9th Circuit: Wage and Hour Class Action Prevails

10/22/2010 By Thomas Kaufman and Michael Gallion

The 9th U.S. Circuit Court of Appeals affirmed judgment for the plaintiffs following a class-action trial in a wage and hour case.

The district court's decision in the *Wang* case had become infamous because it frequently has been quoted to support propositions that were generally negative for employers in wage and hour class actions. The district court decision took a very lax view on what is required to support class certification in an exemption misclassification case such that certification would be proper in practically every case. In essence, the decision held that in any case where the employer collectively classified a job as exempt, certification would be appropriate.

Many wage and hour practitioners presumed the case to be largely dead and buried when, in July 2009, the 9th Circuit handed down two decisions that expressly rejected the central holding of the *Wang* district court decision. In *Vinole v. Countrywide Home Loans Inc.*, 571 F.3d 935 (9th Cir. 2009) and *Mevorah v. Wells Fargo Home Mortgage*, 571 F.3d 953 (9th Cir. 2009), the 9th Circuit held that a class could not properly be certified under Rule 23(b)(3) (the primary method of certifying wage and hour class actions) based exclusively or primarily on the basis that the employer uniformly treated all of the class members as exempt. The 9th Circuit recognized that "focusing on a uniform exemption policy alone does little to further the purpose of Rule 23(b)(3)'s predominance inquiry." This pronouncement suggested a disapproval of the reasoning in the *Wang* district court decision and reduced the influence of the district court opinion.

However, *Wang* has re-emerged even stronger as an appellate decision. The appeals court affirmed that the reporter plaintiffs did not satisfy the criteria for the Fair Labor Standards Act's (FLSA) creative professional exemption and were unlawfully denied overtime. The Chinese Daily News articles "do not have the sophistication of the national-level papers at which one might expect to find the small minority of journalists who are exempt," the appeals court stated. The court also upheld the class certification of the state law claims, and ruled that the evidence presented to the jury was sufficient to support a finding that reporters who worked more than five hours per day were not provided with meal breaks of at least 30 minutes in violation of California law.

Although the 9th Circuit did not repudiate its holdings in *Vinole* and *Mevorah*, its recent decision in *Wang* contains a veritable treasure trove of pronouncements that class plaintiffs will try to make use of in later cases. Two of its holdings are particularly troubling to employers.

First, notwithstanding *Vinole* and *Mevorah*, the 9th Circuit found an alternative basis to affirm the *Wang* certification order, using Rule 23(b)(2) of the Federal Rules of Civil Procedure instead of 23(b)(3). The vast majority of wage and hour class actions that are certified seek primarily to recover back wages, interest and various statutory penalties. Because these claims primarily are interested in monetary recovery, the only way for a court to certify them is to use Rule 23(b)(3), which requires a court to conclude that

common issues predominate over individualized issues. Rule 23(b)(2) is usually used in cases where the primary purpose of the class action is to obtain an injunction to change the defendants' behavior. To obtain certification under Rule 23(b)(2), a plaintiff must show only that "the party opposing the class has acted or refused to act on grounds that apply generally to the class," a much easier standard to satisfy.

The 9th Circuit affirmed certification under this standard notwithstanding that the plaintiffs recovered more than $7 million in back pay, interest and penalties from Chinese Daily News. It accepted the district court's finding that it was as important to the plaintiffs to change the newspaper's wage and hour practices going forward as it was to recover money. The opinion suggests that it is simply left to the broad discretion of the trial court to decide the relative importance of monetary recovery vs. injunctive relief in each case. As long as the class representative is a current employee seeking an injunction, a district court seemingly could routinely decide that the plaintiff considered injunctive relief the most important relief. If a district court reaches this conclusion, then it could certify a class that would otherwise be unmanageable under Rule 23(b)(3) standards. Such a rule makes little sense in the exempt misclassification context where even injunctions are designed to ensure that pay practices are changed (i.e., that employees receive overtime pay).

Separate from its analysis of class certification, the *Wang* opinion also rejects a promising FLSA pre-emption argument. Because the FLSA does not allow class action, the plaintiffs attempted to use California's Unfair Competition Law (UCL) to borrow violations of the FLSA but pursue the action as a class action with a four-year statute of limitations. The defendants argued that the FLSA pre-empts the UCL when it attempts to borrow the FLSA but drastically alter its remedial scheme.

In *Mevorah*, the 9th Circuit had suggested without deciding that the FLSA may pre-empt the UCL when it seeks to transform FLSA claims in this manner. In doing so, the 9th Circuit cited a law review article by professor Rachel Alexander that laid out, in scholarly detail, the grounds for concluding that Congress' primary purpose in enacting the 1947 "Portal to Portal" amendments to the FLSA was to bar class actions and require each individual employee affirmatively to bring his or her FLSA claim on his or her own behalf. If that premise is accepted, then principles of "conflict pre-emption" would preclude using the UCL to frustrate Congress' intent.

In *Wang*, by contrast, the 9th Circuit held that there was no federal pre-emption, and its analysis completely ignores the various grounds that Alexander discussed in the cited article. For example, the 9th Circuit explains, in conclusory fashion, that Congress did not intend to protect employers in enacting the FLSA but rather "the central purpose of the FLSA is to enact minimum wage and maximum hour provisions designed to protect employees." This broad assertion missed the point that Congress expressly amended the FLSA in 1947 for the primary purpose of scaling back its provisions, which had been causing "ruinous liability" to employers. While one could argue whether the evidence that was set forth in Alexander's analysis of the legislative history is sufficient to support conflict pre-emption, the Wang court does not even acknowledge her analysis or try to refute it.

Wang v. Chinese Daily News Inc., 9th Cir., 08-55483 (Sept. 27, 2010).

Professional Pointer: There is some hope that the U.S. Supreme Court will grant review to *Wang* because the decision does not cite, and refuses to follow, a 4th Circuit decision, *Anderson v. Sara Lee Corp.*, 508 F.3d 181 (4th Cir. 2007). In *Anderson*, the 4th Circuit held that the FLSA does indeed pre-empt state laws that attempt to borrow its standards

and apply broader remedies. This creates a circuit split on an important issue. One of the main reasons for Supreme Court review is to resolve such circuit splits, so the Supreme Court could take interest in this case.

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Editor's Note: This article should not be construed as legal advice.

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