SEYFARTH SHAW

Management Alert

Courts to Consider Theories, Not Facts, on Certification

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Seyfarth Synopsis: *In* Lubin v. Wackenhut Corp.*, the California Court of Appeal reinstated an effort to certify a class of over 10,000 security officers required to sign on-duty meal period agreements. The Court of Appeal directed the trial court to look at the plaintiffs' theory of recovery when deciding if a class action is appropriate, not at whether and how often any violations actually occurred.*

The Facts

The Wackenhut Corporation provides physical security services to businesses, gated communities, banks, schools, and other clients. Wackenhut required its California security officers to sign on-duty meal period agreements. Wackenhut then allowed its clients to dictate whether an employee actually had an off-duty or on-duty meal period on any particular shift.

Plaintiffs, former Wackenhut security officers, sued for a failure to provide off-duty meal and rest breaks, and for inadequate wage statements.

The trial court initially certified a class of over 10,000 security officers, and Wackenhut then provided discovery on a sampling of employees. As the case approached trial, Wackenhut moved for decertification in light of *Wal-Mart Stores, Inc. v. Dukes,* the 2011 U.S. Supreme Court case that criticized using a "trial by formula" to determine liability with statistical evidence. The trial court decertified the class (in 2012), on the grounds that individual issues predominated and that it would not be possible to conduct a manageable trial. Plaintiffs appealed the decertification order. The Court of Appeal then took its time, issuing its decision in November 2016.

The Court of Appeal's Decision

Plaintiffs contended that decertification was not warranted by a change in circumstances or case law, and that the trial court used improper criteria to grant the motion to decertify. Plaintiffs said the trial court should have considered their *theory of liability* in deciding whether certification was appropriate, not whether, factually speaking, liability actually existed on a class-wide basis. The Court of Appeal agreed with Plaintiffs, held that the trial court erred in granting the motion to decertify, and sent the case back to the trial court for further proceedings.

As to the issue of predominance, the Court of Appeal held that the "ultimate question" is whether the issues to try jointly, as compared to those to try separately, are so substantial that a class action would be the best method to try the claims. Significantly, the Court of Appeal focused on whether Plaintiffs' "theory of recovery" was amenable to class treatment, even if each class member must individually prove damages, and even if some class members had no damages at all.

The Court of Appeal relied on *Tyson Foods v. Bouaphakeo*, a post-Dukes 2016 U.S. Supreme Court case, to conclude that statistics—if reliable to prove or disprove elements of the relevant claim—can establish class-wide liability. The Court of Appeal rejected Wackenhut's argument that *Dukes* entitles a defendant to present individual defenses to the merits of each class member's

claim even if common evidence of wage and hour violations would suffice for class litigation. In such a case, the Court of Appeal held, defenses to individual claims are really questions of damages, which do not prevent certification. The Court of Appeal concluded that statistical sampling was appropriate here, where Plaintiffs offered it as a secondary source of proof and as a discovery manageability tool, rather than as the sole proof of liability, as in *Dukes*.

The Court of Appeal criticized the trial court for looking at whether the security officers actually *received* off-duty meal and rest periods (an issue of damages), as opposed to focusing on the theory of liability: whether Wackenhut unlawfully failed to *provide* off-duty meal and rest periods. Wackenhut allegedly failed to "provide" off-duty meal periods when it required all employees to sign on-duty meal period agreements, without determining in advance whether the nature of the work at each site prevented an off-duty meal period. (That determination instead was made later, by the client.) Wackenhut also lacked a rest-break policy for some time, and then instituted a policy that required security officers to remain on call during their breaks. The Court of Appeal determined that the "common questions" for class certification were whether the theories of liability relying on those facts "have merit."

The Court of Appeal distinguished wage and hour cases from the Title VII claims brought in *Dukes*. Title VII permits employers to present evidence to defeat asserted legal violations—evidence the Court of Appeal found to be "necessarily" individualized. By contrast, there is no such burden-shifting procedure for claims alleging inadequate meal and rest periods, and thus the Court of Appeal found that any Wackenhut defenses could be presented on a class-wide basis.

The Court of Appeal rejected the trial court's finding that Wackenhut's affirmative defense, based on the "nature of the work," raised individualized issues. The Court of Appeal reached this conclusion despite "profound" differences among the worksites and nature of the work that various security officers performed. The Court of Appeal held that because Wackenhut did not analyze the nature of the work on an individualized basis before requiring employees to sign on-duty meal period agreements, it could not later rely on the individualized nature of the work to defeat class certification.

The Court of Appeal also held that the trial court applied the wrong evidentiary standard in granting decertification—plaintiffs seeking certification need not "conclusively establish" that a defendant had a policy that violated wage and hour laws. Rather, plaintiffs need only produce "substantial evidence" to support their theory of liability towards a predominant portion of the putative class members.

Finally, the Court of Appeal held that Plaintiffs could bring class claims as to inadequate wage statements where required elements under Labor Code section 226 were missing from all wage statements, because that fact alone was enough to prove that putative class members were injured. The Court of Appeal based this ruling on amendments to Section 226, which came after the trial court's decertification ruling. These amendments "clarified" that an injury under the statute is established simply by the existence of legal defects in the wage statement.

What *Lubin* Means for Employers

Lubin potentially burdens the defense for employers facing class litigation related to imperfect wage and hour policies. The use of statistics to help prove class-wide liability appears to be back in style in California courts. The decision places an even higher premium on the need to have written wage-hour policies that comply with the arcane requirements of the California Labor Code and the California Wage Orders, as an imperfect policy can provide a potential hook for plaintiffs to claim class-wide liability even when only some employees are actually hurt by it.

Further, when relying on any exception to wage and hour requirements (like the "nature of the work" exception justifying an on-duty meal period agreement), employers should do an individualized analysis if they later want to use individualized defenses to their advantage against class certification.

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