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## **Ninth Circuit Holds that Employers Are Entitled to Individualized Damages and Affirmative Defense Determinations in Wage and Hour Class Actions**

By Michael Gregg

In *Wang v. Chinese Daily News, Inc.*, 2013 U.S. App. LEXIS 4423 (9th Cir. Mar. 4, 2013), the U.S. Court of Appeals for the Ninth Circuit issued a decision that runs contrary to its prior endorsement of the use of inferential statistics to award damages in class actions. The court for the first time ruled that employers defending against wage and hour claims are “entitled to individualized determinations of each employee’s eligibility’ for monetary relief” and entitled “to litigate any individual affirmative defenses they may have to class members’ claims.” The Ninth Circuit also vacated the district court’s certification decision under Federal Rule of Civil Procedure 23(b)(2) and remanded the case to the district court to consider whether the case should be certified as a class action under Rule 23(b)(3), which requires proof that common questions of law and fact predominate over questions affecting individual members. The decision will likely make it harder for plaintiffs to obtain class action certification in federal courts within the Ninth Circuit.

### **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 federal Fair Labor Standards Act (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), which applies to class actions primarily seeking injunctive or declaratory, rather than monetary, relief.

Following a 16-day trial, the jury returned a special verdict, awarding the plaintiff class over \$2.5 million in damages. The district court then held a bench trial on the remaining issues of injunctive relief, penalties, and restitution pursuant to Business and Professions Code section 17200. The court denied the plaintiffs’ request for an injunction, concluding that the employer had taken steps towards compliance with federal and state wage and hour provisions such that the remaining injuries could be remedied by money damages.

In 2010, the Ninth Circuit affirmed the judgment, but on October 3, 2011, the U.S. Supreme Court vacated the judgment and remanded the case to the Ninth Circuit for further consideration in light of the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

## Ninth Circuit Departed from Its Prior Endorsement of Inferential Statistics to Award Damages in Class Actions

In *Hilao v. Estate of Marcos*, 103 F.3d 767 (1996), the Ninth Circuit affirmed an award of nearly two billion dollars to over 9,500 class members, which was determined by selecting 137 claims at random and then extrapolating the validity and value of the untested claims from that sample. This procedure was supported by expert testimony that an examination of 137 claims would achieve “a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed.” The trial court then selected a special master to review the claim forms and depositions of the 137 randomly selected claimants and make recommendations to the jury on damage awards to the remaining class members. The jury adopted most of the special master’s recommendations with respect to the 137 claimants and adopted the recommendations as to the remaining class members. The defendant appealed the judgment on due process grounds, among others. The Ninth Circuit rejected the due process challenge and noted that due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” The decision to affirm the judgment was based in large part on the fact that the time and judicial resources required to try all the claims would make resolution impossible. After balancing the interests of the judiciary and the parties, the court in *Hilao* concluded that the statistical method used to award damages did not violate due process.

The Ninth Circuit’s ruling in *Wang v. Chinese Daily News* that employers defending against wage and hour class actions are “entitled to individualized determinations of each employee’s eligibility for monetary relief” and are entitled “to litigate any individual affirmative defenses they may have to class members’ claims” departs from the court’s prior endorsement in *Hilao* of the use of inferential statistics to award damages in class actions.

## Reversal of Certification of State Law Claims

In 2010, the Ninth Circuit initially affirmed the district court’s certification of the plaintiffs’ state law monetary claims in *Wang* under Rule 23(b)(2), which applies to cases seeking injunctive or declaratory relief. Significantly, a party seeking class certification under Rule 23(b)(2) does not have to establish that common questions of law and fact predominate. The Ninth Circuit affirmed certification of the monetary claims under the injunctive relief provisions because the “claims for monetary and injunctive relief were closely related” and “the request for monetary relief neither ‘introduce[d] new and significant legal and factual issues,’ nor raised particular due process manageability concerns.”

On remand, in light of the U.S. Supreme Court’s ruling in *Dukes* that claims for individualized monetary relief cannot be certified under the injunctive/declaratory relief provisions, the Ninth Circuit reversed the district court’s certification of state law claims under Rule 23(b)(2), and remanded the case to the district court to reconsider its analysis under Rule 23(a)(2) and 23(b)(3). With respect to the commonality requirement under Rule 23(a)(2), the Ninth Circuit emphasized that, although a single common question can satisfy the requirement, the common contention must be one that will resolve an issue central to the validity of the plaintiffs’ claims in “one stroke.” Moreover, the Ninth Circuit instructed the district court that the plaintiffs “must show significant proof” that the company operated under a general policy that violated California labor laws.

As to the predominance requirement under Rule 23(b)(3), the Ninth Circuit telegraphed to the district court that a certification decision based solely on the fact that the employer had a uniform policy of classifying all reporters and account executives as exempt employees would be overturned. The Ninth Circuit emphasized that, as it previously held in *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 571 F.3d 953, 958 (9th Cir. 2009), “a presumption that class certification is proper when an employer’s internal exemption policies are applied uniformly to the employees . . . disregards the existence of other potential individual issues that may make class treatment difficult if not impossible.”

## Implications of the Decision

The decision in *Wang v. Chinese Daily News* is important because it supports employers’ arguments that they have a due process right to defend against wage and hour claims on an individualized basis and represents a departure from prior Ninth Circuit authority endorsing the use of inferential statistics to award damages in class actions. Consequently, the decision will likely make it harder for plaintiffs to establish that litigation of wage and hour claims on a class-wide basis is a superior—or even an appropriate—method for resolving these types of claims.

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