



Hot Inside Counsel Issues

Presentation Subtitle

Vinole v. Countrywide Home Loans, Inc. (9th Cir. 2009)

- Home Loan Consultants (HLCs) alleged that they were misclassified as “exempt” and denied overtime and other wages lawfully due to non-exempt employees.
- The district court denied class certification and the denial was appealed.
 - The issues on appeal were if the district court abused its discretion by:
 - (1) prematurely considering Countrywide’s motion to deny class certification, which was filed prior to plaintiffs’ motion to certify the class and prior to pretrial and discovery cutoffs; and
 - (2) finding that predomination of individual issues precluded class certification.
- The Ninth Circuit affirmed the denial of certification of overtime claims.
 - The court held that “Plaintiffs’ claims will require inquiries into how much time each individual HLC spent in or out of the office and how the HLC performed his or her job.”

In re Wells Fargo Home Mortgage Overtime Pay Litig. (9th Cir. 2009)

- District court granted plaintiff's class certification motion, holding that:
 - the employer's uniform classification of a group of its employees could support class certification; and
 - procedural tools could properly be used to try the case.
- Ninth Circuit reversed the district court's grant of class certification.
 - The court held that "the district court abused its discretion in relying on that policy to the near exclusion of other factors relevant to the predominance inquiry."

On remand, the District Court held that "Vinole...appears to foreclose any viable path for certifying this action as a class action" and denied the plaintiff's renewed motion for class certification on the basis that individual inquiries would predominate over common questions.

Trinh v. JPMorgan Chase & Co. (S.D. Cal. 2009)

- The complaint alleged that defendant violated state and federal law by misclassifying loan officers as “exempt,” failing to pay them overtime and other wages, and failing to provide meal and rest breaks.
- The court denied conditional FLSA certification, finding that plaintiffs did not show that they were similarly situated to all of defendant’s loan officers.

Sexton v. Franklin First Financial, Ltd. (E.D.N.Y. 2009)

- Plaintiff, a former loan officer employed by defendant, brought federal and state claims for unpaid minimum wages and overtime compensation on behalf of himself and other similarly situated individuals.
- The court granted plaintiff's motion for conditional certification of the FLSA collective action.
 - The court stated that “[i]n particular, the ‘similarly situated’ requirement has been satisfied because plaintiff and opt-in plaintiffs have set forth a factual basis . . . for having been subject to a common policy of being denied overtime and minimum pay by defendants.”

Garcia v. Freedom Mortgage Corp. (D.N.J. 2009)

- The court granted plaintiff's motion for conditional certification of a collective action on behalf of similarly situated loan officers and loan processors.

Miranda v. Citibank, N.A. (C.D. Cal. 2009)

- Plaintiff sought to certify a class of all current and former Citibank Bank at Work Relationship Managers, alleging that they were misclassified as “exempt” and unlawfully denied overtime under state and federal law.
- The court denied class certification based on the necessity for individualized inquiries with respect to exemptions, even though “the plaintiffs shared a common job title and core duties.”
 - Specifically, the court found:
 - *The amount of time spent “outside” for purposes of the applicability of the outside sales exemption varied from person to person and at least some of the Bank at Work Relationship Managers exercised discretion in their decision-making regarding, for example, which prospective clients to target and how best to communicate with current clients.*

Whalen v. JPMorgan Chase & Co. (W.D.N.Y. 2008)

- An underwriter, who decisioned loans, alleged that he, and a class of similarly situated underwriters, were misclassified as “exempt” and denied overtime compensation.
 - In his motion for summary judgment, plaintiff argued that the role of underwriters was “one of mere production, ‘helping to generate credit product after credit product for each customer.’”
 - In its cross-motion for summary judgment, defendant argued that the underwriters were exempt administrative employees who exercised discretion and independent judgment.
- The court found that the underwriters were exempt administrative employees who were not entitled to overtime pay.
 - The court held that “plaintiff’s duties . . . are clearly ‘office, non-manual work directly related to management policies or general business operations of the employer,’ and therefore administrative.” The court also held that “plaintiff’s duties included ‘the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered,’ and therefore involved the exercise of discretion and independent judgment sufficient to render them exempt.”
- In November of 2009, the Second Circuit reversed, finding that Plaintiff’s work in “selling loans” was not “related either to setting management policies nor to general business operations such as human relations or advertising, but rather concern the production of loans – the fundamental service provided by the Bank.”

Stages of the litigation:

- Trial court – rejected the insurance claims adjusters' argument that “no person who is a claims adjuster for an insurer can be exempt . . . because claims adjusting is production work in an insurance company” and denied plaintiffs’ motion for summary adjudication.
- Appellate court – reversed and held that the insurance claims adjusters were not exempt from California's overtime pay requirements under the administrative exemption.
- Supreme Court of California – granted the Petition for Review.
 - On Petition for Review, defendant argued that the appellate court's explanation of the administrative exemption (as applying only to work performed at the level of policy or general operations) was contrary to: (1) the DOL's regulations, incorporated into state law; and (2) interpretive federal cases that have generally concluded that insurance claims adjusters are exempt administrative employees.
- Parties are awaiting a decision from the Supreme Court of California.

The DOL filed an amicus brief supporting the defendants.

- In its amicus brief, the DOL argued that insurance claims adjusters:
 - are generally exempt employees under the DOL’s regulations;
 - generally satisfy the “directly related” prong of the Administrative Exemption; and
 - have been found to be exempt in every relevant federal court decision addressing this issue.
- The DOL also argued that the administrative/production dichotomy is not a dispositive test except where the work falls clearly on the production side of the dichotomy and such is not the case with insurance claims adjusters.

Misclassification Claims: Accountants

Nguyen v. BDO Seidman (C.D. Cal. 2009)

- A purported class action alleging that accounting firm BDO Seidman improperly classified non-licensed accounting professionals as exempt from overtime.
- The district court held that individualized questions as to the purported class members' job duties and qualifications precluded treatment as a class action.
 - » Specifically, class certification was denied under the administrative exemption in part because at least some, if not all, class members performed high-level tax-related work in areas requiring the evaluation of "grey areas" in preparing tax returns and analytical skills in researching tax issues.
 - » As to the professional exemption, the court found that the putative class members "have a wide variety of advanced degrees, certificates, and training that they use in the performance of their tax and audit job duties."
- The Ninth Circuit denied a petition seeking interlocutory review of the denial of certification.

Sobek v. PricewaterhouseCoopers, LLP (E.D. Cal. 2009)

- Court granted summary judgment to plaintiff class, finding that the class of unlicensed associates in defendant's Attest Division was not exempt from California's overtime laws because they did not qualify for California's professional, executive, or administrative exemption.
- The court found that:
 - plaintiffs did not qualify for the professional exemption because they could not be considered "learned professionals" without a license;
 - plaintiffs did not qualify for the executive exemption because they did not manage a recognized department or subdivision of the business (managing individual projects or "engagements" did not count); and
 - plaintiffs did not qualify for the administrative exemption because they were subject to "more than general supervision."
- This case has been certified for interlocutory appeal to the Ninth Circuit and PricewaterhouseCoopers has submitted its brief on appeal.

Hendricks v. Chase (D. Conn. 2010)

- Plaintiffs were hedge fund accountants and sought to certify a class on behalf of all fund accountants (hedge funds, mutual funds, pension funds, private equity funds, etc.)
- The Court denied Plaintiffs' motion for class certification of both the FLSA collective action and the putative Rule 23. The Court found that there were “disparate factual and employment settings” for members of the proposed class, including differences in supervisory responsibilities, accounting knowledge, and client and compliance responsibilities.
- The Court also denied summary judgment as to the named plaintiffs, finding that there were factual questions as to whether they qualified for the professional and/or administrative exemption.

- 2006 DOL Opinion Letter
 - IT Support Specialists who provide help desk support and troubleshooting are not exempt.
- IBM: \$65 million settlement in a class action covering approximately 32,000 technical support workers
- *Millan v. Citigroup Inc.* (S.D.N.Y. 2008)
 - New York federal court granted summary judgment, finding that an IT professional, who configured wiring and software to allow equipment and software to be connected to a specific network, was exempt.
- *Ritzer v. UBS Fin. Servs. Inc.* (D.N.J. 2008)
 - Federal court in New Jersey conditionally certified a collective action brought by technical support associates of UBS.

Misclassification Claims: Information Technology (Cont'd)

Clarke v. JPMorgan Chase Bank, N.A., No. 08-civ-2400 (S.D.N.Y 2010)

- Chase had reclassified some employees whose duties included installation, troubleshooting, and maintenance. Plaintiffs defined their putative collective action class by those who were reclassified,
- Plaintiff attempted to use the reclassification as evidence that Chase's conduct of previously classifying the employees as exempt was willful and as evidence that Chase admitted that these individuals should have at all times been classified as exempt.
- The court granted summary judgment to Chase, and in doing so, it rejected both of these arguments. Specifically, the court found that the reclassification and memos describing it were not evidence of willfulness, and instead stated that: “[T]he internal JPM emails and memoranda cited by Clarke suggest that the reclassification was a good-faith effort to ensure that its classification of IT employees complied with the FLSA – and that the reclassification was likely a conservative measure adopted at a time when FLSA collective action overtime lawsuits were becoming more and more common. Simply put, even viewed in the light most favorable to Clarke, the reclassification is not evidence that JPM’s alleged violation of the FLSA was knowing or reckless.”
- The court refused to extend to one of the named plaintiffs the benefit of the three-year limitations period for willful misconduct, and it dismissed his claim because he was barred by the two-year limitations period.
- The Court found that the other named Plaintiff fit squarely within the computer employee exemption. In this regard, the Court found that it must focus on the plaintiff’s duties (rather than communications regarding the reclassification) when determining whether he was properly classified.

Lewis v. Wells Fargo & Co. (N.D. Cal. 2009)

- The Northern District of California granted conditional certification to a class of technical support workers “with the primary duties of installing, maintaining, and/or supporting software and/or hardware, including but not limited to network engineers, but excluding PC/LAN Engineers,” who allege that defendant violated the FLSA by misclassifying them as “exempt.”
- The court found that “[p]laintiffs me[t] their burden of showing that all technical support workers are similarly situated with respect to their FLSA claim: all technical support workers share a job description, were uniformly classified as exempt from overtime pay by Defendant and perform similar job duties.”

Malloy v. Richard Fleischman & Assocs. Inc. (S.D.N.Y. 2009)

- The court granted conditional certification to a class of information technology support specialists, finding that “[a]t this preliminary stage, plaintiff has more than satisfied his *de minimis* burden of showing that he is ‘similarly situated’ to the proposed class members.”
- According to the court:
 - “Plaintiff identifie[d] a common policy or practice that is applicable to all the IT support specialists employed by [defendant].”
 - “[P]laintiff [] offered evidence that the IT specialists he seeks to represent lack the kind of discretion and independent judgment required of exempt employees.”
 - “The fact that these employees perform skilled work . . . does not automatically exempt them from the wage and hours laws.”
 - It was not persuaded by defendant’s argument that these employees are “uniquely situated *vis a vis* each other, and so cannot be part of a ‘similarly situated’ group of plaintiffs.”
 - “[V]ariation in damages among members of the putative class does not defeat certification of a collective action.”

Riddle v. SunTrust Bank (N.D. Ga.)

- Plaintiff, a client technology specialist whose position was titled “CTS 4,” alleged that she and similarly situated individuals were denied overtime compensation and sought conditional certification of the class.
- The court granted plaintiff’s motion for conditional certification under “the lenient standard appropriate at the notice stage.”
 - The court found that “[d]efendant’s contentions that CTS 4s have different higher level responsibilities beyond the core technical services they provide are not sufficient at this stage to demonstrate that Plaintiff is not similarly situated to the putative class members.”

California's Computer Professional Exemption

- Labor Code 515.5's overtime exemption applies to employees who meet specific duties and wage requirements.
- Wage requirements: To be exempt, the employee in 2009 and 2010 must earn:
 - \$37.94 per hour or \$79,050 in yearly salary
- Duties requirements: To be exempt, the employee must possess skill in *one* of these disciplines:
 - Computer systems analysis
 - Programming
 - Software engineering

- Plaintiff sought to certify a class of 13 different types of loan officers and managers alleging unpaid expenses.
 - Specifically, the plaintiff alleged that he, and others, were:
“(1) subject to uniform compensation and expense reimbursement policies; and (2) not reimbursed for expenses.”
- The court denied certification, finding that the legal requirements of reimbursing for “necessary expenditures” would have to be evaluated individually for each employee.
- The court also found that the putative class was not sufficiently numerous to warrant certification.

PAGA –

- A private citizen may sue as a “private attorney general” for penalties for underlying violations of state wage and hour laws.
 - Administrative remedies must be exhausted.
 - If he or she succeeds, the penalties imposed will be split 75/25 with the California Labor and Workforce Development Agency.

Arias v. Superior Court (Cal. 2009)

- The Supreme Court of California held that the class does not have to be certified before bringing a “representative action” under PAGA.
 - Defendant argued that if class certification is not required, plaintiffs could continually bring PAGA claims against their employer for the same issues.
 - In response, the court stated that “[b]ecause an aggrieved employee’s action under the Labor Code Private Attorney General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.”