imposition of collateral estoppel to preclude litigation of an issue by appellant as a non-party to the prior actions . . . ." (*Id*., at 93.)

Second, *Rodgers* considers the situation presented in this matter: whether collateral estoppel applies if different plaintiffs in different lawsuits

have comparable goals against the same defendant. (*See generally*, *Id.*, at 89-95.) The *Rodgers* Court concluded that due process prohibits application of collateral estoppel, even where plaintiffs have comparable goals, unless some special relationship or agreement between the plaintiffs in different matters is shown to exist. (*Id.*, at 95.)

The Second District's ruling disregards the *Rodgers* analysis and creates a dangerous rule of general application: the identity of counsel is an element that is considered when determining whether parties in two separate lawsuits are in privity with each other. This discordant ruling by the Second District will create adverse, unanticipated consequences to litigants throughout the state.

California decisional law acknowledges the "recognizably important right to counsel of his choice. . . ." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915 [145 Cal.Rptr. 9].) However, the Second District's ruling will have the consequence of intruding upon that right, <u>both in class actions and in individual lawsuits</u>. Because that Court concluded that identity of counsel is a factor in collateral estoppel analysis, a client seeking representation in a potential class action must now consider whether to seek counsel without experience against a defendant. The *Rodgers* Court noted this significant threat when it reasoned:

> To find that an identity of attorneys presenting the same issue on behalf of different parties results in issue preclusion would promote attorney shopping, and tend to prevent parties from

> obtaining representation by chosen counsel familiar with an issue or matter in litigation. And to impose issue or claim preclusion essentially on the basis of prior adjudication of an identical issue would ignore the identity-of-parties requirement of collateral estoppel that is predicated upon due process principles.

(*Rodgers, supra,* 136 Cal.App.4th at pp. 93-94.)

In its ruling, the Second District Court held, "We conclude that similarity of counsel is one factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit." (*Alvarez,* 143 Cal.App.4th at p. 1237.) As there is nothing about this holding that limits its application to class actions, it will be applied in individual lawsuits any time a similarly aggrieved plaintiff seeks representation from an attorney with experience litigating a particular type of claim against a particular defendant. A defendant that prevails against one plaintiff on an important issue will assert that a different plaintiff cannot independently litigate the same *or similar* issue through the same attorney.

The spillover of the Second District's ruling into individual litigation will create significant unintended consequences for litigants and counsel alike, chilling their ability to match up freely. Plaintiffs, in particular, will lose the benefit of counsel's experience with a particular type of claim against a particular defendant. This unintended outcome jeopardizes the claims of all potential plaintiffs in California.

When the Second District split from *Rodgers,* it articulated a rule that interferes with a plaintiff's right to select experienced counsel and extended the

collateral estoppel doctrine outside its long-settled bounds.

B. The Second District's Ruling Denies Access To The Judicial System By Plaintiffs With Smaller Claims.

Courts have long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 434-435 [97 Cal.Rptr.2d 179], citing *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 703-704 [63 Cal.Rptr. 724] and others.) In *Discover Bank*, *supra*, this Court, quoting *Keating v. Superior Court* (1982) 31 Cal.3d 584 [183 Cal.Rptr. 360], emphasized the value of the class action device:

> This court has repeatedly emphasized the importance of the class action device for vindicating rights asserted by large groups of persons. We have observed that the class suit " 'both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. [Citation.]' " [Citation.] Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to "retain[ ] the benefits of its wrongful conduct." [Citation.]

(*Discover Bank*, *supra*, 36 Cal.4th at p. 157.)

Class actions provide a critical mechanism that protects a litigant's right to reasonable court access. Here, however, the Second District, without support, asserted, "Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of

their personal claims." (*Alvarez,* 143 Cal.App.4th at p. 1238.) The Second District was simply wrong in this regard. For example, in this matter, some Petitioners stand to recover overtime compensation for as little as 1 to 4 months of work. (PLNTFS. APP., at 420.)

Realistically, such limited claims do not provide an adequate incentive for an aggrieved employee to challenge their employer's classification of their position as exempt from overtime laws, a fact that this Court has long recognized. In *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864 [97 Cal.Rptr. 849], this Court emphasized the harm that would result if a defendant could pick off class members to kill a class action suit, concluding that "only members of the class who can afford to initiate or join litigation will obtain redress. . . ." (*La Sala, supra,* 5 Cal.3d at p. 873.)

In stark contrast to the principle that the small claimants are entitled to their day in court, the Second District's ruling will deny absent class members access to the judicial system as soon as one trial court determines that it will not utilize the class action device as a case management tool. The injustice is tangible. An absent putative class member, with limited options for feasible access to the judicial system, will now have an essential tool for leveling the playing field, the class action device, ripped from him despite no notice of this potential result and no participation in the lawsuit that effectively extinguished his rights. In effect, one decision denying class certification will, in many instances, serve as a *de facto* adjudication of all claims against the entire class.

C. At A Minimum, Due Process Considerations Cannot Permit The Dismissal Of Class Allegations Through Application Of The Collateral Estoppel Doctrine Where The Prior Proponent Of Certification Was Rejected On Typicality Or Adequacy Grounds.

Ignored by the Second District in its Opinion, the record below established that the plaintiff in the *Gorman* matter was found to be inadequate (PLNTFS. APPENDIX, at 130) and the plaintiffs in the *Duran* matter were found to be atypical (PLNTFS. APPENDIX, at 151).

The Second District created a rule that precludes absent class members from asserting their own class allegations in a subsequent lawsuit when an earlier, similar lawsuit is denied certification for any reason. The Second District's Opinion is constitutionally unsound. At a minimum, no plaintiff determined to be inadequate or atypical should ever be permitted to bind absent putative class members.

Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. . . ." The party seeking certification must establish the existence of an ascertainable class and a well-defined community of interest among class members. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104 [131 Cal.Rptr.2d 1].) "The 'community of interest' requirement

embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 [17 Cal.Rptr.3d 906].) The second two prerequisites, typicality and adequate representation, focus instead on the desired characteristics of the class representative. (1 Conte & Newberg, Newberg on Class Actions (4th ed. 2002) Typical Claims Or Defenses, Rule 23(a)(3), § 3:13.) The existence of the adequacy and typicality factors sets a barrier past which due process rights would be violated, and the Second District's ruling must be reversed to protect against the persistent recurrence of that constitutional violation.

The United States Supreme Court has explicitly declared adequate representation in class actions as essential to the provision of due process: "[T]he Due Process Clause of course requires that the named plaintiff [in a class action] at all times adequately represent the interests of the absent class members." (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812 [105 S.Ct. 2965, 86 L.Ed.2d 628]; *accord Nevada v. United States* (1983) 463 U.S. 110, 135 n. 15 [103 S.Ct. 2906, 77 L.Ed.2d 509], citing *Hansberry v. Lee* (1940) 311 U.S. 32, 44 [61 S.Ct. 115], for the proposition that absent class members could not be bound where the class representatives "had interests that impermissibly conflicted with those of persons represented"). This requirement of adequate and aligned interests is essential. "Final judgments . .

. remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement." (*Matsushita Electric Industrial Co. v. Epstein* (1996) 516 U.S. 367, 396 [116 S.Ct. 873] (Ginsburg, J., concurring in part and dissenting in part).)

" ' "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." ' " (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 720 [41 Cal.Rptr.3d 728], citing *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1155 [81 Cal.Rptr.2d 155].) The reasonable expectation requirement cannot be satisfied if a plaintiff in a prior action sought certification and was found to be atypical or inadequate. The *Mooney* Court explains this reasoning:

> " 'The "reasonable expectation" requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, ***or*** if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped. [Citations.] Furthermore, due process requires that the party to be estopped must have had a fair opportunity to pursue his claim the first time. [Citation.]' [Citation.]" (*Old Republic Ins. Co. v. Superior Court, supra,* at p. 154, 77 Cal.Rptr.2d 642.)' "

(*Mooney, supra*, 138 Cal.App.4th at 720, emphasis added.) Absent putative class members can never form the expectation that an inadequate or atypical

proposed class representative is serving in a representative capacity. In the first instance, the proposed representative, by definition, is incapable of representing the interests of absent class members, and in the second instance, the proposed representative, by definition, is not fully representing all of the claims of absent class members. In fact, citing to *In re Bridgestone/Firestone, Inc., Tires Products* (7th Cir. 2003) 333 F.3d 763, the Second District quoted language indicating that absent class members are bound by a certification denial, *provided that the named representatives furnished adequate representation*.[7] (*Alvarez*, 143 Cal.App.4th at p. 1236.)

At a minimum, the need to impose adequacy and typicality exceptions to the Second District's opinion strongly supports the granting of this Petition.

D. The Utility Of The Class Action Device Is Of Such Importance That It Must Be Safeguarded, And Its Renewed Assertion By An Absent Class Member Will Prejudice Neither Trial Courts Nor Defendant.

As Newberg on Class Actions succinctly states, "In numbers there is strength." (2 Conte & Newberg, Newberg on Class Actions (4th ed. 2002)

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[7] The *Bridgestone/Firestone* decision was not identified by any party until Respondent cited to this decision in its supplemental letter brief filed after oral argument was complete. The Second District, in relying upon the rationale of this inapposite decision, failed to comply with Government Code section 68081.

Advantages and Disadvantages of Class Actions, § 5:3.) This pronouncement has been echoed by the United States Supreme Court:

> Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.

(*Hawaii v. Standard Oil Co. of Cal.* (1972) 405 U.S. 251, 266 [92 S. Ct. 885, 31 L. Ed. 2d 184].)

This Court has consistently recognized that class allegations are essential to the vindication of substantive rights and critical for adequate protection of litigants. Most recently, in determining that the waiver of class claims in a consumer contract of adhesion can be unconscionable, this Court said:

> [A]s . . . cases of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the "procedural" label on such devices understates their importance and is not helpful in resolving the unconscionability issue.

(*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161 [30 Cal.Rptr.3d 76].) After identifying the impact of class action allegations on substantive rights, *Discover Bank* rejected countervailing rationales, including the notion that the availability of attorney's fees provides an adequate substitute for the class device. (*Discover Bank*, *supra*, 36 Cal.4th at 162.) *Discover Bank*, following a long line of established precedent, confirms that class action allegations provide some essential *extra* to an individual claim that must be

protected.

The substantive strength-in-numbers benefit of class actions is as evident in the employment law setting as it is in consumer class actions. (*See, e.g., Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 [17 Cal.Rptr.3d 906].) However, in the wage & hour setting, class actions provide to employees a further, substantive benefit: they insulate individuals from the fear and risk of suing one's employer individually. "[T]he risks entailed in suing one's employer are such that the few hardy souls who come forward should be permitted to speak for others when the vocal ones are otherwise fully qualified." (*Ste. Marie v. Eastern R.R. Ass'n* (D.C.N.Y. 1976) 72 F.R.D. 443, 449, *decision supplemented*, 458 F.Supp. 1147, *decision supplemented*, 497 F.Supp. 800, *revd. in part and affd. in part*, (2d Cir. 1981) 650 F.2d 395.)

Out of self interest, defendants do not concede these benefits. As Respondent did in this matter, defendants object to a trial court's consideration of a class certification motion on the ground that considering the motion is an unjust cost to them. The Second District apparently accepted this argument, as much of its opinion emphasizes the threat of repeated class actions. This argument is a fallacy.

It is the defendant's desire to escape the full measure of liability for misconduct that motivates the objection to a subsequent trial court's review of certification, and a defendant's desire to avoid liability should, as a matter of settled policy in California, not be indulged. In particular, where injustice

would result, the doctrine is rejected. (*Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757 [22 Cal.Rptr. 14]; *Chern v. Bank of America* (1976) 15 Cal.3d 866, 872 [127 Cal.Rptr. 110]; *People v. Conley* (2004) 116 Cal.App.4th 566, 570-571 [10 Cal.Rptr.3d 477].) The injustice exception extends to matters involving mixed questions of law and fact. (*Powers v. Floersheim* (1967) 256 Cal.App.2d 223, 230 [63 Cal.Rptr. 913].)

Collateral estoppel is also rejected where the public interest is at issue. (*Louis Stores*, 57 Cal.2d at 757.) Courts have recognized a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest. (*Chern*, 15 Cal.3d at 872, citing *Louis Stores*; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 381.) A defendant's wish to escape full liability for wrongdoing must habitually give way to the right of litigants to seek classwide relief and the right of trial court's to find innovative ways to permit the possibility of such relief. "A defendant who in one way or another victimizes hundreds of thousands, has, after all, no constitutional right to be subjected to only one lawsuit." (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 968 [124 Cal.Rptr. 376].)

Despite these clearly defined restrictions on the application of collateral estoppel, the Second District relied upon the rationale from *In re Bridgestone/Firestone, Inc., Tires Products* (7th Cir. 2003) 333 F.3d 763 to support its overbroad collateral estoppel rule. In doing so, the Second District

succumbed to the *argumentum ad terrorem* that diminishes the rationale of *Bridgestone/Firestone*.

First, when critically examined, *Bridgestone/Firestone* does not represent a typical collateral estoppel decision. Rather it concerns the application of The Anti-Injunction Act, 28 U.S.C. § 2283 and the reach of federal power over state court actions.

Second, the *Bridgestone/Firestone* decision is inapposite to this matter, due to the unique aspects of the Bridgestone/Firestone decision. The *Bridgestone/Firestone* decision concerned a factually complicated, nationwide class action, with all the related problems posed thereby. The *Bridgestone/Firestone* Court enjoined a state court from certifying a nationwide class action after the Seventh Circuit Court of Appeals had determined that a nationwide class action was utterly unmanageable due to the extreme variation in facts, circumstances and state laws affecting class members:

> Classes comprising owners of more than 60 million tires and 3 million vehicles, including many different models, are unsuitable for several reasons, we concluded-not the least of which is that different rules of law govern different members of the class.

(*Bridgestone/Firestone, supra,* 333 F.3d at 765.) That decision did not (and could not) state that an individual state could not certify a state-wide class. In fact, it held to the contrary: "Indeed, our opinion contemplated that states would certify narrower classes. . . ." (*Bridgestone/Firestone, supra,* 333 F.3d

at p. 766.) As this is a California state class action, there is no equivalent analogy to the nationwide/state dichotomy of *Bridgestone/Firestone*.

Finally, *Bridgestone/Firestone* falls prey to the same arguments that persuade the Second District's decision. The *Bridgestone/Firestone* Court, setting up its straw-man argument, said:

> "Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% (0.9 = 0.349). Filing in 20 states produces an 88% probability of national class certification (0.9 = 0.122). This happens whenever plaintiffs can roll the dice as many times as they please-when nationwide class certification sticks (because it subsumes all other suits) while a no-certification decision has no enduring effect."

(*Bridgestone/Firestone*, 333 F.3d at 767.) While this outcome is presented so as to sound terrifying and unjust, it is a virtual impossibility. If filed simultaneously, the federal courts resolve this possibility through the MDL panel. States have a wide array of abatement procedures to prevent simultaneous litigation of identical cases. If filed sequentially, the absence of tolling eliminates claims until, in fairly short order, none remain viable (assuming the defendant ends its wrongful conduct, which did not happen here). And, assuming one court in ten determines that certification is a tool it deems appropriate to use in a given case, and all ten courts are upheld on appeal, this fact provides no support for permitting one trial court to impose its sensibilities about case management on another trial court that is equally reasonable in the exercise of its discretion. Instead, it confirms the precept that

trial courts should be permitted to exercise sound discretion in determining whether certification is, on balance, appropriate (and, as a corollary, they should be *required* to exercise that discretion).

Appellants ask this Court to rehear and reconsider whether *Bridgestone/Firestone*'s *argumentum ad terrorem* persuaded this Court to reach an unsupportable conclusion about the legitimate scope of collateral estoppel.

E. The Second District's Ruling Erred By Failing To Reconcile Itself With The Existence Of Sequential Statute Of Limitations Tolling Decisions In State And Federal Court.

The Ninth Circuit noted in *Catholic Social Services, Inc. v. I.N.S.* (9th Cir. 2000) 232 F. 3d 1139 that since there is no rational basis for distinguishing between individual claims and class claims, there is no reason to deny tolling to a subsequent class action where an individual claim would also be timely. (*See also, Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1118-1119 [245 Cal.Rptr. 658], recognizing *American Pipe* serial tolling; *Yang v. Odom* (3rd Cir. 2004) 392 F. 3d 97.)

The Second District's ruling ignores this authority. However, *American Pipe* and its progeny, such as *Crown, Cork & Seal Co., Inc. v. Parker* (1983) 462 U.S. 345 could not exist under the Second District's collateral estoppel rule because there could *never* be an issue of statute tolling for subsequent

class actions: since no subsequent class action against the same defendant could ever be filed one the first class action was filed but not certified.

The fact that subsequent class actions, alleging the same delict, against the same party, may eventually lose *American Pipe* tolling answers the persecution straw man argument raised by Respondent and the Second District. The passage of time naturally restricts the number of such actions that can be maintained for the same wrong against the same defendant. Moreover, where a defendant fails to correct unlawful conduct directed at a class, that defendant *should* be subjected to renewed scrutiny in the form of subsequent class actions addressing the ongoing wrongful behavior.

V.

CONCLUSION

Because the *Alvarez* opinion has created a pivotal turning point in the understanding and utility of the class action device, review by this Court is urgently needed. Moreover, review by this Court is urgently needed to prevent an erosion of the due process backstop that prevents the application of the collateral estoppel doctrine beyond carefully circumscribed boundaries that err on the side of preserving claims rather than on extinguishing them. Without review, a measure of justice will be lost from our state.

Dated: November 19, 2006

Respectfully submitted,

ARIAS, OZZELLO & GIGNAC, LLP

H. SCOTT LEVIANT

By:_____

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CERTIFICATION

Line Spacing: Appellants' Petition for Rehearing was double spaced, except for indented quotations and footnotes, which were all single spaced.

Typeface and Size: The typeface selected for this Brief is 13 point Times New Roman. The font used in the preparation of this Brief is proportionately spaced.

Word Count: The word count for this Brief, excluding Table of Contents, Table of Authorities, Proof of Service, Verification and this Certification is approximately 8,116 words. This count was calculated utilizing the word count feature of Microsoft Word 2003.

Dated: November 19, 2006

Respectfully submitted,

ARIAS, OZZELLO & GIGNAC, LLP

H. SCOTT LEVIANT

By:_____
H. SCOTT LEVIANT
Attorneys for Plaintiffs and Petitioners

Alvarez v. May Dept. Stores Co. (October 11, 2006)
143 Cal.App.4th 1223 [49 Cal.Rptr.3d 892]

EXHIBIT “1”

Briefs and Other Related Documents
Alvarez v. May Dept. Stores Co.Cal.App. 2 Dist.,2006.

Court of Appeal, Second District, Division 4, California.
Jose **ALVAREZ** et al., Plaintiffs and Appellants,
v.
MAY DEPARTMENT STORES COMPANY, Defendant and Respondent.
No. B184504.

Oct. 11, 2006.

Background: Past and present department store managers filed individual and prospective class action complaints, alleging tort and statutory claims based on their employer's failure to pay them overtime wages. The Superior Court, Los Angeles County, No. BC303042,Rolf M. Treu, J., sustained defendant's demurrer to the class action allegations without leave to amend. Plaintiffs appealed.

Holding: The Court of Appeal, Suzukawa, J., held that plaintiffs were barred by prior judgment denying certification of class composed of other named plaintiffs who were "virtual representatives" of these plaintiffs from relitigating issue of class certification.

Affirmed.

West Headnotes

[1] Appeal and Error 30 95

30 Appeal and Error
30III Decisions Reviewable
30III(E) Nature, Scope, and Effect of Decision
30k95 k. Relating to Parties or Process. Most Cited Cases

Appeal and Error 30 102

30 Appeal and Error
30III Decisions Reviewable
30III(E) Nature, Scope, and Effect of Decision
30k102 k. On Demurrer. Most Cited Cases
Although an order sustaining a demurrer without leave to amend is not an appealable order, an order, whatever form it may take, which has the effect of denying certification as a class action, is an appealable order.

[2] Parties 287 35.17

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.17 k. Community of Interest; Commonality. Most Cited Cases
The community of interest requirement for class certification is satisfied by a showing of (1) predominant common questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class.

[3] Parties 287 35.17

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.17 k. Community of Interest; Commonality. Most Cited Cases
Class actions will not be permitted where there are diverse factual issues to be resolved, even though there may be many common questions of law; a class action cannot be maintained where each member's right to recover depends on facts peculiar to his case.

[4] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
When an appellate court reviews a ruling on demurrer, its only task is to determine whether the complaint states a cause of action.

[5] Appeal and Error 30 852

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court

30k852 k. Scope and Theory of Case. Most Cited Cases
An appellate court must affirm if the trial court's decision to sustain the demurrer was correct on any theory.

[6] Parties 287 75(4)

287 Parties
287VI Defects, Objections, and Amendment
287k75 Defects and Grounds of Objection as to Parties in General
287k75(4) k. Mode of Objection in General. Most Cited Cases
It may be proper at the pleading stage to strike class allegations if the face of the complaint and other matters subject to judicial notice reveal the invalidity of the class allegations.

[7] Judgment 228 677

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k677 k. Persons Represented by Parties. Most Cited Cases

Judgment 228 715(2)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k715 Identity of Issues, in General
228k715(2) k. What Constitutes Identity of Issues. Most Cited Cases
Past and present department store managers who filed individual and prospective class action complaints, alleging tort and statutory claims based on their employer's failure to pay them overtime wages, were barred, under collateral estoppel doctrine, by prior judgment denying certification of class composed of other named plaintiffs who were "virtual representatives" of these plaintiffs from relitigating issue of class certification; purported class complaint in previous lawsuit alleged same general misconduct occurring during same time period, and certification was sought for same class of employees by same attorneys, who provided adequate representation to plaintiffs in previous lawsuit.
See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 401.

[8] Judgment 228 634

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases
In order to apply the collateral estoppel doctrine, (1) the issue must be identical to that decided in the prior proceeding, (2) the issue must have been actually litigated in the prior proceeding, (3) the issue must have been necessarily decided in the prior proceeding, (4) the decision must have been final and on the merits, and (5) preclusion must be sought against a person who was a party or in privity with a party to the prior proceeding.

[9] Judgment 228 634

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases
In deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation.

[10] Parties 287 35.44

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.43 Notice and Communications
287k35.44 k. In General. Most Cited Cases

Parties 287 35.51

287 Parties
287III Representative and Class Actions
287III(B) Proceedings
287k35.51 k. Options; Withdrawal. Most Cited Cases
No statute or rule requires notice, and an opportunity to opt out, before class certification decision is made; it is a post-certification step.

[11] Judgment 228 677

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(B) Persons Concluded
228k677 k. Persons Represented by Parties. Most Cited Cases
Collateral estoppel requires that the party in the earlier case have interests sufficiently similar to the party in the later case, so that the first party may be deemed the "virtual representative" of the second party.

****893** Arias, Ozzello & Gignac, H. Scott Leviant, Santa Barbara, Mike Arias, and Mark A. Ozzello; Law Offices of Jeffrey P. Spencer and Jeffrey Spencer, San Clemente, for Plaintiffs and Appellants.
Wasserman, Comden & Casselman, Alhambra, John S. Curtis; Law Offices of Julia Azrael, Julia Azrael; and David E. Martin for Defendant and Respondent.
SUZUKAWA, J.
[1] ***1227** Plaintiffs and appellants,[FN1] 56 past and present "Area Sales Managers" ****894** (ASM's) employed by defendant and respondent the May ***1228** Department Stores Company (respondent), alleged both individual and class-action claims for failure to pay overtime compensation (Lab.Code, § § 1194, 1198), conversion, violation of the unfair practices law (Bus. & Prof.Code, § 17200 et seq.), and violation of the Labor Code Private Attorneys General Act of 2004 (Lab.Code, § 2698 et seq.). Based on the doctrine of collateral estoppel, the trial court sustained without leave to amend respondent's demurrer to the complaint's class action allegations and this appeal followed.[FN2]

FN1. Plaintiffs and appellants are: Jose **Alvarez**, Margo Arias, Maria Bocanegra, Vincent Bonnemere, Cynthia Byrd, Chester Espino, Andrea Fannon, Kim Gensch, Nicole Giebel, Lynn Halo-Gerber, Paul Harris, Selma Hovsepian, Ronald Jackson, Alice Leedom, Leah Lindberg, Margaret Mackinnon, Amber Polo, Margaret Sommer, Sarah Statz, Eileen Trujillo-Cameron, Roy Valdivia, Laura Zarate, Kylie Tigard, Dinafay Crandell, Kimberly DeWolfe, Matthew Finch, Timothy Frank, Michael Jalaty, Chrystine Johnson, Harold Katzman, Cathy Knox, Cynthia Madison, Angelica Madrigal, Tasha Southerland, Debi Brewer, James Gardner, Paula Gardner, Richard Hager, Belinda McCauley, Steven Pitts, Shane Price, Gerardo Torres, Kelly Tran, Leslie Garcia, Omar Leiva, Kimberly Frye, Stacey McClure, Yvonne Pfrimmer-Lopez, Zora Zizich, Stephanie Bunch, Gina Marchand, Bonnie Brown, Steven Esperanza, Carey Holland, Claudette Michaud, and Darren Muth.

FN2. Although an order sustaining a demurrer without leave to amend is not an appealable order, "an order, whatever form it may take, which has the effect of denying certification as a class action, is an appealable order. [Citations.]" *(Morrissey v. City and County of San Francisco* (1977) 75 Cal.App.3d 903, 907, 142 Cal.Rptr. 527.)

Appellants seek reversal of the order, claiming that the doctrine of collateral estoppel is inapplicable to an order denying class certification in another lawsuit brought by other plaintiffs because absent putative class members are not bound prior to the certification of a class. Alternatively, appellants contend that the doctrine of collateral estoppel was erroneously applied to the facts of this case. For the reasons set forth below, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit was initially filed in September 2003. It is one of several lawsuits filed by appellants' counsel against respondent on behalf of ASM's who were classified as "exempt" employees, and thus not paid overtime wages, although they worked more than 40 hours per week.

The Gorman Case

In July 1997, appellants' counsel filed a class action against respondent in Los Angeles County Superior Court (*Gorman v. Robinsons-May, Inc.*, BC174606 (*Gorman*)). The purported class in *Gorman* consisted of approximately 612 "current and former employees of Defendant Robinsons Department Stores within the states of California, Arizona and Nevada, holding the position of a salaried manager designated by Robinsons as an Area Sales Manager within the last three (3) years." The claims arose out of the alleged "illegal designation of Area Sales Managers as exempt employees and the failure of Defendants, and each of them, to pay Area Sales Managers overtime compensation." The complaint alleged: failure to pay overtime compensation in violation of the Labor Code, unfair business practices

(***1229**Bus. & Prof.Code, § 17200 et seq.), fraud, and negligent misrepresentation, and prayed for compensatory damages and injunctive relief. Generally, it claimed that the ASM's performed many of the same functions as the nonexempt employees, but were told that they were not entitled to overtime pay.

The trial court denied class certification in *Gorman* in December 1998, stating that the plaintiffs had failed to demonstrate a community of interest or an ascertainable class and that the proposed class representatives were unsuitable because they had unsatisfactory employment histories.

The Duran Case

In September 1999, appellants' counsel, in association with other attorneys, filed ****895** another class action in San Bernardino County Superior Court against respondent on behalf of ASM's, alleging causes of action for failure to pay overtime wages, unlawful business practices, and conversion (*Duran v. Robinsons-May, Inc.*, RCV42727 (*Duran*)). The complaint in *Duran* alleged that all ASM's performed the same duties and the job is a standardized one completely lacking in independent discretion.

After an evidentiary hearing, the trial court denied a motion to certify the class in *Duran* with respect to the Labor Code and conversion causes of action. The Court of Appeal affirmed the order in an unpublished opinion filed April 18, 2003. (*Duran v. Robinsons-May, Inc.*, E031288.) The Court of Appeal opinion held that the declarations submitted in support of the motion established that the 1600 class members' interests were so dissimilar that "it would not be proper to certify plaintiffs as class representatives for a class whose members are so dissimilar in their interests. Common questions of fact could not predominate."

This Case

In September 2003, appellants' counsel filed the present complaint on behalf of current and/or former ASM employees against respondent. It alleged that respondent intentionally and improperly designated them as exempt to avoid payment of overtime wages and other benefits.

Respondent demurred to the third amended complaint (TAC) based on the grounds that an order denying certification of the same class was issued in *Duran* and thus appellants were barred from relitigating the issue under the ***1230** doctrine of collateral estoppel. In addition, respondent claimed that the claims arising before February 1999 were barred by the statute of limitations.

The demurrer was argued on May 19, 2005, and taken under submission. On June 27, 2005, the court issued an order sustaining the demurrer without leave to amend as to the class action allegations and with leave to amend as to the claims arising before February 1999. The trial court's order stated, inter alia, "Two cases preceded the filing of this case, *Gorman* and *Duran*. Both cases sought to certify a class of current and former ASMs of Robinsons-May.... [¶] Plaintiffs argue that under federal law, the denial of class certification is never binding on absent putative class members.... Defendant's reply persuasively refutes plaintiffs' argument.... [¶] Plaintiffs do not argue that defendant failed to establish the required elements for application of collateral estoppel ... except privity.... Defendants persuasively respond to plaintiffs' argument...."

The court also ordered all proceedings stayed once appellant filed a notice of appeal from the order on the demurrer.

CONTENTIONS ON APPEAL

Appellants contend that the court erred in sustaining the demurrer because: (1) the class allegations cannot be resolved by way of a demurrer; (2) the *Gorman* and *Duran* cases had no plaintiffs in common with this case and thus the refusal in those cases to certify the class is not binding; (3) the principles of res judicata are inapplicable to this case; (4) respondent's issue preclusion argument was rejected in the *Duran* case by the Court of Appeal for the Fourth Appellate District; and (5) respondent's demurrer was frivolous and based upon non-citable authority.

DISCUSSION

A. The Resolution of Class Certification on Demurrer

[2] Code of Civil Procedure section 382 authorizes a class suit where a party can ****896** establish an ascertainable class and a well-defined community of interest. The community of interest requirement is

satisfied by a showing of "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ***1231***(Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327, 17 Cal.Rptr.3d 906, 96 P.3d 194 *(Sav-On)*; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106, 131 Cal.Rptr.2d 1, 63 P.3d 913.)

[3] " 'Class actions will not be permitted ... where there are diverse factual issues to be resolved, even though there may be many common questions of law.' [Citation.] '[A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case.' " *(Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 118, 133 Cal.Rptr.2d 367; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 397, 112 Cal.Rptr.2d 99.)

[4][5] When an appellate court reviews a ruling on demurrer, its only task "is to determine whether the complaint states a cause of action." *(Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, 271 Cal.Rptr. 146, 793 P.2d 479.) "An appellate court must affirm if the trial court's decision to sustain the demurrer was correct on any theory. *(Hendy v. Losse* (1991) 54 Cal.3d 723, 742, 1 Cal.Rptr.2d 543, 819 P.2d 1.)" *(Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, 50 Cal.Rptr.2d 736.)

Trial courts properly and routinely decide the issue of class certification on demurrer. "When class certification is challenged by demurrer, 'the trial court must determine whether "there is a 'reasonable possibility' plaintiffs can plead a prima facie community of interest among class members...." [Citation.] " '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.' [Citations.] If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all of the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage." [Citation.]' " *(Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101, 13 Cal.Rptr.3d 343, quoting *Silva v. Block* (1996) 49 Cal.App.4th 345, 349-350, 56 Cal.Rptr.2d 613.)

[6] It may be proper at the pleading stage to strike class allegations if the face of the complaint and other matters subject to judicial notice reveal the invalidity of the class allegations. *(Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5, 79 Cal.Rptr.2d 897.) An evidentiary hearing on the appropriateness of class litigation is not necessary unless there is a "reasonable***1232** possibility" that the plaintiff can establish a community of interest and ascertainable class. *(Ibid.)*

B. The Effect of the Duran Ruling

1. *Duran Case*

[7] The *Duran* complaint defined the potential class as "All current and former Employees of Robinson-May, Inc., holding the position of a salaried manager designated by Robinson-May, Inc. as an Area Sales Manager, and who worked more than eight (8) hours in any given day and/or more than forty (40) hours in any given week, during the period September 9, 1995 to the present and who were not ****897** paid overtime compensation pursuant to applicable *Cal. Labor Code* requirements."

Similarly, the TAC in this case defines the potential class as "all current and former employees of [respondent], holding the position of a salaried manager designated by [respondent] as an 'Area Sales Manager' (sometimes referred to herein as 'ASM'), and who worked more than eight (8) hours in any given day and/or more than forty (40) hours in any given week and who were not paid overtime compensation pursuant to applicable *Cal. Labor Code* requirements."

The complaint in *Duran* alleged that ASM's should not have been classified as exempt employees because they spent more than 50 percent of their time on nonmanagerial tasks and thus are entitled to overtime pay. The *Duran* plaintiffs contended that all ASM's perform the same standardized work as dictated by Robinsons-May. They claimed ASM's lack discretion and independence in merchandising, hiring, and supervising decisions. The declarations submitted by each of the parties (38 from plaintiff and 60 from defendant, in addition to excerpts from numerous depositions) ranged from those who worked only on nonexempt tasks to those who regarded their work as executive and discretionary in nature. The Court of Appeal held that "[I]f a similar

split in opinion exists company-wide among ASMs, it would not be proper to certify plaintiffs as class representatives for a class whose members are so dissimilar in their interests. Common questions of fact could not predominate among the 1600 ASMs."

In this case, as in *Duran*, the TAC alleges that respondent required the ASM's to work more than 40 hours per week, but they were all classified as ***1233** exempt and received no overtime pay. Appellants contend they spend more than 50 percent of their time performing nonexempt duties, that their job duties are standardized, and that they lack discretion or independent judgment in merchandising, hiring, and supervising decisions.

2. *Collateral Estoppel*

[8] Collateral estoppel is a doctrine which prevents relitigation of issues previously argued and resolved in a prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, 272 Cal.Rptr. 767, 795 P.2d 1223.) In order to apply this principle: (1) the issue must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in the prior proceeding; (4) the decision must have been final and on the merits; and (5) preclusion must be sought against a person who was a party or in privity with a party to the prior proceeding. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481, 111 Cal.Rptr.2d 870, citing *Lucido, supra.*)

[9] "[I]n deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875, 151 Cal.Rptr. 285, 587 P.2d 1098.)

The initial question we must answer is the following: What is the precise nature of appellants' right at issue here? Our decision will not eliminate appellants' substantive right to bring their lawsuit. Instead, it could potentially deny them the ability to serve as a representative of other ****898** litigants. The distinction may be crucial when we balance appellants' due process rights against the competing interests promoted by the doctrine of collateral estoppel. If the right to proceed as a class plaintiff is a property right, we must keep in mind the general principle "in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (*Hansberry v. Lee* (1940) 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (*Hansberry*).)

Appellants assert the right to be a class representative is inextricably tied to the right to pursue a personal claim. They argue that the power of the class ***1234** action lawsuit provides the individual plaintiff with the means to successfully combat a social injustice that might otherwise go unabated. They conclude that "a due process right to be a class representative must be recognized in light of the fact that the mere assertion of class allegations causes a defendant to recognize greater potential risk ... in an individual litigant's claims, a *substantive* effect."

Respondent argues that the interest in the right to sue as a class is not a protected property right. It argues while the courts have recognized that class actions facilitate the court's ability to manage a lawsuit and achieve substantial justice in a particular case, the tool is subject to appropriate limitations.

In comparing other forms of representative lawsuits, our Supreme Court has reached the same conclusion. In *Hogan v. Ingold* (1952) 38 Cal.2d 802, 243 P.2d 1, the court discussed the rights of a shareholder who complained that limitations placed on her ability to bring a derivative suit deprived her of a valuable property right. The court wrote: "This contention cannot be sustained; a person has no property right in being appointed or in acting on his own nomination as a guardian *ad litem.* He may nominate himself but he cannot compel the court to accept his nomination; he has no property right to be accepted by the court to institute and maintain an action in the right of another on terms beyond the control of the court or the Legislature." (*Id.* at p. 809, 243 P.2d 1.)

In *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 46 Cal.Rptr.3d 57, 138 P.3d 207, referring to the right under Business and Professions Code section 17200 to bring lawsuits as a representative of the public, the court cited *Hogan* and affirmed its holding that "the interest in suing on another's behalf is not a property right beyond statutory control." (*Id.* at p. 233, 46 Cal.Rptr.3d 57, 138 P.3d 207.)

Appellants give no reason why a class plaintiff has any greater right to serve as a representative than a shareholder in a derivative action or a representative of the public in an unfair competition suit. That appellants cannot is not surprising. There is no such right. We conclude that there is a distinction between using a prior ruling to bar a litigant from receiving a hearing on the merits and applying a prior decision to prevent a litigant from proceeding as a class representative.

Nonetheless, appellants assert that the holding in *Duran* cannot bar their attempt to certify a class. They claim "[i]t is an established rule of law that, in an action not certified as a class, the outcome of that action is binding only on the named parties." They urge that is the rule "throughout the entire country regarding the res judicata effect of denial of certification on absent ***1235** putative class members." In particular, appellants cite *Bittinger v. Tecumseh Products Co.* (6th Cir.1997) 123 F.3d 877, 880-881 (*Bittinger*). Appellants overstate their case.

****899** In *Bittinger*, plaintiffs, acting individually and on behalf of a class of former employees, filed suit. The court granted defendant's motion for summary judgment, *but did not reach the question of class certification.* (*Bittinger, supra,* 123 F.3d at p. 879.) Bittinger, who was not an original plaintiff, brought suit on behalf of the same class. The trial court dismissed the class claims, relying on the doctrine of res judicata. The appellate court reversed, concluding that Bittinger could not be bound by the prior decision.

Bittinger does not assist appellants because the court did not hold that absentee class members may never be bound by a prior ruling denying class certification. Nor did the court hold that class certification was necessary to bind absent class members. The case merely affirmed the basic principles of issue preclusion. In order to prevent the relitigation of an issue, that issue must have been decided in the prior proceeding, and the class issue was not decided in the first action. The other cases cited by appellant provide no support for their view. None of the cases deals with the question whether a court may enforce a prior class decision on litigants in a subsequent action.

Appellants cite the principle we acknowledged above and the United States Supreme Court reiterated in *Richards v. Jefferson County* (1996) 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76, that it would violate the Due Process Clause of the Fourteenth Amendment to bind a party to a judgment rendered in a prior lawsuit in which the party was not present or adequately represented. However, the *Richards* court recognized there are exceptions to the general rule, as outlined in *Hansberry.* "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." (*Hansberry, supra,* 311 U.S. at p. 41, 61 S.Ct. 115.) Appellants are incorrect when they assert that absent class members may never be bound by prior litigation.

Respondent directs us to a federal case which deals squarely with the issue whether collateral estoppel may be applied in the class certification arena. In *In re Bridgestone/Firestone, Inc., Tires Products* (7th Cir.2003) 333 F.3d 763 (*Bridgestone/Firestone*), plaintiffs attempted to certify a national class in the district court. The trial court granted certification, but its decision was reversed on appeal. Plaintiffs then filed a number of suits in various jurisdictions seeking to certify the same class. When one state court certified ***1236** the class, defendants, pursuant to title 28 United States Code section 2283, sought an anti-class action injunction from the federal court to enforce its earlier ruling.

In analyzing the issue, the court distinguished between non-class and class situations. " 'Virtual representation,' a doctrine that we disapproved in *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir.1998), would permit the outcome of one non-class suit to control another if the plaintiffs are similarly situated; *Tice* holds, to the contrary, that, outside the domain of class actions, precedent rather than preclusion is the way one case influences another. Our suit, by contrast, was commenced as a class action, and one vital issue was litigated and resolved on a class-wide basis: whether a *national* class is tenable. Absent class members are bound provided that the named representatives and their lawyers furnished adequate representation, which they did." (*Bridgestone/Firestone, supra,* 333 F.3d at p. 769.)

****900** [10] The plaintiffs in *Bridgestone/Firestone* argued that absent members could not be bound because they had not been provided notice and an opportunity to opt out of the certification decision. The court stated: "[N]o statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-

certification step." (*Bridgestone/Firestone, supra*, at p. 769.) The court concluded, "[e]very person included in the district court's class definition still has the right to proceed on his own. What such a person now lacks is the right to represent a national class of others similarly situated; that's the upshot of a fully contested litigation in which every potential class member was adequately represented on this issue." (*Ibid.*)

We agree with the federal court's reasoning. When a prevailing party seeks to enforce a ruling denying class certification against an absent putative class member, the general principles of collateral estoppel apply. Those principles ensure that the absent party's interest was adequately represented in the prior proceeding. Thus, we turn to the facts of our case, noting that appellants argue they are not in privity with the *Duran* plaintiffs and the *Duran* court did not decide the identical issue.

[11] Collateral estoppel requires that the party in the earlier case have interests sufficiently similar to the party in the later case, so that the first party may be deemed the "virtual representative" of the second party. (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070-1073, 71 Cal.Rptr.2d 77 (*Citizens*).) Or the first party must be acting in a representative capacity for the second party. (*Gates v. Superior Court* (1986) 178 Cal.App.3d 301, 307, 223 Cal.Rptr. 678.) "The emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford ***1237** application of the principle of preclusion. [Citations.]" (*People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931, 937, 84 Cal.Rptr. 773.)

The *Duran* complaint and the TAC allege respondent engaged in the same general misconduct concerning the same policies and procedures. Both complaints allege the misconduct took place during approximately the same time period. The parties sought certification of the same class of employees. In fact, in the trial court, appellants conceded that the class in the *Duran* action included, by definition, appellants. The *Duran* plaintiffs and appellants sought class certification using the same attorneys and there is no allegation that the representation provided to the plaintiffs in *Duran* was inadequate. Although the causes of action are not identical, the principle of collateral estoppel does not depend on the legal theory used but the primary right asserted. (*Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 992, 95 Cal.Rptr.2d 837; *Johnson v. American Airlines, Inc.* (1984) 157 Cal.App.3d 427, 432, 203 Cal.Rptr. 638.) The primary right asserted in each case was the right to litigate claims in a class action lawsuit.

Appellants cite *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 38 Cal.Rptr.3d 528 for the proposition that the same counsel's representation of different plaintiffs in successive actions is a factor this court should not consider in determining issues of privity or adequacy of representation. Appellants read too much into the *Rodgers* opinion. The court decided "[t]hat appellant is represented by the same counsel as were the plaintiffs in the prior actions does not, we conclude, ****901** suffice to extend the doctrine of privity *to his case*." (*Id.* at p. 93, 38 Cal.Rptr.3d 528, italics added.) The *Rodgers* court did not hold that the identity of counsel is never relevant. We conclude that similarity of counsel is one factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit.

Appellants do not claim that their interests were not adequately represented in the *Duran* case. Indeed, it would be difficult to make such an argument. In *Duran*, the trial court considered 38 declarations of ASM's presented by the plaintiffs, 60 declarations of ASM's presented by the defendants, declarations by other employees, and deposition testimony offered by both parties. Appellants do not argue that there is any evidence or argument that the *Duran* plaintiffs failed to present.

"In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." (*Citizens, supra*, 60 Cal.App.4th at p. 1070, 71 Cal.Rptr.2d 77.) "Whether someone is in privity with the actual parties requires close examination of the circumstances of each case." (*People v. Henderson* (1990) 225 Cal.App.3d 1129, 1151, 275 Cal.Rptr. 837.)

***1238** In analyzing the facts, we conclude the *Duran* plaintiffs were the "virtual representatives" of appellants. The only difference we can discern between the parties is the name of the representative plaintiff. The interested parties, their claims, and their counsel are the same. We also examine whether the first party had the same interest as the precluded party and the motive to present the same claim. (*Clemmer, supra*, 22 Cal.3d at p. 877, 151

Cal.Rptr. 285, 587 P.2d 1098.) The *Duran* plaintiffs had a strong motive to assert the same interest as appellants, as each group's goal was identical-each wanted its class certified. As noted, the *Duran* plaintiffs had a full opportunity to present their case. The circumstances are such that appellants should reasonably have expected to be bound by the *Duran* decision. As appellants would have enjoyed the fruits of a favorable outcome, fairness dictates that they should be bound by the effect of the decision against them. Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of their personal claims.

3. *Notice*

Appellants argue that they cannot be bound by the *Duran* decision because a class has not yet been certified. They claim that "until certification has been granted and adequate notice of class certification has been sent, the absent class members are not bound by the rulings in the case." They cite *Home Sav. & Loan Assn. v. Superior Court* (1976) 54 Cal.App.3d 208, 212, 126 Cal.Rptr. 511 (*Home Savings*), in support of their assertion. Their argument misses the mark.

Home Savings merely restated the general rule that a class member who does not receive notice of litigation may not be bound by the result. The court did not hold that an absent class member may *never* be bound by a prior ruling or that only rulings pertaining to a certified class can be enforced in subsequent litigation. Moreover, the court did not decide the issue when notice to absent class members was required for purposes of collateral estoppel.

In *Frazier v. City of Richmond* (1986) 184 Cal.App.3d 1491, 228 Cal.Rptr. 376 (*Frazier*), plaintiffs argued they should not be bound by a ruling in a previous case. They also cited *Home Savings* and claimed they were entitled to notice of the ****902** prior proceeding. The *Frazier* court noted the *Home Savings* panel "never addressed *whether* notice was required," and appeared to deem its case to be one where notice is mandatory under the federal rules. (*Id.* at p. 1501, 228 Cal.Rptr. 376.)

More importantly, *Home Savings* addressed the issue of notice after a class is certified. We agree with the conclusion of the *Bridgestone/Firestone* ***1239** court that notice is a post-certification requirement. We see no statutory mandate or equitable principle that demands that notice of an unsuccessful attempt to certify a class be sent to all putative class members prior to binding a litigant who seeks to certify the same class. As discussed, we conclude that due process is satisfied when an absent class member's interest is adequately represented. (*Johnson v. American Airlines, Inc., supra,* 157 Cal.App.3d at p. 433, 203 Cal.Rptr. 638.)

4. *Identity of Issues*

Relying on *Sav-On, supra,* 34 Cal.4th 319, 17 Cal.Rptr.3d 906, 96 P.3d 194, appellants urge they cannot be bound by the *Duran* decision because the law on class certification has changed since that court issued its opinion. Thus, appellants conclude, the *Duran* court did not decide the same issue presented in the instant case. They are incorrect. The *Sav-On* court resolved the question of "whether the trial court abused its discretion in certifying as a class action this suit for recovery of unpaid overtime compensation." (*Id.* at p. 324, 17 Cal.Rptr.3d 906, 96 P.3d 194.) The court evaluated the evidence presented in the trial court and did not change the standards for class certification, citing *Lockheed Martin Corp., supra,* 29 Cal.4th 1096, 1106, 131 Cal.Rptr.2d 1, 63 P.3d 913, which had recently reviewed those standards. (*Sav-On* at p. 326, 17 Cal.Rptr.3d 906, 96 P.3d 194.) The *Lockheed Martin Corp.* case was the law relating to class certification standards when the *Duran* court affirmed the trial court's order denying certification.

Appellants further argue that the *Sav-On* decision eliminated the legal basis for the Court of Appeal's affirmance in *Duran* of the order denying class certification. Appellants contend that because the *Sav-On* decision "clarified the scope of the holding in *Ramirez v. Yosemite Water [Co.]* [(1999)] 20 Cal.4th 785 [85 Cal.Rptr.2d 844, 978 P.2d 2] ..., which was relied upon exclusively by the Court of Appeal in *Duran*," the "continued reliance upon *Ramirez* in overtime class actions is misplaced." Appellants state that because "[u]nder virtually identical facts, the *Sav-On* Court has determined that wage and hour cases such as the instant matter are suitable for class [action] treatment[,] it is not just plausible, it is likely, that Plaintiffs can successfully allege *and* certify a UCL class action."

Appellants, however, have overstated the Court of Appeal's reliance upon *Ramirez* in upholding the denial of class certification in *Duran.* Although the appellate opinion in *Duran* cited to *Ramirez,* it did so

only in passing and without any explanation of whether or how the facts of *Duran* were similar to those in *Ramirez.* Moreover, the mere reinstatement of the order granting class certification in *Sav-On* based on the finding that the trial court did not ***1240** abuse its discretion does not suggest that the facts of this case would compel the trial court, as a matter of law, to grant class certification.

Finally, appellants contend that the trial court could not rely on the *Duran* decision, as it was an unpublished opinion. The trial court was entitled to take judicial notice of the decision denying class certification as it was "relevant under the doctrines of law of the case, res judicata, or ****903** collateral estoppel." (Cal. Rules of Court, rule 977(b)(1).)

Although appellants assert for the first time in their reply brief that public policy demands that the doctrine of collateral estoppel not be applied here, we are not persuaded. Put simply, if appellants are correct, every motion denying class certification could be relitigated until the desired result was reached. The losing class plaintiff could merely insert the name of a different individual to be the potential class representative. When appellants' counsel was asked in oral argument when the string of unsuccessful lawsuits would end, his answer in essence was-when the pursuit is no longer economically feasible. [FN3] We disagree.

> FN3. Indeed, in association with other attorneys, counsel is involved in a fourth case seeking to certify the same class in Orange County Superior Court. (*Bracamonte v. The May Department Stores Company*, Case No. 05CC00129.) The case was filed after the trial court issued its tentative ruling in this matter sustaining respondent's demurrer.

"The class action is a product of the court of equity-codified in section 382 of the Code of Civil Procedure." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458, 115 Cal.Rptr. 797, 525 P.2d 701.) It is manifestly unfair to subject respondent to a revolving door of endless litigation. In cases, such as this one, where a party had a full opportunity to present his or her claim and adequately represented the interests of a second party who seeks the same relief, principles of equity, " '[p]ublic policy and the interest of litigants alike require that there be an end to litigation.' [Citation.]" (*Citizens, supra*, 60 Cal.App.4th at p. 1065, 71 Cal.Rptr.2d 77.)

C. Effect of Duran Writ Petition

Appellants contend that the matter of issue preclusion was already presented and rejected in the *Duran* case. The assertion is unavailing. The *Duran* court decided the *Gorman* case could not collaterally estop the *Duran* plaintiffs from certifying its class, but it did not determine whether collateral estoppel could apply to future certification efforts. The question we answer today is whether the *Duran* decision, which followed a full hearing on the merits, bars these appellants from seeking class certification.

***1241** DISPOSITION

The order is affirmed. Respondent is awarded its costs on appeal.

We concur: EPSTEIN, P.J., and WILLHITE, J.
Cal.App. 2 Dist.,2006.
Alvarez v. May Dept. Stores Co.
143 Cal.App.4th 1223, 49 Cal.Rptr.3d 892, 06 Cal. Daily Op. Serv. 9652, 2006 Daily Journal D.A.R. 13,767

Briefs and Other Related Documents (Back to top)

- 2006 WL 1110026 (Appellate Brief) Respondents' Opening Brief (Mar. 6, 2006) Original Image of this Document (PDF)
- 2005 WL 3949178 (Appellate Brief) Appellants' Opening Brief (Dec. 2, 2005) Original Image of this Document (PDF)
- B184504 (Docket) (Jun. 30, 2005)

END OF DOCUMENT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 6701 Center Drive West, Suite 1400, Los Angeles, California 90045.

On November 20, 2006, I served the document described as: **PETITION FOR REVIEW** on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [ ] to interested parties as follows [or] [✓] as stated on the attached service list:

SEE ATTACHED SERVICE LIST

[✓] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[ ] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[ ] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

[ ] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[ ] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this November 20, 2006 at Los Angeles, California.

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