



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

***“Winning” The Case:
The End Game***



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***
- Second Webinar (May 2): ***Fighting to Win: Deconstructing Conditional & Class Certification***
- Today's Webinar: ***"Winning" the Case: The End Game***
- Fourth webinar (TBA): **Assessing your company's wage and hour policies and practices to reduce litigation risks.**
- Fifth webinar (TBA): **California-specific wage/hour issues**
- **Webinar today at 2:30 ET on *Christopher v. SmithKline***



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

- Webinar series follows publication of ***Wage & Hour Collective and Class Litigation*** (Law Journal Press, 2012)
 - ▶ Dedicated to substantive and procedural issues critical to effective defense strategies
 - ▶ The definitive treatise on this important subject
- The treatise is available through Law Journal Press, http://www.lawcatalog.com/product_detail.cfm?productID=17136&seclist=0&return=search_results
- Our panelists today are the 3 co-authors, partners
 - ▶ Noah Finkel – Chicago Office
 - ▶ Brett Bartlett – Atlanta Office
 - ▶ Andrew Paley – LA/CC Office



What We Will Cover

- Defining A "Win"
- Gutting the Case Before Trial: Motions to Dismiss and Summary Judgment
- Coordinating the Attack - How Coordinated Summary Judgment and Decertification Motions Can Eviscerate Plaintiff's Collective and Class Claims
- Effective Mediation Techniques and Crafting an Advantageous Settlement Agreement
- Calling the Plaintiffs' Bluff: Winning Trial Strategies
- Navigating Changes in Business Practices and Other Mitigating Measures



Defining A “Win”



Defining a “Win”

- Critical for an employer to determine its goals in defending against a wage/hour collective and class action and to communicate them to counsel. What does a “win” look like?
 - ▶ Limiting class size?
 - ▶ Prevailing on legal issues?
 - ▶ Getting an advantageous settlement/release
 - ▶ Beating the “spread”



Defining a “Win”

- Factors Important in determining goals and exit strategy:
 - ▶ Impact on workforce of conditional certification and discovery?
 - ▶ Impact on public and stockholder relations?
 - ▶ Impact on business of a change in exempt status or practice?
 - ▶ Will a change in classification or pay practice put company at competitive disadvantage?
 - ▶ Has company already changed its classification or pay practice?
 - ▶ How strong are company’s defenses? What are odds of defeating claims and at what point in the litigation?
 - ▶ Is there a business rationale for an aggressive, fight to the finish defense?
 - ▶ Will continued litigation or loss impact ongoing or potential union campaign?
 - ▶ What is the exposure?
 - ▶ What are likely defense costs and expenditure of other resources likely to be



Gutting the Case Before Trial: Motions to Dismiss and Summary Judgment



Motions to Dismiss

- *Twombly / Iqbal* Motions
 - ▶ Rule 8 requires adequate factual allegations
 - ▶ A “formulaic recitation of the elements of a cause of action will not do”
 - ▶ All allegations including those related to class treatment, must contain sufficient allegations for a court to determine that a plaintiff is entitled to move forward – merely reciting Rule 23’s requirements is not sufficient
 - ▶ Complaint must set forth specific facts, which if true, would support both the legal claims and class treatment
 - ▶ Motions to dismiss are rarely granted with prejudice in the first instance
 - If you believe that counsel will be able to “fix” the complaint, it may be more beneficial to nail down the named plaintiff’s testimony in an early deposition and then move for summary judgment or file a motion to deny certification
 - ▶ Certain courts have been more reluctant to grant *Twombly / Iqbal* motions



Motions to Dismiss

- **Attacking the proposed class definition**
 - ▶ Failure to allege an ascertainable class
 - Example - “all non-exempt retail employees”
 - ▶ Fail-Safe class definitions
 - Class definition must be based on objectively verifiable characteristics
 - Class cannot be defined by the merits of the claim –i.e. “all non-exempt employees who have been denied overtime compensation”
- **Lack of standing**
 - ▶ Example – named plaintiff is not a member of a sub-class alleged
- **Res judicata based on a prior release and judgment**
 - ▶ Are the claims covered by a prior class settlement and judgment



Motions to Dismiss

- Copy-cat actions
 - ▶ Denial of prior class / collective action involving similar claims
- Claim splitting
 - ▶ Multiple suits arising from same set of operative facts
 - ▶ Plaintiffs cannot separate theories of recovery and bring successive suits
- Failure to timely file a motion for class certification
 - ▶ Certain districts have local rules governing the timing of motions for class certification – *i.e.* Central District of CA – 90 day rule
 - ▶ Some judges issue scheduling orders setting forth briefing deadlines
 - ▶ Failure to adhere to court's deadlines can provide a basis to request that the class allegations be dismissed
 - ▶ No prejudice to the putative class members – no substantive right to a class action procedure; of tolling of claims in a Rule 23 case; putative class members retain their right to file individual suits



Motions for Summary Judgment

- Summary judgment / adjudication of one or more of the named plaintiffs' claims prior to class certification
 - ▶ Plaintiff's attempt to raise disputed issues of fact may sabotage their class certification arguments
 - ▶ Lack of res judicata as to putative class members but the effective result is that plaintiffs' counsel are unlikely to re-file
 - ▶ If obtain summary judgment of one named plaintiff's claims – demonstrates that certification is improper
 - ▶ Potential collateral estoppel effect
 - ▶ Waiver of the one-way intervention rule – possibility that plaintiffs will file their own motion for summary judgment prior to class certification
- Summary judgment of “class claims”
 - ▶ Rely on evidence from various putative class members
 - ▶ Moving for summary judgment may force plaintiffs to highlight differences between class members



Coordinating the Attack: The Use of Summary Judgment and Decertification Motions to Eviscerate Collective and Class Claims



Summary Judgment of Claims of Entire Class

- **Timing**: After obtaining admissions from plaintiffs and using legal arguments to prove that the classification or practice complies with federal and state law
- **Purpose**: To prevail on all defenses and/or as a tactic to leverage more favorable settlement
- **Effect**: Outright victory, green light to trial, or leveraged compromise
- **Risk**: Possibility of court granting summary judgment for Plaintiff or using summary judgment arguments to deny decertification
- **Examples**: Pharmaceutical sales reps who are exempt under *Christopher v. SmithKline Beecham*; store managers who clearly qualify for executive exemption; tipped employees in a single location who have been paid in compliance with tip pooling provisions



Filing Summary Judgment & Decertification Motions

- Summary Judgment on Named Plaintiffs' Claims
 - Summary Judgment on One or More Opt-Ins' Claims
 - *Opportunity to use the plaintiff's response to distinguish her from other class members*
 - *Elaboration of individualized defenses*
 - *Demonstration of procedural quagmire necessitated by individualized inquiries into alleged violations as to each class member*
- FLSA Decertification Standard:***
- Disparate factual and employment settings of the individual plaintiffs
 - The various defenses available to the defendant that appear to be individual to each Plaintiff
 - Fairness and procedural considerations
 - **Note:** It is the Plaintiff's burden even at this stage to establish that she and members of the putative collective action are similarly situated



Partial Summary Judgment on One or More Issues

- **Timing**: Variable. Could effectively follow summary judgment loss on underlying claims or loss on decertification
- **Purpose**: Reduce exposure; eliminate plaintiffs barred by statute of limitations; streamline issues to be determined at trial
- **Effect**: Define method by which damages will be calculated; define period covered by any recovery
- **Examples**: Applicability of the half-time method of calculating overtime in misclassification case; determination that defendant did not willfully violate the FLSA; determination that opt-ins are barred by limitations period



Effective Mediation Techniques and Crafting an Advantageous Settlement Agreement



Why Mediate

- Mediation is where many wage-hour lawsuits end
- The main questions usually are:
 - ▶ When?
 - ▶ Who will mediate?
 - ▶ What range?
 - ▶ And on what terms?
- A mediator is not necessarily required to settle a case, but is helpful for class or collective action settlements
 - ▶ Provides structure
 - ▶ Can add creativity
 - ▶ Assists in obtaining court approval



Why Mediate

- **Minimizes risk of adverse judgment**
 - ▶ Even if Plaintiff prevails only in part, Plaintiff becomes a “prevailing plaintiff” for attorneys fees purposes
 - Consider whether 1/3 of settlement results in fees greater than what court would award
- **Avoids incurring legal fees**
- **Reduces strain on the business**
- **No post-decertification individual cases to defend**
 - ▶ But may have follow-on lawsuits
- **No risk of publicity from rulings**
 - ▶ But likely publicity of settlement from court-approval process



When to Mediate Early

- The earlier the mediation, the lower the investment made by the employer and its counsel
- The earlier the mediation, the lower the investment made by Plaintiffs' counsel
 - ▶ Early mediation results in higher “profit margin” for Plaintiffs' counsel
- The earlier the mediation, the less likely Plaintiffs' counsel will have discovered bad facts or additional claims



When Not to Mediate Early

- The later the mediation, the more likely the *employer* discovers Plaintiff's bad facts and some potential affirmative or other defenses
- The later the mediation, the less likely the employer will be regarded as a good target (due in part to diminishing profit margin for plaintiffs' attorneys)
- The later the mediation, the less likely the focus of the case is on conditional certification than on the difficulties in maintaining ultimate certification, the merits of the claim, and damages issues
- The later the mediation, the more likely the opt-in rate benefits the employer



Approaching Mediation

- Selection of mediator
- Exposure analysis
 - ▶ Discussed in Webinar Part I
 - ▶ Share with Plaintiff's counsel?
- Obtaining settlement authority
- Mediation statement
 - ▶ Share with plaintiff's counsel?
- Prepare a checklist of key terms and draft MOU
- Bring exposure analysis on Excel spreadsheet to manipulate data as helpful



Key Settlement Terms - Highlights

- Where possible, include Rule 23 mechanism
- Claims made or common fund agreement
- Reversionary settlement if possible
 - ▶ Use “ground up” calculation formula rather than “top down”
- Comprehensive wage-hour release
- FLSA opt-in mechanism on claim form
- Broad definition of “settlement class”
- Amend complaint to add claims to be extinguished and named plaintiffs as representatives of added positions
- If FLSA only, maximize confidentiality
- Gross settlement amount includes ALL payments to be made (including administration costs, incentive awards, employer-side payroll taxes etc.)



Calling the Plaintiff's Bluff: Winning Trial Strategies



Prepare for Trial on Day 1

- Few cases go to trial but should prepare for trial from day 1
 - ▶ Select 30(b)(6) witnesses who will be good trial witnesses
 - ▶ Depose or obtain declarations from class members who will be supportive in order to lock in testimony
 - ▶ Plaintiffs' counsel do not believe the case will be tried and rarely are prepared for trial
- Make plaintiffs prove their case – do not stipulate to their methodology of collective proof
- Most plaintiffs' counsel are not prepared to spend the money to get it right
 - ▶ Good experts and proper surveys are expensive



Trial Plans

- Force plaintiffs to articulate a trial plan at the earliest opportunity
- Argue that liability can rarely be proven with collective evidence
- Plaintiffs generally try to rely on surveys or sampling with statistical extrapolation
 - ▶ *Dukes* disapproved “trial by formula” on due process grounds
 - ▶ Even if done properly, sampling cannot be used for a unitary liability determination unless liability as to 100% of sample members



Attack Plaintiff's Trial Plan

- Plaintiffs often will argue that their expert can conduct a survey or “code” deposition testimony and present their findings without the need for class members to testify at trial
 - ▶ Due process violation – prevents employer from cross examining witness before trier of fact
 - ▶ Based on self-serving deposition testimony – prevents employer from presenting contradictory evidence
 - ▶ Plaintiffs’ expert is not an expert in credibility – cannot determine if someone is lying or exaggerating based on their deposition testimony
 - ▶ Recall issues – individuals cannot accurately recall tasks or hours worked over long periods of time
 - ▶ Attack survey methodology – *i.e.* non-response bias; content and ordering of questions



Attacking Plaintiff's Expert

- Consider filing a *Daubert* motion to exclude plaintiff's expert
 - ▶ Methodology not based on scientifically accepted principles
 - ▶ Invades the province of the jury



Strategic Considerations

- **Develop a theme for the case early on**
 - ▶ Example – managers accepted responsibility and increased pay to run office but now claim that they really just performed same duties as the people they supervised
 - ▶ Example -- employees broke the rules by hiding the amount of work performed and preventing company from paying overtime
- **Jury v. bench trials**
 - ▶ Accepted wisdom that employers do not fare well before juries is not necessarily accurate
 - ▶ Juries may be more sympathetic to employer's position in wage/hour cases than a judge, especially if plaintiffs are alleging a "technical" violation
 - ▶ Consider mock jury exercises



Burden of Proof / Order of Presentation of Evidence

- Misclassification cases

- ▶ Consider admitting that some members of the class worked more than 40 hours week / 8 hours a day and were not paid overtime

- Satisfies plaintiffs' burden – shifts burden to employer to prove affirmative defense
 - Allows for argument that employer gets to go first and last



Navigating Changes in Business Practices and Other Mitigating Measures



During Litigation

- Will a change in business practices be used against you?
 - ▶ As an evidentiary matter, see Fed. R. Evid. 407 on Subsequent Remedial Measures
 - ▶ But could color judge's view nonetheless
- Consider the timing
 - ▶ Will a change color the plaintiff's counsel's perception of the employer's goals of the litigation?
 - ▶ Will a change color putative plaintiffs' perception of the validity of the challenged practice?
 - ▶ Will a change increase the opt-in rate if before conditional certification?



During Litigation

Consider the nature of the challenged practice

- ▶ Does it affect the employer operationally?
- ▶ Is it one that will be visible to employees?
- ▶ Is the challenged practice popular among employees?

- Consider the benefits of the change

- ▶ Will it “stop the bleeding?”
- ▶ How valuable is that?

- Consider other mitigating measures

- ▶ E.g., instead of reclassifying as non-exempt, limit hours

- Balance all factors



Post-Litigation

Remedial

- Correct:
 - ▶ time clock rules
 - ▶ overtime calculations
 - ▶ handbook provisions
 - ▶ job descriptions
 - ▶ evaluations
 - ▶ management hierarchy
 - ▶ compensation levels



Preventative

- Wage & Hour Task Force
- Audit:
 - ▶ Audit Team
 - ▶ Periodic
 - ▶ Pay Practices
 - ▶ Exempt Classification
- For exempt jobs, ensure that all documents support exemption
 - ▶ Job descriptions
 - ▶ Evaluations
 - ▶ Job duty training materials
- For nonexempt employees, ensure all time is captured, employees sign off on revisions/corrections, overtime is properly calculated
- **TRAIN ALL LEVELS!!!**



Conclusion and Questions