

## In This Issue:

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Ninth Circuit issues decision on a number of class action issues, including certification of state law damages claims as a class action under FRCP 23(b)(2).

## Ninth Circuit Decision on a Mixture of Class Action Issues May Make Federal Courts a More Attractive Forum For Plaintiffs

By Michael Gregg

The Ninth Circuit recently issued a decision encompassing a medley of class action issues. In *Wang v. Chinese Daily News, Inc.*, No. 08-56740 (Sept. 27, 2010), the Ninth Circuit affirmed a district court's decision to certify state law damages claims as a class action under Federal Rule of Civil Procedure 23(b)(2), a rule that generally applies to cases seeking injunctive, rather than monetary, relief. The court in *Chinese Daily News* also affirmed the district court's decision to invalidate class members' elections to opt-out of the class action due to coercion and to issue corrective opt-out notices after trial on the merits. The court also affirmed the district court's ruling that California Business & Professions Code Section 17200 is not preempted by the Fair Labor Standards Act (FLSA). Finally, the Ninth Circuit affirmed the concurrent prosecution of an FLSA opt-in collective action and a Rule 23 opt-out class action, as well as the district court's conclusion that the newspapers' journalists were non-exempt employees entitled to wage and hour protections under the FLSA and California law.

### Factual & Procedural Background

The plaintiffs in *Wang v. Chinese Daily News* filed a class action against their employer—a community newspaper—for wage and hour violations based on the FLSA, California's Labor Code and Section 17200 of the California Business and Professions Code. The plaintiffs claimed that they were denied overtime compensation, meal and rest breaks and accurate wage statements. The trial court certified the FLSA claim as an opt-in collective action and the state law claims as an opt-out class action under Rule 23(b)(2).

Class members were given three months to opt-into the FLSA claim and to opt-out of the state law claims. Notices were mailed to 187 class members and were also made available to employees at the defendant's Monterey Park location. After the vast majority of the class members opted-out of the state law claims, the plaintiff filed a motion to invalidate the opt-outs based on alleged coercive conduct by

the defendant. The trial court invalidated all the opt-outs and deferred any future opt-out procedure until after the trial on the merits.

At the summary judgment stage, the district court held that defendant's reporters did not qualify for the creative professional exemption.

Following a 16-day trial, the jury returned a special verdict in the plaintiffs' favor and awarded damages on all class claims. Then, the court held a bench trial on the remaining issues of injunctive relief, penalties and restitution pursuant to Business and Professions Code Section 17200. The court held that a cause of action under section 17200, predicated on violations of the FLSA, is not preempted. The court, however, denied the plaintiffs' request for an injunction, concluding that defendant had taken steps towards compliance with federal and state wage and hour provisions such that the remaining injuries could be remedied by money damages. After trial on the merits, the court issued an order establishing a 30-day time period for class members to opt-out of the state law class action claims.

## Exempt Status of Journalists

*Wang v. Chinese Daily News* is the first case in the Ninth Circuit to consider the creative professional exemption as it relates to journalists. In this case, the Ninth Circuit affirmed the district court's holding that the journalists were nonexempt employees entitled to state and federal wage and hour protections.

To qualify for the creative professional exemption, an employee must meet the minimum salary requirement and his or her "primary duty" must be "the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work."<sup>1</sup> Employees of newspapers and other media are not exempt creative professionals if they "only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals."<sup>2</sup>

In *Wang*, the Ninth Circuit approved the district court's consideration of the "sophistication" of the articles and found them lacking in this regard because, due to the intense pace at which the reporters worked, their primary duties did not involve conducting investigative interviews, analyzing and interpreting public events, writing editorial opinion or other commentary but consisted of "standard recounts of public information [created] by gathering facts on routine community events."

## Certification of State Law Claims Under Rule 23(b)(2)

The district court in *Wang* certified the plaintiffs' state law claims under Rule 23(b)(2) and held, in the alternative, that certification was also appropriate under Rule 23(b)(3). Rule 23(b)(2), however, generally applies to cases seeking injunctive relief. A party seeking class certification under Rule 23(b)(2) does not have to establish that common questions of law and fact predominate. While claims seeking monetary relief may be certified as a part of a Rule 23(b)(2) class, the rule does not extend to cases that predominantly seek monetary damages. On appeal, *Chinese Daily News* challenged the district court's decision to certify the class under Rule 23(b)(2) and argued that claims for monetary relief predominated.

The Ninth Circuit affirmed the district court's certification decision under Rule 23(b)(2) and did not address whether class certification was appropriate under Rule 23(b)(3). The court, however, noted that *Mevorah v. Wells Fargo Home Mortg.* (*In re Wells Fargo Home Mortgage*)<sup>3</sup> and *Vinole v. Countrywide Home Loans, Inc.*<sup>4</sup> disapproved of the district court's decision to certify the class under Rule 23(b)(3) based solely on an employer's policy of treating all employees in a certain position uniformly. In affirming the decision to certify the class action under Rule 23(b)(2), the Ninth Circuit said that the district court certified the class after

concluding that claims for monetary relief were on “equal footing” with claims for injunctive relief. The Ninth Circuit said that the “claims for monetary and injunctive relief were closely related” and cited *Dukes v. Wal-Mart Stores, Inc.*<sup>5</sup> for the proposition that class certification was appropriate under Rule 23(b)(2) because “the request for monetary relief neither ‘introduce[d] new and significant legal and factual issues,’ nor raised particular due process manageability concerns.” In *Dukes v. Wal-Mart*, the court affirmed certification of claims for back pay along with an injunctive relief claim under Rule 23(b)(2). In *Wang*, however, the district court certified all of the plaintiffs’ state law claims for overtime, meal and rest breaks and wage statement claims under Rule 23(b)(2). The Ninth Circuit did not address this distinction in its opinion. In the end, the Ninth Circuit placed particular emphasis on the fact that the vast majority of the class members were current employees and stood to benefit from an award of injunctive relief.

## Invalidation of Opt-outs Due to Coercion

In affirming the district court’s decision to invalidate the opt-outs, the court in *Wang v. Chinese Daily News* relied, in part, on the pronouncement in *Gulf Oil Co. v. Bernard*<sup>6</sup> that district courts have “the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties.” This authority, according to the Ninth Circuit in *Wang*, is “especially broad” when notice and the opportunity to opt-out are not required but are ordered by the court in the exercise of its discretion. Because the district court in this case certified the state law claims under Rule 23(b)(2), and not (b)(3), notice to the class was not mandatory.

In support of their request to invalidate the opt-outs, the plaintiffs submitted evidence that two of the three named plaintiffs were terminated after the lawsuit was filed. The plaintiffs also submitted evidence that the defendant placed a large sign in its facility and over a table on which the opt-out forms were placed, saying “Don’t Tear the Company Apart! Don’t Act Against Each Other!” In addition, the plaintiffs submitted a declaration from the class action notice administrator that opt-out rates ordinarily do not exceed 1% and that 90% of the current employees opted-out, compared to 25% of the former employees. Although the defendant responded with evidence supporting the reasons for the termination of the plaintiffs and the high opt-out rates, the Ninth Circuit held that the district court’s decision was supported by the evidence.

## Corrective Opt-Out Notices After Trial on the Merits

One of the obvious reasons why class certification determinations take place prior to trial on the merits is so that putative class members will not know the results of the claims asserted before choosing whether to be bound by the judgment or opt-out. However, in *Wang v. Chinese Daily News*, class members were given the opportunity to opt-out of the case after the defendant’s liability had already been established and damages awarded. The Ninth Circuit approved such a procedure where “there is a need to regulate the notice and opt-out process to maintain the integrity of the action in the face of a party’s coercive activity.” However, the Ninth Circuit appeared to limit this procedure to the circumstances in the case.

## Business and Professions Code Section 17200 Not Preempted by FLSA

California Business and Professions Code Section 17200 permits recovery for unlawful business practices and, in doing so, “borrows” violations of other laws and treats them as independently actionable under Section 17200. In *Wang*, the plaintiffs’ Section 17200 claim was predicated on alleged violations of the FLSA. Consequently, the defendant argued that the plaintiffs’ Section 17200 claims were preempted by the FLSA. The district court rejected this argument and the Ninth Circuit affirmed.

The Ninth Circuit said that express preemption did not apply because the FLSA does not expressly preempt state law. It also said that field preemption did not apply because the FLSA permits states to enact stricter wage and hour laws. That left only the possibility of conflict preemption, which applies where it is “impossible to comply with both state and federal requirements” or “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” In

its opinion, the Ninth Circuit found no conflict between the FLSA and certification of the plaintiffs' Section 17200 claims because it is "obviously possible to comply with both laws simultaneously." However, the opinion contains no discussion of the argument that permitting a Section 17200 class action claim—predicated on alleged violations of the FLSA—to proceed on an opt-out basis conflicts with Congress's intent that FLSA claims not be adjudicated under this procedure.<sup>7</sup>

## Concurrent Prosecution of FLSA Opt-in Collective Action and Rule 23 Opt-out Class Action

Under U.S. Code Title 28 Section 1367(c)(2), a district court may decline to exercise supplemental jurisdiction when a state law claim predominates over the federal law claim over which the court has original subject matter jurisdiction. Chinese Daily News argued that the state law claims predominated and that the district court erred in exercising supplemental jurisdiction. In support, the paper argued that because an FLSA action requires the affirmative consent of class members to join the action and state law class claims do not, the FLSA claim will invariably have fewer participants than the state law claims and, therefore, the state law class claims predominated over the federal claims. The Ninth Circuit refused to follow Third Circuit authority that a district court abuses its discretion in exercising supplemental jurisdiction over a state law wage class action and said that because the state law class action claims essentially replicated the FLSA, they did not predominate.

## Implications of the Decision

The decision in *Wang v. Chinese Daily News* suggests that certain newspapers, especially smaller publications, will have more difficulty establishing that their journalists fall under the creative professional exemption and, consequently, must be able to establish that their journalists contribute a unique or creative interpretation to a news product. In addition, the decision will likely result in more plaintiffs seeking certification of class action claims under Rule 23(b)(2). The case also teaches that, after a class action is certified, employers must be mindful of the negative consequences of their communications with, and actions toward, class members. Ultimately, the decision may make federal courts in the Ninth Circuit an even more attractive forum for class actions.

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<sup>1</sup> 29 C.F.R. § 541.302(a).

<sup>2</sup> 29 C.F.R. § 541.302(d) (2004).

<sup>3</sup> 571 F.3d 953, 958-59 (9th Cir. 2009).

<sup>4</sup> 571 F.3d 944-48 (9th Cir. 2009).

<sup>5</sup> 603 F.3d 571 (9th Cir. 2010) (en banc).

<sup>6</sup> 452 U.S. 89, 100-101 (1981).

<sup>7</sup> See e.g., *Daprizio v. Harrah's Las Vegas, Inc.*, 2010 U.S. Dist. LEXIS 84307 (D. Nev. 2010); *Williams v. Trendwest Resorts, Inc.*, 2007 U.S. Dist. LEXIS 62396 (D. Nev. 2007).