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Inside

Point of View: When Settling a Wage and Hour Class Action May Not Be the Best Option

By Karen J. Kubin

Court watchers estimate that employers paid over $250 million in the ten largest wage and hour class action settlements in 2008, and that only begins to tell the story. While it may be tempting—and save legal fees in the near term—to settle a wage and hour class action rather than litigate it—substantial payouts such as these do provide an incentive to plaintiff lawyers to keep suing. This is particularly true when a settlement is reached early in the case, as often happens, before the plaintiff's lawyers have had to do any significant work.

Short-term gain, in short, can lead to long-term pain. Class action settlements, by their nature, cannot be confidential because they must be approved by the court with notice to the class and an opportunity to be heard.[1] Agreements by the plaintiff lawyers not to sue the settling defendant again are prohibited in California.[2] And plaintiff lawyers are very effective in sharing information with each other and the press. The resulting notoriety that accompanies these settlements can produce incentives for further litigation, and examples of the consequences are legion. A large computer company paid $65 million in a highly publicized wage and hour settlement, and just got sued again. A private security firm recently paid $15 million to settle another of these cases, and guess what happened next. The problem, moreover, is multi-layered; settlement of an action challenging the exempt classification of one job category in a large company, for example, can and commonly does lead to lawsuits challenging the exempt classification of myriad other job categories at the same company, or to actions successively challenging the classification of the job category that was initially attacked, if the classification was not changed when the first case was settled.

Which leads to the proposition that settling may not be the best option in these cases. Contrary to the conventional post-*Sav-On*[3] wisdom that employers could never defeat class certification in wage and hour class actions, the California Court of

Appeal's 2006 opinion affirming the denial of certification of a class of grocery managers in *Dunbar v. Albertson's*[4] proved that employers could. Armed with the guidance provided by *Dunbar*, trial courts have increasingly denied class certification in wage and hour cases, finding that the issues presented are too highly individualized and fact-specific to make the cases amenable to classwide treatment.

So what are the alternatives to early settlement? One is to deploy a strategy from the start of the case aimed at fleshing out three things: first, whether the case can be won at the pleading stage; second, whether class certification can be defeated; and third, whether the case can be won on the merits, for example, on a motion for summary judgment. If it appears reasonably likely that class certification can be defeated, the focus should be single-mindedly on achieving that result. Litigating a case through the class certification stage costs money, to be sure. But the long range benefits of litigating—and defeating—class certification can make it a prudent business decision that is well worth the expense.

Update: Court Orders Arbitration of Labor Commissioner Wage Claim

By Lloyd W. Aubry, Jr.

In our April 2009 Employment Law Commentary entitled "Arbitration Agreements in Light of *114 Penn Plaza v. Pyett*," [**link**] we discussed the U.S. Supreme Court's recent decision in which it affirmed a long standing line of cases upholding mandatory pre-dispute arbitration agreements that require employees to arbitrate employment claims. In *114 Penn Plaza*, the Supreme Court held that unionized employees working under a collective bargaining agreement could be required to arbitrate age discrimination claims, explicitly overruling an older precedent, *Alexander v. Gardner Denver Company*, 415 U.S. 36 (1974), whose ongoing validity had been in doubt. We also pointed out that the trend of decisions in California seemed to be going the other way. While paying lip service to the enforceability of arbitration agreements, the California courts were increasingly finding ways not to enforce such arbitration agreements. However, we noted that a recent California decision, *Roman v. Superior Court*, 2009 WL 975994 (Cal. App. 2 Dist., April 13, 2009), did enforce an arbitration agreement, perhaps signaling a reversal of the trend.

On May 29, 2009, the Second Appellate District issued another decision, *Sonic-Calabasas A, Inc. v. Frank Moreno*, again enforcing an arbitration agreement but this time in a somewhat surprising context. The court held that an employee who had signed a mandatory pre-dispute arbitration agreement could be required to arbitrate a claim for vacation pay wages that had been filed with the Labor Commissioner. In the trial court, the Labor Commissioner represented the employee and argued that the petition for arbitration filed by the employer was premature pending the processing of the claim before the Labor Commissioner. The Labor Commissioner argued that once a decision had been reached by the Labor Commissioner in one of its so-called "Berman" administrative hearings, if the employer appealed the decision to Superior Court, the matter could then go to arbitration rather than to the *de novo* hearing in Superior Court. The appellate court disagreed, holding that an arbitration agreement enforceable under the Federal Arbitration Act preempted all state proceedings, including administrative proceedings, and therefore the Labor Commissioner was ousted from any jurisdiction over the claim. The court pointed out that the U.S. Supreme Court has continually emphasized the speedy and conclusive benefits of arbitration; thus, to delay arbitration pending the Labor Commissioner's processing of the claim would unnecessarily and unduly delay the proceeding, inconsistent with the policies behind the Supreme Court's enforcement of arbitration agreements.

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Chances are, the plaintiff lawyers will not come back to the well.

That said, there are doubtless those cases that need to be settled, for myriad reasons. A recent development in California is noteworthy in that context.

On June 11, the California Supreme Court denied review of the Court of Appeal's decision in *Chindarah v. Pick Up Stix, Inc.*,[5] which recognized an employer's right prior to class certification to settle wage and hour claims directly with putative class members. *Chindarah* involved claims on behalf of a class of current and former employees of Pick Up Stix for unpaid overtime, penalties, and interest due to Pick Up Stix's alleged misclassification of several job categories as exempt from overtime pay. After attempts to settle the lawsuit through mediation failed, Pick Up Stix approached putative class members directly to settle with as many of them as possible, offering each an amount based on what it had previously offered at the mediation. Over 200 current and former employees accepted the offer and signed a settlement agreement, which included a general release. By signing the settlement agreement, the employees acknowledged that they spent more than 50 percent of their time performing managerial duties, released Pick Up Stix from all claims for unpaid overtime and any other California Labor Code violations during the relevant period, and agreed not to participate in any class action that might include a released claim. The class action was effectively gutted.

The plaintiffs then amended the complaint to add allegations that the settlement agreements violated the Labor Code, and several workers who had signed them joined the proposed class action as plaintiffs (the *Chindarah* plaintiffs). Pick Up Stix filed a cross-complaint against the *Chindarah* plaintiffs for breach of the settlement agreement. The *Chindarah* plaintiffs moved for summary adjudication of the cross-complaint, contending that the releases were void under Labor Code sections 206[6] and 206.5,[7] and Pick Up Stix moved for summary judgment on the complaint, on the ground that the releases barred any recovery by the *Chindarah* plaintiffs. The trial court found that the Labor Code does not prohibit the release of a claim for unpaid wages where there is a bona fide dispute over whether any wages are owed.[8] Further, the trial court found that because Pick Up Stix "produced evidence showing a good faith dispute with regard to classification of the employees," it had "produced evidence . . . creating a triable issue of fact as to whether or not [plaintiffs] were owed any additional wages."[9] Finding the releases valid as a matter of law, the trial court granted Pick Up Stix's motion for summary judgment and denied the plaintiffs' motion for summary adjudication.[10] The Court of Appeal affirmed.

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Plaintiff lawyers reacted harshly to *Chindarah*, claiming that it will be used to employers' unfair advantage. But there is no evidence that was the case in *Chindarah*, and there is likewise no reason to believe that other employers would not execute a *Chindarah* strategy as carefully as the employer apparently did in that case, to assure that the terms offered putative class members are fair and settlements are entered into on a fully informed basis, free of coercion or overreaching.

In those cases that need to be settled, *Chindarah* may prove a useful tool for achieving a company's goal. But the decision to settle, as with any litigation-related decision, should not be taken without full consideration of *all* the costs, including the risk that settlement will invite more litigation, which is very real. If a company wishes to forestall future lawsuits, fighting—and winning—the present one may well be in the company's long-term best interest, notwithstanding the short-term cost. ■

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[1] *See, e.g.*, Fed. R. Civ. P. 23(e).

[2] *See* Cal. R. Prof. Cond., R. 1-500.

[3] *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004).

[4] *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422 (2006).

[5] *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796 (2009).

[6] Labor Code section 206 provides in pertinent part:

> In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.

Cal. Lab. Code § 206, subd. a.

[7] Labor Code section 206.5 provides in pertinent part:

> An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made. A release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee. Violation of this section by the employer is a misdemeanor.

Id., § 206.5, subd. a.

[8] *Chindarah*, 171 Cal. App. 4th at 799.

[9] *Id.*

[10] *Id.*

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