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The *Wage & Hour Collective and Class Litigation* Webinar Series for Wage & Hour Blog Subscribers

Fighting to Win: Deconstructing Conditional & Class Certification

Introduction

- **The *Wage & Hour Collective and Class Litigation* Webinar Series for Wage & Hour Blog Subscribers**
  - www.wagehourlitigation.com
- First webinar (March 21): ***Drafting the Blueprint: Modeling An Effective & Efficient Defense to Collective and Class Actions***
- Today's webinar: ***Fighting to Win: Deconstructing Conditional & Class Certification***
- Third webinar (June 6)*:* ***"Winning" the Case: The End Game***
- Fourth webinar (TBA): ***California-specific issues***
- Fifth webinar (TBA): Assessing your company's wage and hour policies and practices to reduce litigation risks.

Wage & Hour Collective and Class Litigation (Law Journal Press, 2012)

- *Wage & Hour Collective and Class Litigation*
  - Dedicated to substantive and procedural issues critical to effective defense strategies
  - The definitive treatise on this important subject
- Our panelists today are the 3 co-authors, partners
  - Noah Finkel – Chicago Office
  - Brett Bartlett – Atlanta Office
  - Andrew Paley – LA/CC Office
- The treatise is available through Law Journal Press, http://www.lawcatalog.com/product_detail.cfm?productID=17136&setlist=0&return=search_results

What We Will Cover

- Collective v. Class Actions
- Consequences of Conditional Certification
- Responding to the Motion to Facilitate Notice—Conditional Certification
- Methods to Effectively and Efficiently Defeat or Limit Conditional Certification and the Potential Impact of *Wal-Mart v. Dukes*
- Managing an Order Granting Conditional Certification
- Defeating “Hybrid” Cases”
- Decertification – Be careful what you wish for

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Collective v. Class Actions

The Collective Action

- Fair Labor Standards Act, §216(b)
  - "Similarly situated" employees
  - Consent in writing filed with court to "opt-in" to become a "party"
  - District courts may facilitate notice to putative collective members "in appropriate cases." *Hoffman-LaRoche v. Sperling* (1989) allowing opt-ins

- Contrast with Rule 23 Class Action
  - Numerosity, commonality, typicality, adequacy
  - Predominance of common questions of law and fact and superiority of class action to other methods of adjudication
  - Class certification considered after discovery
  - If class is certified, notice is sent to class members allowing them to opt-out

The Collective Action

Two-phase collective certification process

- Since *Hoffman*, absent substantial discovery, courts generally have adopted (1) conditional certification with "lenient" standard; followed after discovery by (2) motion to decertify
- Courts vary dramatically in applying the "lenient" standard at the first phase
- Decertification phase – more stringent; similar to Rule 23 certification
- If conditional certification is granted, notice sent to putative collective members who may the opt-in
- Procedures should be ordered by court to govern opt-in period

- The conditional certification motion and the defendant's response is a critical phase in the defense of a collective action
  - Positioning a collective action to maximize the chance of defeating or limiting conditional certification is pivotal to everything that follows in the defense

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The Consequences of Conditional Certification

The Bad News

- Notice will be distributed to putative class as defined by the court
- Plaintiff's counsel will seek access to your employees' names and contact information which they can use now and after this case
- Word of the case may spread among your employees, and not in a positive way—blogs, websites, emails, may attract union interest
- The press may publish stories about your case
- Opposing counsel will attempt to assert leverage by claiming that the sky is falling
- Costs of defense will increase

The Good News

- Opt-in rates are generally low – 10% - 20%
- If settlement is an option, the number of collective members will be relatively definite at the end of the notice period
- Generally, a conditionally certified collective action may discourage other plaintiffs' attorneys from filing subsequent actions
- Even where courts "rubber stamp" conditional certification, the second-stage analysis may demonstrate differences leading to decertification

Optimizing The Good & Minimizing The Bad – Internal Planning

- Develop an internal communications plan
  - Front-line supervisors/managers may be provided a basic script to respond to employees' questions; the message should be neutral in tone
  - They should not dissuade employees from opting into the case
  - More substantive employee inquiries should be escalated to one or several point people, who should respond using a form Q&A with consistent answers to commonly asked questions
- Develop a plan for inquiries from the press
  - Identify a point person for all such inquiries
- Establish the clear message that retaliation against opt-in plaintiffs or putative class members is absolutely prohibited

Optimizing The Good & Minimizing The Bad – The All-Important Discovery Plan

- Take the long view: (a) summary judgment, (b) decertification, (c) trial, and (d) appeal
- Each opt-in is a “party plaintiff”; discovery should be permitted from each (and any who refuse should be dismissed)
- Cost benefit of amount of discovery – efficiency
- Avoid the representative discovery trap; e.g., beware of sampling
- Depositions are expensive; consider the law of diminishing returns
- Target any written discovery to the case and to probative issues; make it easily answered by opt-ins
- Consider the use of experts for data and job analyses

Optimizing The Good & Minimizing The Bad – The All-Important Discovery Plan

- Affirmative Depositions
  - Realize that named plaintiff's can often best demonstrate differences
  - Identify your best deponents
  - Choose your locations
  - Opt-in depositions need not be exhaustive
  - Focus on the merits
  - Don't forget hours worked, pay, and time off
- Defense Depositions
  - Importance of 30(b)(6) depositions/selection of PMKs
  - Identification of key witnesses likely to be deposed
  - Preparation of witnesses

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Options in Responding to a Motion for Conditional Certification

Why Employers Usually Oppose Conditional Certification

- Opposing a motion for conditional certification is the only way to defeat it. And defeat of a conditional certification may be the death knell of the litigation
- Even if not completely successful, a vigorous opposition may result in a limited conditional certification order
- A strong opposition brief may condition the court for a more favorable ruling at a later stage
- A strong opposition can be leveraged into a favorable settlement

Why Employers Usually Oppose Conditional Certification

- "You can't put the toothpaste back in the tube"
  - The judge may hold that the case is "only" conditionally certified, and that dissimilarities urged on the court will be considered at the second stage
  - But notice is issued, and potential plaintiffs become plaintiffs
  - Collective action discovery is expensive
  - Risk of litigating a collective action is substantial, no matter what the changes of success are on the merits or ultimate certification
  - A decertification order may result in, literally, hundreds of individual or multi-plaintiff lawsuits

Why an Employer May Choose To Not Oppose Conditional Certification

- Most conditional certifications motions are granted, often even in the face of a compelling opposition
  - Know the jurisdiction
  - Know the judge's prior rulings
  - Know what other courts have done in similar cases
- Dissimilarities may seem insignificant, especially at the conditional certification stage
  - Nature of the claim
  - Results of internal investigation
- An employer may be better off by not previewing ultimate certification arguments at the conditional certification stage, especially where it intends to obtain admissions from plaintiffs in depositions

Why an Employer May Choose To Not Oppose Conditional Certification

- Opposing a motion for conditional certification has its costs:
  - Legal fees can be substantial, especially if a declaration campaign is involved
  - And a declaration campaign can create workplace buzz among potential plaintiffs
- It may be advantageous to trade opposition for a favorable class definition, content of notice, and/or form of notice/distribution method
- Especially if a low opt-in rate is anticipated, conditional certification may not be significantly detrimental, and its occurrence may help defeat Rule 23 certification
- Post-opt-in settlement may be the exit strategy

The Bottom Line

- The consequences of conditional certification are extremely significant
- The “can’t put toothpaste back in the tube” phenomenon can exert tremendous settlement pressure
- Thus, most employers will oppose conditional certification

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Some Methods to Most Effectively and Efficiently Defeat or Limit Conditional Certification

Methods to Obtain and Use Evidence to Defeat or Limit Conditional Certification

- Timing of motion may dictate the standard used by the court and the amount evidence available to oppose motion
  - Employers should argue that the more discovery conducted, the higher the standard should be for conditional certification
  - If Plaintiffs seek conditional certification shortly after filing of the complaint, employer may not have time to conduct discovery or gather much evidence in support of opposition
- Declaration campaign
  - Decide target of declaration campaign – managers, supervisors, putative class members
  - Lock in good evidence from putative class members
  - Help identify strengths and weaknesses of case at early stage
  - Courts may place less weight on declarations than depositions
  - Potentially expensive and disruptive

Methods to Obtain and Use Evidence to Defeat or Limit Conditional Certification

- Declarations of managers
  - Important to being able to tell employer's side of story
  - Likely that declarants will be deposed so choose witnesses carefully
- Depositions of named plaintiffs and opt-ins
  - Often the most persuasive evidence
- Use of experts

Limiting the Putative Class

- Courts often skeptical of requests for nationwide classes encompassing multiple positions, locations, supervisors, practices
- Argue that putative class should be limited to individuals who share named plaintiff's position, location, supervisor
- Court may redefine class or may deny without prejudice and allow plaintiff to re-file a motion for conditional certification of a more narrow class

Use of *Wal-Mart v. Dukes* to Defeat Conditional Certification

- "Similarly situated" standard akin to Rule 23(a) commonality standard
- *Dukes*' argument that plaintiffs failed to show common unlawful policy
- Anecdotal evidence of individual manager's actions is insufficient to support nationwide certification
- May be more persuasive at ultimate certification, but it can persuade some judges at conditional certification as well
  - *See e.g., MacGregor v. Farmers* (D. S.C. 2011)
  - *But see, Creely v. HCR ManorCare* (N.D. Ohio 2011)

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Managing an Order Granting Conditional Certification

Ensuring The Proper Contents Of Notice

- BE CERTAIN TO ADDRESS IT IN YOUR OPPOSITION TO CONDITIONAL CERTIFICATION

Should ***not*** indicate judge's endorsement Should ***not*** suggest that plaintiff's claims are valid Should ***not*** provide only plaintiff's counsel's information	Should state that judge has not made any determination on merits Should state defendant's position Should provide contact information for defense counsel
Should ***not*** suggest a free ride for opt-ins Should ***not*** suggest an indefinite opt-in period Should ***not*** describe contingency arrangement	Should explain that opt-ins may be deposed and be subject to obligations Should describe a finite opt-in period within which consent must be **filed** Should explain that opt-in can select other counsel

Ensuring The Proper Process For Notice

- **Seek Court order detailing procedures governing opt-in period**

•Do ***not*** agree to multiple notices •Do ***not*** agree to follow-up phone calls •Do ***not*** agree to at-work postings •Do ***not*** agree to web postings •Do ***not*** agree to allow the postmark to serve as the signifier of a timely consent; only filing counts	•Insist on single distribution by U.S. Mail •Insist that all other distribution and postings be ceased •Insist that email addresses, phone numbers, and social security numbers should be off limits
•Consider a post-card reminder as a compromise to repeated notices •Consider allowing late opt-ins •Consider requiring late opt-ins to be collected and filed with objections reserved	•Request that a TPA be used to distribute notice •Request list of all notices sent prior to court authorization •Request that counsel provide updated lists of opt-ins with pertinent information

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Defeating "Hybrid" Cases

Why Rule 23 Class Actions Usually Are Not Superior to Collective Actions

Are Hybrid Cases Really Obtaining Judicial Approval?

- An employer's exposure usually is higher under Rule 23 state law claims
  - Opt-out vs. Opt-in
- Recent appellate cases have rejected some anti-hybrid arguments
  - Fisher v. Rite-Aid (3d Cir. 2012)
  - Ervin v. OS Restaurants (7th Cir. 2011)
  - Lindsay v. GEICO (D.C. Cir. 2006)
- Holdings:
  - Rule 23 opt-out certification of a state law overtime or minimum wage claim is not "inherently incompatible" with an FLSA opt-in collective action
  - An FLSA collective action does not preclude the exercise of supplemental jurisdiction of a Rule 23 state law wage-hour class action
  - The Rules Enabling Act does not preclude the bringing of a Rule 23 state law wage-hour class action

But The Demise of Anti-Hybrid Arguments is Greatly Exaggerated

- A state law overtime class action is not "superior" to an FLSA collective action under Rule 23(b)(3)
- A class is not so numerous that "joinder is impracticable" under Rule 23(a)(1)
- Possible exceptions include evidence of threats of retaliation or other actual hurdles to opt in
- These arguments cannot be made on a motion to dismiss and cannot be made categorically
  - Wait for class certification response brief, or
  - *Vinole* motion following discovery
- The strength of these arguments remains uncertain

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Whether and How to Defeat Ultimate Class and Collective Action Certification

The Mixed Blessing of Decertification

- Defeating conditional certification is usually a good thing but be careful what you wish for
- Could end up with multiple individual actions in separate jurisdictions
  - Unlikely that all opt-ins will pursue individual actions but many may, especially if plaintiffs' counsel believe that they could recover their fees
  - May be more expensive to litigate than a collective action and cause greater inconvenience to company witnesses
  - May be harder to resolve all cases at once either by dispositive motion or settlement
- Decertification may give leverage to settle all opt-in claims at a significant discount
- Defeating Rule 23 certification is always a good thing – plaintiffs' counsel rarely file multiple individual actions in Rule 23 cases

Using an Expert to Highlight Dissimilarities

- To pick apart the plaintiff's theory of collective liability
- To show how the results of a sample cannot be extrapolated to the class or collective with a sufficient degree of statistical certainty
- To critique a plaintiff's survey tool
- To analyze data to highlight differences among class/collective action members

Trial, Trial, Trial

- The three best arguments against ultimate certification are trial, trial, and trial
- Insist that plaintiffs set forth a detailed trial plan, and keep hammering on it
  - Plaintiffs required to demonstrate at the earliest possible stage their theory for trying the case on the basis of collective proof
  - Failure to demonstrate how liability could be tried with collective proof is a reason to deny conditional certification or obtain decertification
- As case gets closer to trial (and even during trial), judges may be more likely to decertify

Trial, Trial, Trial

- Avoid falling into the trap of stipulating to sampling or use of surveys to determine liability. Object to plaintiff's trial plan loudly and often
- Argue that liability almost never should be based on statistical sampling or survey evidence. *See e.g. Duran v. U.S. Bank*
  - Even if sampling were to demonstrate liability as to percentage of class, cannot know which class members
  - Even if court approves use of sampling, would still need mini trials to determine the "data points" for each person within sample; process becomes unmanageable
- Bifurcation liability and damages – even if liability can be determined on collective basis; still need individual trials with regard to alleged damages
- Plaintiffs often have not thought through how they will try the case and are unprepared to do so

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Conclusion and Questions