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State-Court Wage & Hour Class Actions

by

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I. Federal-Court Jurisdiction Over State-Law Claims

Federal courts with FLSA claims have sometimes refused to exercise supplemental jurisdiction under 28 U.S.C. § 1367 because § 1367(c)(2) expressly allows district courts to decline to exercise such jurisdiction if the State-law claim "substantially predominates" over the Federal claim. *De Asencio v. Tyson Foods Inc.*, 342 F3d 301 (3d Cir. 2003), among other cases, held that State-law wage and hour claims are so much more valuable than FLSA claims—because State-law claims are subject to Rule 23 opt-out requirements in which most potential class members do not opt out, whereas relatively few FLSA class members opt in—and that the exercise of supplemental jurisdiction is therefore inappropriate. Another ground for refusing to exercise supplemental jurisdiction is that the State-law claim raises novel or complex issues. 28 U.S.C. § 1367(c)(1). There is also a catch-all for "other compelling reasons," which some courts have held satisfied because of the potential for confusion in sending out a notice requiring class members to take action to opt out if they want to be excluded from the State-law class, while taking action to opt in if they want to be included in the FLSA collective action. The result is that plaintiffs' causes of action are split, or that FLSA rights are ignored.

A completely unintended effect of the big-business juggernaut that produced the so-called "Class Action Fairness Act"—a measure supported by a national coalition of business organizations spending hundreds of millions of dollars to "protect" class members, and opposed by virtually every national consumer, civil rights, and public-interest organization, and by the AFL-CIO and several individual unions—is that it provides an alternative basis for Federal-court jurisdiction. If the standards of the Act are met, the Federal court will have jurisdiction over the State-law claims without the discretionary grounds for declining jurisdiction in § 1367(c).

CAFA is a complex statute signed into law on February 18, 2005. For details, see ELIZABETH J. CABRASER AND RICHARD T. SEYMOUR, ANALYSIS, IMPLICATIONS, AND TEXT OF THE CLASS ACTION FAIRNESS ACT 2005, SPECIAL ALERT TO CALIFORNIA CLASS ACTIONS PRACTICE AND PROCEDURE, CALIFORNIA FORMS OF PLEADING AND PRACTICE (LexisNexis, 2005). CAFA applies to actions "commenced" after the date of enactment. *Pritchett v. Office Depot*, 360 F.Supp.2d 1176, 1181 (D. Colo. 2005), *aff'd*, 404 F.3d 1232, 1238 (10th Cir. 2005)—a Colorado-law wage and hour action removed two weeks before trial—held that the term "commenced" in the statute refers to the original commencement of the action, whether in State or Federal court. Office Depot had argued that its removal petition "commenced" the action in Federal court and satisfied the effective-date provision of CAFA. The district and appellate courts rejected the argument. The case was remanded to State court.

The barebones requirement of CAFA is that more than $5 million in the aggregate is at stake, and that there is diversity between any defendant and any plaintiff or class member. There are exceptions for single-state classes in which a primary defendant is in-state.

II. State-by-State Survey

This survey covers reported State-court decisions involving wage & hour issues in class actions, whether the claims were brought under State statutes or common law, principally from late December 2003 to the present. Only decisions available on WestLaw were included; generally, these are appellate decisions.

A. Alaska

Fred Meyer of Alaska, Inc. v. Bailey, 100 P.3d 881, 882–83 (Alaska 2004), summarized the entire case:

> This appeal arises out of Fred Meyer's classification of manager Ron Bailey as an exempt employee and therefore ineligible for overtime pay under the Alaska Wage and Hour Act (AWHA). Bailey opted out of a class action for overtime pay because of a threat by his store manager. Within two years of being told by a different manager that participation in a court action would not jeopardize his job, Bailey filed a lawsuit claiming overtime compensation. Fred Meyer appeals the superior court's finding that Bailey was not exempt, as well as the superior court's allowance of claims not within the statute of limitations. It also challenges the superior court's admission of an expert report and its finding that Fred Meyer did not show by clear and convincing evidence that it acted in good faith. Bailey appeals the superior court's failure to award prejudgment interest. Because the superior court did not err when it found that Bailey was not exempt, we affirm that ruling. We also conclude that the superior court did not err in its determination that Fred Meyer failed to show by clear and convincing evidence that it acted in good faith. Because Bailey claims that he was not notified of the entry of judgment, we remand so that he may be provided an opportunity to submit his calculation of prejudgment interest and his cost bill.

B. Arkansas

Crenshaw v. Eudora School District, 362 Ark. 288, 208 S.W.3d 206 (Ark. 2005), in response to a question certified to it by the U.S. District Court for the Eastern District of Arkansas in an FLSA case, held that Arkansas school districts are political subdivisions of states and are not entitled to Eleventh Amendment immunity.

C. California

Recent California class-action decisions in wage & hour and wage payment cases have done nothing to dampen the sense of many plaintiffs' lawyers in other parts of the country that, if we are very, very good and die and go to heaven, we will wake up practicing in California.

1. Attorneys' Fees

Sampson v. Parking Service 2000 Com, Inc., 117 Cal.App.4th 212, 11 Cal.Rptr.3d 595 (Calif. App. 2004), *review denied*, affirmed the lower court's fee award to the claimant for work done in court defending the Labor Commissioner's award to him, and affirmed the denial of fees for work done in the administrative process. The court held that the fee award was made pursuant to the provision of the Labor Code allowing fees against parties unsuccessfully challenging the Labor Commissioner's award, and had as its paramount purpose the discouragement of unmeritorious appeals. "We cannot rewrite the Labor Code to give Sampson the benefits of the administrative remedy, that is the prompt payment of wages, and the benefits of recovering all his attorney fees to prosecute his claim under the judicial remedy. We therefore conclude that if an employee pursues an administrative remedy under section 98 to recover overtime compensation, the sole right to recover attorney fees is governed by section 98.2, subdivision (c), and not section 1194." *Id.* at 228.

2. Class Action Waiver

Murphy v. Check 'N Go of California, Inc., 156 Cal.App.4th 138, 67 Cal.Rptr.3d 120, 13 Wage & Hour Cas.2d (BNA) 1597 (Calif. App. 1st Dist. 2007), held that the arbitration agreement's allocation of jurisdiction to the arbitrator to decide questions of unconscionability, and the agreement's class-action waiver, were procedurally and substantively unconscionable. The court held that the unconscionable provisions could not be severed from the arbitration agreement because there were two such provisions. "Here, as we have explained, at least two aspects of the arbitration agreement are unconscionable: (1) the provision for arbitrator determinations of unconscionability issues; and (2) the class action waiver. "[G]iven the multiple unlawful provisions, the trial court did not abuse its discretion in concluding that the arbitration agreement is permeated by an unlawful purpose" (*Armendariz, supra*, 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669), and that the agreement as a whole should not be enforced." 156 Cal.App.4th at 149, 67 Cal.Rptr.3d at 128-29.

3. Class Contact Lists

Crab Addison, Inc. v. Superior Court, 169 Cal.App.4th 958, 87 Cal.Rptr.3d 400 (Cal. App. 2d Dist. Dec. 30, 2008) (No. B208142), affirmed an order requiring defendant to disclose contact information for putative class members.

Belaire-West Landscape, Inc. v. Superior Court, 149 Cal.App.4th 554, 57 Cal.Rptr.3d 197 Calif. App. 2d Dist. 2007), *review denied* (July 25, 2007), denied the writ for review of an order requiring defendant to provide a class contact list. The court summarized its ruling:

> Real parties in interest Sebastian Rodriguez and Jose Luis Mosqueda filed a putative class action lawsuit against their former employer, Belaire-West Landscaping, Inc., alleging wage and hour violations. During precertification discovery, the trial court granted a motion to compel Belaire-West to provide the names and contact information of all current and former Belaire-West employees and adopted a proposed notice to those individuals that would have required them to object in writing in order to prevent information about them from being disclosed to the real parties in interest. . . . [W]e conclude that the opt-out notice adequately protects the privacy rights of the current and former employees involved.

149 Cal.App.4th at 556, 57 Cal.Rptr.3d at 198 (citation omitted). The court explained further: "While our conclusion that there is no serious invasion of privacy from the disclosure with an opt-out notice obviates any need to engage in further analysis, we nonetheless observe that the balance of interests also supports the trial court's order. The current and former employees are potential percipient witnesses to Belaire-West's employment and wage practices, and as such their identities and locations are properly discoverable." 149 Cal.App.4th at 562, 57 Cal.Rptr.3d at 203.

Puerto v. Superior Court, 158 Cal.App.4th 1242, 70 Cal.Rptr.3d 701 (Calif. App. 2d Dist. 2008), held that plaintiffs were entitled to the addresses and telephone numbers of all potential witnesses, including employees. The court rejected defendant's argument that the privacy interests of the employees required that they be notified and allowed to give or withhild

consent to the disclosure.

4. Class Certification: Predominance of Common Issues

Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal.4th 554, 576, 169 P.3d 889, 983, 67 Cal.Rptr.3d 468, 485 (Calif. 2007), involved the question whether defendant had properly reimbursed plaintiffs for use of their personal vehicles to perform their work by increasing their commission rates. The court held that "the validity of this claim will turn on the resolution of these questions: (1) Did Harte-Hanks adopt a practice or policy of reimbursing outside sales representatives for automobile expenses by paying them higher commission rates and base salaries than it paid to inside sales representatives? (2) If so, did it establish a method to apportion the enhanced compensation payments between compensation for labor performed and expense reimbursement? (3) If so, was the amount paid for expense reimbursement sufficient to fully reimburse the employees for the automobile expenses they reasonably and necessarily incurred?" The court went on to state: "Neither the trial court nor the Court of Appeal framed the class certification issue in that way, and so neither court considered whether these inquiries are capable of resolution on a class-wide basis. Accordingly, the class certification issue is to be reconsidered upon remand."

Bufil v. Dollar Financial Group, Inc., 162 Cal.App.4th 1193, 76 Cal.Rptr.3d 804 (Calif. App. 1st Dist. 2008), *review denied* (July 30, 2008), reversed the lower court's denial of class certification. The court held that plaintiff was not collaterally stopped from pursuing class certification because of the prior denial of certification of a larger class of which she was a subset. The court held that the present case involved "a distinct subclass restricted to hourly employees who tracked Dollar's recordkeeping system from September 2003 to the present with the designation of not having taken a meal period because the employee was the only employee in the store or was supervising a trainee who could not be left alone." 162 Cal.App.4th at 1203, 76 Cal.Rptr.3d at 811. The court held that the class claim had been structured by plaintiff to present a single question of law: was defendant entitled to deny overtime to employees in plaintiff's position, or not, and that the class could be identified from the computer records maintained by defendant. As such, it cured the problems that led to the earlier denial of certification for the larger class.

Aguiar v. Cintas Corp. No. 2, 144 Cal.App.4th 121, 50 Cal.Rptr.3d 135, 12 Wage & Hour Cas.2d (BNA) 18 (Cal. App. 2d Dist. 2006), *review denied* (Jan. 24, 2007), reversed the denial of class certification for a class of employees of defendants, who were contractors of the Los Angeles Department of Water and Power ("DWP"), claiming a violation of the Los Angeles Living Wage Ordinance ("LWO"). That ordinance stated that it applied to employees of contractors who worked on city contracts for at least twenty hours a month, and there was a legal question as to its validity. The court held that a broad class could be certified despite the potential conflict between those who did and did not meet the requirement, by creating subclasses:

> Although the question of the validity of the 20-hour rule creates a distinction between putative class members, it is not, as Cintas claims, a distinction that renders class treatment inappropriate. Cintas is correct that, because the 20-hour rule may be enforceable, employees who worked at least 20 hours per month on DWP contracts might

> have interests antagonistic to those who did not. But that potential conflict cannot defeat class treatment because the putative class can be divided into two subclasses: one subclass consisting of Cintas employees at its Whittier, Pico Rivera and Ontario facilities who worked at least 20 hours per month on the DWP contracts in existence between May 1, 2000 and January 28, 2004 and a second subclass consisting of Cintas employees at its Whittier, Pico Rivera and Ontario facilities who worked on the DWP contracts in existence between May 1, 2000 and January 28, 2004 but for less than 20 hours per month. This use of subclasses is an appropriate device to facilitate class treatment. . . .
>
> To the extent questions arise later in the litigation about how to determine which putative class members worked at least 20 hours per month on the DWP contracts, or whether their schedules varied from month to month, that burden falls on Cintas. It was Cintas's business decision to commingle DWP items with those of other customers and to allow all employees to work on the items at each substation (for example, sorting, hanging, folding) as they were processed through the plant.

Id. at 134 (citations omitted). The court then held that the class was ascertainable because defendants' failure to keep proper records justified a presumption of class membership, and placed on them the burdens and risks of any difficulty in ascertaining class members:

> The members of plaintiffs' proposed class are ascertainable from Cintas's payroll records, which identify each employee by name, job code, dates of employment and rate of pay. Those payroll records will identify all employees who performed functions relevant to the DWP contracts during the time period DWP items were processed at each of the Whittier, Pico Rivera and Ontario facilities. Because, according to Cintas's own evidence, DWP items were not segregated but rather processed through the plants along with goods from Cintas's other customers and Cintas did not assign specific employees to work on DWP items, it is reasonable to infer at this stage of the litigation that all employees in relevant positions worked to some extent on the DWP contracts. Cintas cannot defeat class treatment because it failed to keep track of the employees who worked on the DWP contracts, as it certified it would do, and commingled DWP items with those of other customers. If it is determined later in the litigation that certain employees did not work on DWP contracts, those employees can be eliminated from the class at that time.

Id. at 136 (citations omitted).

Sav-on Drug Stores, Inc. v. Superior Court 34 Cal.4th 319, 17 Cal.Rptr.3d 906, 96 P.3d 194, 9 WH Cases 2d 1692 (Calif. 2004), reversed the intermediate court and held that common issues predominated in a classification case involving drug store operating managers and assistant managers. "As the focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case . . . in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. . . . 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.'" *Id.* at 327 (citations omitted). The court gave great deference to the trial court's evaluation of the factual showings, and stated at 329–30:

> The record contains substantial, if disputed, evidence that deliberate misclassification was

> defendant's policy and practice. The record also contains substantial evidence that, owing in part to operational standardization and perhaps contrary to what defendant expected, classification based on job descriptions alone resulted in widespread de facto misclassification.[4] Either theory is amenable to class treatment. Unquestionably, as the Court of Appeal observed, defendant is entitled to defend against plaintiffs' complaint by attempting to demonstrate wide variations in the types of stores and, consequently, in the types of activities and amounts of time per workweek the OM's and AM's in those stores spent on different types of activities. Nevertheless, a reasonable court crediting plaintiffs' evidence could conclude it raises substantial issues as to both whether a misclassification policy existed and whether, in any event, a uniform classification policy was put into practice under the standardized conditions alleged. A reasonable court, even allowing for individualized damage determinations, could conclude that, to the extent plaintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception, a class action would be the most efficient means of resolving class members' overtime claims.
>
> [4] As earlier noted, defendant's interrogatory responses indicate that during the class period it reclassified all AM's from exempt to nonexempt with "no change in the job description or job duties." The court could rationally have regarded the reclassification as common evidence respecting both defendant's classification policies and the AM's actual status during the relevant period.

The court upheld the trial court's determination that the factual dispute did not so much concern disagreement over which tasks were performed, but whether such tasks were managerial. The dispute was therefore amenable to class treatment. *Id.* at 330–31. The court held that the eventual need for individual determinations of damages did not defeat class treatment:

> Defendant does not dispute that class certification may be appropriate in an overtime exemption case, only whether it is appropriate in this case. Defendant suggests this class action is likely to "degenerate into a multitude of mini-trials," but, as noted, the evidence to the contrary is substantial. As alleged, each class member's claim to unpaid overtime depends on whether he or she worked for defendant during the relevant period in a position that was misclassified either deliberately (on a class basis) or circumstantially (again, as a consequence of defendant's class-wide policies and practices). That calculation of individual damages may at some point be required does not foreclose the possibility of taking common evidence on the misclassification questions. . . . In any event, "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages."

Id. at 332–33 (citations omitted). Later in the opinion, the court stated: "Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' . . . Individual issues do not render class certification inappropriate so long as such issues may effectively be managed." *Id.* at 334 (citations omitted). The court stated that the lower courts must find "'procedurally innovative'" ways to manage individual questions, and cited numerous examples including bifurcation, use of subclasses, administrative processing, use of questionnaires, hearings devoted to single issues, use of special masters to conduct individual hearings; and possible use of a

formula. *Id.* at 339 & nn. 11, 12. The court stated:

> Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. "It would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues."

Id. at 340 (citations omitted).

5. <u>Collateral Estoppel as to Certification</u>

Ghazaryan v. Diva Limousine, Ltd., __ Cal.Rptr.3d __, 2008 WL 5279762 (Calif. App. 2d Dist. Dec. 22, 2008) (No. B201509), reversed the denial of class certification as to a proposed class of limousine drivers, where defendant's computer records were sufficient to ascertain the class and even to determine which class members had to take their meal breaks while "on call." The court held that the plaintiffs and class members were not bound by a prior class settlement if their claims were limited to those accruing since the release date.

Larner v. Los Angeles Doctors Hosp. Associates, LP, 168 Cal.App.4th 1291, 86 Cal.Rptr.3d 324 (Calif. App. 2d Dist. Dec. 8, 2008) (No. B202085), *review filed* (Jan. 20, 2009), affirmed the dismissal of plaintiff's class claims on the ground that all of her personal wage claims had been mooted by her individual settlement after the lower court had denied class certification.

Alvarez v. May Department Stores Co., 143 Cal.App.4th 1223, 1232–38, 49 Cal.Rptr.3d 892 (Calif. App. 2d Dist. 2006), *review denied* (Feb. 7, 2007), affirmed defendant's demurrer to the class action Complaint. An earlier lawsuit by other plaintiffs raised the same class wage and hour claims against the same defendant. The court in that case denied class certification based on a lack of community of interest, and the denial was affirmed on appeal. Different plaintiffs filed the *Alvarez* case. The court held that the rules of collaterally estoppel apply to such situations. It explained:

> In analyzing the facts, we conclude the *Duran* plaintiffs were the "virtual representatives" of appellants. The only difference we can discern between the parties is the name of the representative plaintiff. The interested parties, their claims, and their counsel are the same. We also examine whether the first party had the same interest as the precluded party and the motive to present the same claim. . . . The *Duran* plaintiffs had a strong motive to assert the same interest as appellants, as each group's goal was identical—each wanted its class certified. As noted, the *Duran* plaintiffs had a full opportunity to present their case. The circumstances are such that appellants should reasonably have expected to be bound by the *Duran* decision. As appellants would have enjoyed the fruits of a favorable outcome, fairness dictates that they should be bound by the effect of the decision against them. Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of their personal claims.

Id. at 1238 (citation omitted). The court held that notice of the denial of certification was not required before absent class members could be bound. *Id.* at 1238–39.

6. Consideration of Class Certification at Pleading Stage

Prince v. CLS Transportation, Inc., 118 Cal.App.4th 1320, 13 Cal.Rptr.3d 725, 9 WH Cases 2d 1480 (Calif. App. 2d Dist. 2004), *review denied*, reversed the denial of class certification at the pleading stage. "The gist of the action, according to Prince, 'is that CLS paid its drivers only for the time they were on driving assignments rather than for the full duration of their shifts. CLS did not pay its drivers for the time they spent waiting between driving assignments, after a drop off and before the next pickup. CLS also required its drivers to arrive at least thirty minutes before a scheduled pickup, but did not consider that time as hours worked. CLS also improperly calculated the wage rates of its drivers under the 'total remuneration' rule for purposes of determining overtime wages [, and] also withheld gratuities intended for its drivers. In doing these things, CLS also failed to [accurately] record hours worked . . . as required by California law.'" *Id.* at 1323 (footnote omitted). The court held that "it is only in mass tort actions (or other actions equally unsuited to class action treatment) that class suitability can and should be determined at the pleading stage. In other cases, particularly those involving wage and hour claims, class suitability should not be determined by demurrer." *Id.* at 1325. The court then turned to issues likely to arise on remand. It stated: "Based on the allegations of Prince's complaint, the trial court's finding that individual issues predominate is simply wrong. Prince alleges institutional practices by CLS that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis. At this stage, no more is required." *Id.* at 1329. The court also held that the availability of relief in the administrative process is irrelevant to the superiority determination, *Id.* at 1329.

7. Consideration of Merits at Class Certification Stage

Conley v. Pacific Gas & Electric Co., 131 Cal.App.4th 260, 31 Cal.Rptr.3d 719 (Calif. App. 1st Dist. 2005), affirmed the denial of plaintiffs' motion for class certification because their California-law "salary basis" class had no viable claim. The class claim was that defendant did not meet the "salary basis" requirement for exemption because it charged its exempt employees' vacation leave banks for partial-day absences from work. renders all of those employees non-exempt as a matter of California law. The court stated at 263:

> Class certification normally should not be denied on the basis of a perceived lack of merit in the claims asserted on behalf of the proposed class. In this case, however, appellants have invited us to address the merits of their claim. Moreover, in the present posture of this case, the exemption issue presents a pure question of law, which is one of first impression under California law. We therefore deem it appropriate to resolve it on this appeal. Accordingly, in the published portion of this opinion, we conclude that nothing in California law precludes an employer from following the established federal policy permitting employers to deduct from exempt employees' vacation leave, when available, on account of partial-day absences from work. We therefore affirm the order denying certification of the salary basis subclass.

8. Decertification

Walsh v. IKON Office Solutions, Inc., 56 Cal.Rptr.3d 534, (Cal. App. 1st Dist. March 1, 2007) (No. A113172), *as modified* (March 28, 2007), affirmed the decertification of the Account Manager subclass based on lack of commonality, where defendant showed that the duties of Account Managers varied so widely that the affirmative defense that they were exempt as Outside Salespersons would best be litigated on an individual basis. The Account Manager subclass was one of five that had been certified.

9. Determination of Relief to Class Members

Bell v. Farmers Insurance Exchange, 115 Cal.App.4th 715, 9 Cal.Rptr.3d 544, 9 WH Cases 2d 726 (Calif. App. 1st Dist. 2004), *review denied*, affirmed in large part and reversed in small part the judgment for the plaintiff class of California insurance adjusters. The case is a textbook example of the successful organization of a large mass of data through random samples based on depositions of class members, and extrapolation to the class as a whole. The court began by denying reconsideration of the liability finding, holding that subsequent cases were not inconsistent with that determination and that new opinion letters from the U.S. Department of Labor do not justify departures from the "law of the case" doctrine. *Id.* at 727–39. The court also rejected defendant's challenge to the class certification. *Id.* at 739–41. It stated: "By preventing 'a failure of justice in our judicial system' . . . the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions." *Id.* at 741 (citations omitted). In a practice tip, the court refused to consider defendant's challenged to the lower court's findings on commonality because defendant failed to provide specific citations to the record. *Id.* at 742. The court held that the need for individualized determinations of relief did not bar class treatment. *Id.* The court affirmed the denial of defendant's second motion to decertify the class, based on the fact that 9% of a random sample of class members deposed did not work overtime. It explained at 742–43:

> The presence of this marginal element of nonclaimants did not make the class less ascertainable or significantly reduce the required community of interest. Class members were identifiable by their employment in pertinent job categories. The small number of nonclaimants did not deprive plaintiffs of their representative status. The record contains nothing to suggest that nonclaimants constituted an employee segment with distinct interests conflicting with other class members. Finally, it did not affect the common issues of law and fact. The case called for individual adjudications only of the damages resulting from unpaid overtime. The question of an employee's "eligibility for recovery" did not present a distinct issue of liability, as FIE argues, but rather depended on the same factual showing—unpaid overtime hours worked—as the question of the amount of the employee's damages.

(Citation omitted.) The court rejected defendant's argument that individual proof of damages was required, noting that such proof may be required for relief but stating that "if proof of individual damages were required by all potentially affected parties as a condition for class certification, it would go far toward barring all class actions." *Id.* at 744. The court rejected defendant's argument that the average size of the claim, $37,394, precludes class certification. It observed that the conservation of judicial resources is a goal served by class treatment that is independent of the value of the claim. *Id.* at 744–45. The court explained:

> Moreover, class actions may be needed to assure the effective enforcement of statutory policies even though some claims are large enough to provide an incentive for individual action. While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of "random and fragmentary enforcement" of the employer's legal obligation to pay overtime. . . .
>
> FIE maintains that where claims are as large as $37,000, the right to recover attorney fees, costs, and interest provides "ample incentive" for an individual lawsuit. But the size of the average claim in part reflects the accrual of unpaid overtime over the five-year duration of this lawsuit prior to trial. When the complaint was first filed in October 1996, the average claim would have been smaller and a large portion of the claims may not have been reasonably adequate to fund the expense of individual litigation. The length of this litigation in fact underscores the practical difficulties vindicating claims to unpaid overtime. Employees will seldom have detailed personal records of hours worked. Their case ordinarily rests on the credibility of vague recollections and requires them to litigate complex overtime formulas and exemption standards. For current employees, a lawsuit means challenging an employer in a context that may be perceived as jeopardizing job security and prospects for promotion. If the employee files after termination of employment, the costs of litigation may still involve travel expenses and time off from work to pursue the case, and the value of any ultimate recovery may be reduced by legal expenses.

Id. at 745 (citation omitted). The court also rejected defendant's argument that a class action was not superior to administrative enforcement. *Id.* at 745–46. The court then turned to the trial management plan and found it appropriate. It discussed the long-accepted use of approximations in Federal courts and their awards of back pay to non-testifying employees based on the use of representative samples, and continued:

> The present case differs from these precedents only in the size of the employee group and the use of a scientific methodology to infer aggregate classwide damages. If hours worked by nontestifying employees may be inferred from the testimony of other employees within a small employee group, we see no reason why it should not be allowed for a larger employee group. And if rough approximations and statistical estimates pass scrutiny for smaller groups, a scientific methodology based on a random sampling should also qualify as a "just and reasonable inference" of uncompensated hours worked in the case at bar.
>
> FIE vigorously argues that the use of statistical inference improperly "relieved class members of their initial burden of showing they worked overtime," a burden recognized both by the *Mt. Clemens* decision and by California law applying to the recovery of damages in individual wage claims. . . . FIE notes, and we agree, that substantive rules of law may not be altered in the interests of efficient litigation. . . . However, statistical sampling does not dispense with proof of damages but rather offers a different method of proof, substituting inference from membership in a class for an individual employee's testimony of hours worked for inadequate compensation. It calls for a particular form of expert testimony to carry the initial burden of proof, not a change in substantive law. We note that the use of statistical sampling in the present case is

analogous to FLSA precedents that allow back pay to nontestifying claimants. By basing relief on evidence of a pattern or practice, these decisions have also relieved some employees of the procedural necessity of making individual proof.

FIE appears to complain that the determination of aggregate damages on the basis of statistical inference entails the possibility of awarding back wages to particular employees who are not entitled to them. But this possibility also exists in FLSA cases . . . and is not a unique problem of statistical sampling; it is inherent in many class action decisions. FIE's argument for individualized proof of damages, if accepted, would challenge all class action judgments adopting reasonably expeditious means of distributing the recovery among class members. . . . We decline to adopt this point of view, preferring the more pragmatic approach characterizing federal decisions. . . .

Nevertheless, from the perspective of the administration of justice, we see an important negative consequence of the use of statistical sampling to calculate damages: it necessarily yields an average figure that will overestimate or underestimate the right to relief of individual employees. As Professor Robert Bone writes, "sampling can yield an extremely accurate average damage figure and thus an accurate total damage figure for the whole aggregation when the sample average is multiplied by the total number of plaintiffs. [ ] . . . [H]owever, sampling imperfectly distributes this total relative to the expected outcome of an individual trial, giving some plaintiffs more and some less than their individual entitlements." As we will see, the plan of distribution in this case is designed to ameliorate this problem, but it still offers an imperfect method of distributing damages in comparison to individual adjudication.

Weighing against this disadvantage is the consideration that statistical inference offers a means of vindicating the policy underlying the Industrial Welfare Commission's wage orders without clogging the courts or deterring small claimants with the cost of litigation. In a particular case, the alternative to the award of classwide aggregate damages may be the sort of random and fragmentary enforcement of the overtime laws that will fail to effectively assure compliance on a classwide basis. In *Mt. Clemens*, the court held that "the remedial nature of this statute and the great public policy which it embodies" justified a reduced standard of proof of damages. (*Mt. Clemens*, *supra*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515.) The same consideration militates in favor of a reasonably expeditious means of calculating and distributing classwide aggregate damages if individual adjudication of the entitlements of all class members, or a substantial portion of the members, would impose impossible burdens on the courts and litigants.

In our view, it was within the discretion of the trial court to weigh the disadvantage of statistical inference—the calculation of average damages imperfectly tailored to the facts of particular employees—with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts. As stated in *In re Chevron U.S.A., Inc.* (5th Cir. 1997) 109 F.3d 1016, 1018, "[o]ur review of a trial court's plan for proceeding in a complex case is a deferential one that recognizes the fact that the trial judge is in a much better position than an appellate court to formulate an appropriate methodology for a trial."

Id. at 749–51 (footnotes and citations omitted). The court rejected defendant's due process

challenge to the procedure, stating: "In this case, the interest of FIE that was affected by the use of statistical sampling is its total or aggregate liability to the plaintiff class for unpaid overtime compensation. FIE may object to statistical sampling on due process grounds only to the extent that the procedure affected its overall liability for damages." *Id.* at 752 (citations omitted). It continued:

> FIE's aggregate liability was *not* affected by the method of determining individual entitlements to members of the plaintiff class. This issue pertains only to the exercise of the trial court's discretion in ordering a trial management plan. Similarly, the presence of nonclaimants in the class, which may be relevant to the trial court's discretion in certifying the class, has no relevance to FIE's due process claim so long as the inclusion of these class members did not increase the total amount of damages. The record shows that the damage award was in fact calculated on the basis of an average weekly overtime figure that factored in the presence of nonclaimants.

Id. The court held that "the interest of the plaintiffs in using statistical inference as a basis for an aggregate classwide recovery 'is enormous, since adversarial resolution of each class member's claim would pose insurmountable practical hurdles.' . . . Relatively few class members have a realistic capability of assuming the costs and personal risks involved in judicial and administrative remedies." *Id.* (citation omitted). The court held that defendant's right to due process was not affected by the use of statistical extrapolation to arrive at the $88,798,871.12 award for time-and-a-half overtime compensation, and explained:

> FIE argues that the statistical methods used to determine its aggregate liability for time-and-a-half compensation involved a risk of erroneous deprivation of property because "[t]he extrapolation process produced a range of overtime compensation figures between $80 million and $100 million—an arbitrary swing of $20 million." More accurately, the record discloses that the statistical methodology employed by the plaintiffs' expert, Richard Drogin, with the apparent concurrence of FIE's expert, Roy Weinstein, not only estimated the average weekly unpaid overtime of the class on the basis of random sampling of 295 employees, but provided a measure of the possible inaccuracy of the estimate. This measure of possible inaccuracy consisted of a "confidence interval," based on a 95 percent degree of confidence. The term "interval" can be expressed in more familiar language in terms of a margin of error, which is one-half of the interval. Drogin calculated that, with a 95 percent degree of confidence, the average weekly hours of unpaid overtime of the sample of 295 employees, i.e., 9.4 hours, reflected "the true average overtime hours" of the entire class of 2402 employees, subject to a margin of error of 0.9 hours.[26]
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> [26] Kaye and Freedman, *Reference Guide on Statistics* in Federal Judicial Center, Reference Manual on Scientific Evidence (2d ed.2000) pages 83, 119, footnote 118.
>
> We note, first, that, by a process of rounding upward to the nearest 10, FIE overstates the possibility of error. The margin of error of 0.9 weekly hours in fact yields a range of $17 million, or $8.5 million above or below the estimated aggregate classwide damages. Secondly, FIE's argument that repetition of the sampling would result in an "arbitrary swing" between the limits of the margin of error implicitly assumes that there would be an even distribution of outcomes within this range. But there is no basis for such an assumption, or, for that matter, for the contrary assumption that repetition would

result in a clustering of outcomes close to the value of the initial sample. The confidence interval provides a quantitative measure *only* of the limits of the possible inaccuracy of the estimated average value. It does not convey any information regarding the probable distribution of outcomes within the margin of error, and the record contains no testimony on this point. [28]

[28] Finkelstein and Levin, Statistics for Lawyers (2d ed.2001) pages 169-171.

A due process critique of the accuracy of statistical inference implicitly assumes that it is a less reliable method of reaching a correct verdict than individual adjudication. But the proof of damages in an individual claimant's trial may also involve estimates, inferences and other sources of error. The proof of damages by statistical inference chiefly differs in that it openly acknowledges the possibility of error and offers a quantitative measure of possible inaccuracy. In other words, it is overtly probabilistic.

By attacking the statistical proof of damages as "arbitrary" and "speculative," FIE takes a position at odds with the growing acceptance of scientific statistical methodology in judicial decisions and scholarship. Forty years ago, the courts indeed displayed some reluctance to admit survey data,[31] but today "[s]tatistical assessments are prominent in many kinds of cases, ranging from antitrust to voting rights." [32] Citing varied uses of statistics, the court in . . . observes, "The applicability of inferential statistics have long been recognized by the courts." Underlying the contemporary reliance on the methodology of inferential statistics is a recognition that "[e]xperts have developed appropriate modeling techniques for reaching statistically significant and reliable conclusions." . . . We find little basis in the decisional law for a skepticism regarding the appropriateness of the scientific methodology of inferential statistics as a technique for determining damages in an appropriate case.

[31] Diamond, *Reference Guide on Survey Research* in Federal Judicial Center, Reference Manual on Scientific Evidence, *supra*, page 233.

[32] Kaye and Freedman, *Reference Guide on Statistics* in Federal Judicial Center, Reference Manual on Scientific Evidence, *supra*, page 85.

Id. at 753–55 (citations omitted; emphasis in original). However, the court held that the award of $1,210,337 as compensation for unpaid double-time hours presented an issue of constitutional dimension because the statistical extrapolation was subject to a margin of error of 32%. "Moreover, the distribution of employees claiming unpaid double time was highly skewed. Some 83 employees claimed some amount of unpaid double-time compensation, but only 54 employees claimed 0.37 hours or more, and a group of only 16 employees accounted for half of the double-time award." *Id.* at 756. The court continued:

We do not mean to suggest that the margin of error alone may afford a bright-line constitutional distinction. The reliability of an estimate subject to a large margin of error might conceivably be bolstered by evidence of a high response rate, probable distribution within the margin of error, absence of measurement error, or other matters. We have been unable to find in the present record, however, anything that addresses the issues of reliability involved in the calculation of double-time damages. The estimate of unpaid double-time pay appears as a kind of afterthought in the trial management plan. The

> parties' experts did not offer foundational calculations for the determination of double-time or propose an appropriate class size, margin of error, or sampling methodology.

Id. The failure to consider possibly superior alternatives was fatal to the award. *Id.* at 757. The court rejected defendant's claim that it was not allowed to contest the amounts of damages, finding that it had an adequate opportunity to do so, but had failed. Again, the court noted defendant's failure to back up its arguments with citations to the record. *Id.* at 757–58. The court noted:

> We find only one pretrial ruling that significantly restricted FIE's right to contest plaintiffs' proof of damages: the order precluding its expert witness, Roy Weinstein, from testifying on probable measurement error in the deposition testimony of sample members. By measurement error, he meant a tendency for deponents to overstate average hours worked. After an extensive argument and offer of proof, the trial court excluded the testimony on the ground, among others, that it involved an asserted psychological phenomenon outside the scope of Weinstein's expertise as an economist and statistician. FIE has *not* assigned error to this ruling on appeal.

Id. at 758 (emphasis in original). The court rejected defendant's challenge to the distribution procedure: "It is well established that 'the allocation of that aggregate sum [of the judgment] among class members is an internal class accounting question that does not directly concern the defendant. . . .' (2 Conte & Newberg, Newberg on Class Actions, *supra,* § 4:26, p. 233.) The trial court here followed the accepted practice of establishing a non-adversary proof-of-claim procedure." *Id.* at 759. The court held, however, that the claims administrator or that person's designee must be given discretionary authority to challenge claims for possible fraud. "If combined with a conspicuous notice informing employees that the claims administrator has authority to investigate claims for fraud and with a cap on allowable average overtime hours well below the unrealistic limit of 40 hours per week, a strictly limited power of challenge might significantly reduce the possibility of fraud without unduly burdening the claims administration process." *Id.* at 763.

10. Individual Liability

Reynolds v. Bement, 36 Cal.4th 1075, 116 P.3d 1162, 32 Cal.Rptr.3d 483 (Calif. 2005), held that the officers, directors, and other agents of a corporation are not individually liable for the corporation's failure to pay overtime required by California law. The court also rejected plaintiff's conspiracy allegations.

11. Malpractice

Janik v. Rudy, Exelrod & Zieff, 119 Cal.App. 4th 930, 934, 14 Cal. Rptr.3d 751 (Calif. App. 1st Dist. 2005), *review denied*, reversed the dismissal of plaintiff's class malpractice and breach of fiduciary duty claims and required that the claims be tried. The malpractice plaintiff was a class member in the enforcement class action, *Bell v. Farmers Insurance Exchange*, which involved the denial of overtime to insurance claims adjusters. The court summarized the case:

> Plaintiff seeks to impose liability on attorneys who produced a class action recovery of some $90 million, claiming they were negligent because they failed to obtain a still larger recovery. While we may share the attorneys' dismay that their efforts have

been rewarded with this lawsuit rather than with the kudos they no doubt expected, and perhaps deserve, we are nonetheless constrained to hold that plaintiff's claim cannot be rejected out of hand. While it may well be that the attorneys did not breach their duty of care in failing to proceed under an alternative theory that would have produced a greater recovery, we cannot say, as did the trial court, that there simply was no duty for the attorneys to breach.

Plaintiff Stanley Janik brought this purported class action for legal malpractice against defendants Steven Zieff and the law firm of Rudy, Exelrod & Zieff, LLP (collectively defendants or the attorneys), alleging that the attorneys mishandled a prior class action against Farmers Insurance Exchange (Farmers). While having secured recovery for a large class of claims representatives who were not paid overtime compensation on the ground that they were administrators to whom the applicable regulations under the Labor Code assertedly did not apply, the attorneys are faulted for not having sought recovery under the Unfair Competition Law, Business and Professions Code section 17200 (UCL). Under the UCL, the statute of limitations would have permitted recovery for overtime wages earned but unpaid during the four-year period preceding the filing of the complaint, rather than for only the three-year period available under the Labor Code. The trial court sustained defendants' demurrer without leave to amend on the ground that the attorneys had no duty to class members with respect to claims that were not specified in the order certifying a class. Although there is little precedent to guide us, we do not believe that the obligations of class counsel can be so narrowly circumscribed. While the scope of the duty of class counsel must be determined with reference to the certification order, we conclude that the attorneys' obligations may extend beyond the claims as certified to related claims arising out of the same facts that class members reasonably would expect to be asserted in conjunction with the certified claims. Accordingly, we must reverse the judgment and require the attorneys to establish that they did not breach the applicable standard of care before they may be exonerated.

Id. at 934. The malpractice plaintiff and other class members had been notified of the class certification and of the opportunity to opt out, but had not done so. The enforcement plaintiffs were granted summary adjudication as to all their claims in April 1999. That determination was affirmed on appeal. Subsequently, the California Supreme Court held that the Unfair Competition Law ("UCL") could be used to challenge violations of the Labor Code, and that back pay was an appropriate remedy. The malpractice class plaintiffs alleged that plaintiffs should have included in their Complaint, or amended their Complaint to include, a claim under the UCL allowing an additional year's liability. The enforcement class certification order did not include that claim. The court held that enforcement class counsel's duty to the class was not limited to the claims on which the lower court had granted certification, but extends to related claims. While class counsel are not required to bring all such claims, they are required to consider such claims and discuss them with the class representatives. The court explained:

The reasoning that precludes limiting an attorneys duty to the literal terms of the retention agreement applies as well in the context of a class action. In the former situation, the client reasonably expects the attorney at least to call attention to alternative or additional avenues of relief that might be pursued to obtain full redress for the circumstances giving rise to the retention. The attorney has the duty "to use such skill,

prudence and diligence as other members of the profession commonly possess and exercise" in identifying and bringing to the clients attention other courses of action that warrant consideration. . . . If prudence dictates that a claim beyond the scope of the retention agreement be pursued, the client can then consider whether to expand the retention or pursue the additional claim in some other manner. In the context of a class action, both the representative plaintiffs and the absent class members similarly are entitled to assume that their attorneys will consider and bring to the attention of at least the class representatives additional or greater claims that may exist arising out of the circumstances underlying the certified claims that class members will be unable to raise if not asserted in the pending action. The class members are entitled to assume that their attorneys are attempting to maximize their recovery for the conduct they are challenging and that they are not, without good reason, failing to assert those claims that will do so.

This is not to say that there may not be good reasons for failing to assert a particular claim or make a particular motion or argument, even if doing so would have the potential of increasing recovery. (*Davis v. Damrell* (1981) 119 Cal. App. 3d 883, 889, 174 Cal. Rptr. 257; see also 2 Newberg on Class Actions (4th ed. 2002) § 6.5, p. 503 ["One also must consider whether to join additional claims for different theories of liability leading to approximately the same relief. Often this joinder may be advantageous when the precise theory of liability that may be applicable is subject to uncertainty or when the class possesses several related claims. On the other hand, sometimes the more prolix the complaint, the more difficult it is to sustain the class action. A longer complaint may afford additional opportunities for challenge by the defendants concerning the impropriety of certifying a class action and may also give rise to feelings by the court of management difficulties. Thus, it would appear that a straightforward, more limited complaint would enjoy a greater likelihood of success for class certification than a prolix complaint."].) Defendants argue that there were good reasons for initially having failed to assert a cause of action under the UCL, and for not moving to amend the complaint when *Cortez, supra*, 23 Cal. 4th 163, 96 Cal. Rptr.2d 518, 999 P.2d 706 was decided—after they had already obtained a favorable ruling on the summary adjudication motion and were scheduled to try the issue of damages. Defendants may well be right, but these contentions do not relate to the existence of a duty on the part of the attorneys. They go to whether the attorneys breached or fulfilled their duty. . . .

Here, a cause of action under the UCL would have been based on precisely the same practice, and subject to much the same legal analysis, as the certified cause of action under the Labor Code. As explained in *Cortez*, supra, 23 Cal. 4th at page 178, 96 Cal. Rptr.2d 518, 999 P.2d 706, the UCL permits restitution of unpaid wages upon a showing that the employer's failure to pay the wages was an unfair business practice under Labor Code section 1194. "[A]ny business act or practice that violates the Labor Code through failure to pay wages is, by definition . . . an unfair business practice. It follows that an action to recover wages that might be barred if brought pursuant to Labor Code section 1194 still may be pursued as a UCL action seeking restitution pursuant to [Business and Professions Code] section 17203 if the failure to pay constitutes a business practice." (*Cortez, supra*, at pp. 178}–179, 96 Cal. Rptr.2d 518, 999 P.2d 706.) If not included as part of the *Bell* action, the claim for an additional year of recovery was lost. . . . Class counsel therefore were obliged to consider the advantages and disadvantages to

> the class of seeking to add a UCL cause of action to their complaint, to bring these considerations to the attention of the class representatives, and to take or recommend such action (including of course the possibility of doing nothing with respect to such an additional claim) as would an attorney using the "skill, prudence and diligence" commonly exercised by attorneys handling such litigation. . . . We do not in any way imply that defendants failed to do so here, but having undertaken to represent the class in prosecuting the claim to recover unpaid overtime compensation, they were duty bound to use reasonable care to fully protect the interests of the class in obtaining such recovery. Whether they did so is a question of fact that cannot be disposed of on this demurrer.

Id. at 941–43. The court rejected the malpractice defendants' argument that their adequacy had already been determined in the class certification decision, holding that the initial determination is not dispositive of how well class counsel performed their duties after the entry of the certification order. It similarly rejected their argument that their adequacy could only be challenged in the class action. *Id.* at 943–46. The court described the resulting duty of care:

> We disagree with defendants that recognizing the duty underlying plaintiff's complaint will "invite bedlam to ensue in the class action arena." Contrary to defendants' argument, we do not suggest that class counsel are "required to raise each and every claim that the facts of a case possibly support." . . . If a related claim is one that class members reasonably would expect to be asserted, class counsel must respond to the situation in a manner that meets the necessary standard of care. Depending on a great many variables, class counsel may discharge their responsibility by asserting the claim or by bringing the claim to the attention of class members or of the class representatives and deciding that there are good reasons not to assert the additional claim. If class counsel have any question concerning the course that is required by the duty they owe absent class members, the attorneys may seek guidance from the court. It is only if class counsel overlook or mishandle a claim in a manner that competent counsel would not do that they may incur liability to members of the class they have undertaken to represent. Nor do we agree that permitting the enforcement of such a duty will undermine the finality of class action judgments, discourage future class action settlements, or promote forum shopping. Defendants' concern that dissatisfied class plaintiffs will attempt to avoid the jurisdiction of the class action court by filing malpractice actions in a different forum is unwarranted. If the issue on which a malpractice complaint is based has been considered and determined in the class action proceedings, the rulings of the class action court will be binding on members of the class and preclude reconsideration of those matters in another forum. . . . If the issue was not and reasonably should not have been raised in the class action proceedings, however, there is no reason to preclude its assertion in a subsequent action.

Id. at 945–46 (citations omitted). The court rejected the malpractice defendants' argument that a class certification order cannot be amended after a decision on the merits. *Id.* at 946–48. "There may well have been good reasons for proceeding to trial on the existing pleadings rather than attempting to reopen the scope of the complaint, but this is a question that cannot be decided on the present demurrer. We are in no position to decide as a matter of law that class counsel fulfilled their duties to the class by forgoing its claim for an additional year of recovery." *Id.* at 948.

12. Preemption

Prachasaisoradej v. Ralphs Grocery Company, Inc., 18 Cal. Rptr.3d 514, 175 LRRM 2778, 69 Cal. Comp. Cases 1408 (Calif. App. 2d Dist. 2005), *review granted and opinion vacated*, 102 P.3d 903, 22 Cal.Rptr.3d 517 (Calif. 2004), reversed the dismissal of plaintiffs' Complaint and the award of attorneys' fees and costs to defendant. The court described the case at 517–18:

> Appellant is employed by Ralphs as a produce manager. Throughout his employment, he and other similarly situated employees were paid a bonus "that was calculated using a formula which includes deductions for any expenses and losses due to cash shortages, merchandise shortages and shrinkage, workers' compensation, tort claims by non-employees, and other losses beyond Plaintiffs [*sic*] control. . . ." According to appellant, "[t]hrough this method of compensation, Defendants wrongfully deduct expenses from the wages of their employees, including Plaintiffs, which expenses are required by law to be borne by the Defendant employers. In other words, the Plaintiffs carry the burden of losses from their respective stores."

The CBA mentioned bonus payments, but did not specify the formula. The lower court dismissed the action as preempted by the Labor Management Relations Act. The court held that this was error, because the case did not require interpretation of the CBA, and did not involve CBA-created rights. Moreover, the LMRA confers no immunity on employers where a provision of a CBA violates State labor law. In granting review, the California Supreme Court defined the issues to be reviewed:

> The issue to be briefed and argued is limited to the following: Does an employee bonus plan based on a profit figure that is reduced by a store's expenses, including the cost of workers compensation insurance and cash and inventory losses, violate (a) 1. Business and Professions Code section 17200, (b) Labor Code sections 221, 400 through 410, or 3751, or (c) California Code of Regulations, title 8, section 11070?

102 P.3d at 903.

13. Settlement Approval

Kullar v. Foot Locker Retail, Inc., 168 Cal.App.4th 116, 85 Cal.Rptr.3d 20 (Calif. App. 1st Dist. 2008), vacated the lower court's grant of final approval to a proposed settlement because the court held that it lacked sufficient information to determine the fairness of the settlement. The case involved defendant's alleged insistence that employees "'purchase shoes of distinctive design or color (either from Foot Locker or other retailers) as a term and condition of their employment,' without reimbursement," defendant's alleged withholding of "'wages in exchange for Foot Locker's products to be worn as a work uniform,'" the failure to pay wages during security searches, and meal and rest break claims. The court held that objectors were entitled to limited discovery on the merits and valuation of the claims, but could not drag out the case. It continued: "If the settling parties have provided a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated, and there is no reason to believe that significant information has been overlooked, very little in the way of additional discovery may be justified. However, where, as here, the settling parties provide essentially no information to explain, much less to substantiate, their evaluation of the magnitude

or potential merit of the claims being settled, objectors should not be denied access to data that reasonably may be expected to shed light on these issues." 168 Cal.App.4th at 132-33, 85 Cal.Rptr.3d at 34. The appellate court directed the lower court to re-evaluate the settlement's fairness, reasonableness, and adequacy in light of the information obtained.

14. Summary Judgment

Huntington Memorial Hosp. v. Superior Court, 131 Cal.App.4th 893, 32 Cal.Rptr.3d 373 (Calif. App. 2d Dist. 2005), denied defendant's petition for a writ of mandate and held that summary adjudication was not appropriate for the class overtime issues. California is a daily-overtime jurisdiction. "Under state law, the hospital must pay its nurses one and one-half times their regular rate of pay when they work in excess of eight hours in one day. It must pay double time for work that exceeds 12 hours in one day." *Id.* at 898. The court described the practice at issue: "In addition to overtime compensation, the hospital pays a 'short-shift differential' when a 12-hour nurse works fewer than 10 hours in one day. In that event, the nurse earns an extra sum, about $4.00, for each hour worked. If a nurse works 10 hours or more, the hospital does not pay the differential for any hours." *Id.* Plaintiffs claimed that the practice violates the overtime requirement "because nurses who work longer hours are paid a lower hourly wage." *Id.* The issue is whether the short-shift differential must be included in the "regular rate" on which overtime is calculated. Plaintiffs argued that the practice was a subterfuge to allow the defendant to pay lower hourly rates as the number of hours increases. The court described the practical effect of the differential:

> Further, if it is not included in the regular rate, the short-shift differential may produce odd results. For example, as indicated by the hospital's evidence, if 12-hour nurses earn $24.21 as a base rate and work 9.9 hours, they will be paid a total of $307.91 for the shift--eight hours of straight time ($193.68); 1.9 hours of overtime, at time and one-half ($74.23); and a short-shift differential for each hour worked ($40.00). But if the same nurses work an additional six minutes for a total of 10 hours, the short-shift differential will not be included, and the nurses will be paid $271.82--eight hours of straight time ($193.68) and two hours of overtime, at time and one-half ($78.14). Thus, by working an extra .1 hour, the nurses lose $36.09.

Id. at 906. The court stated that California looks to Federal law in determining the regular rate. "Thus, even though this case involves California law—the payment of overtime for work in excess of eight hours in one day—and federal law requires overtime pay only for work exceeding 40 hours in one workweek . . . federal authorities still provide useful guidance in applying state law." *Id.* at 903 (citations omitted). The court held that defendant "did not establish as a matter of law that the short-shift differential is not a subterfuge or artifice," and that summary adjudication was properly denied. *Id.* at 911.

15. Unfair Competition Law

Hodge v. Superior Court, 145 Cal.App.4th 278, 51 Cal.Rptr.3d 519 (Cal. App. 2d Dist. 2006), *review denied* (Feb. 21, 2007), held that plaintiffs could bring an equitable Unfair Competition Law class action to challenge violations of the Labor Code by failing to pay overtime, and that defendant was not entitled to a jury trial.

Blakemore v. The Superior Court of Los Angeles County, 129 Cal.App.4th 36, 27

Cal.Rptr.3d 877 (Calif. App. 2d Dist. 2005), *review denied*, reversed the striking of class allegations, and reversed the dismissal of plaintiffs' claims under the Unfair Competition Law for fraudulent concealment and breach of contract. "This is a class action lawsuit filed against Avon Products, Inc. by women who sell or sold beauty products for Avon as independent sales representatives. The sales representatives allege that Avon shipped them products they did not order and, when they returned and paid for the unordered products, Avon refused to credit their accounts and engaged in various other practices to dissuade them from returning unordered products. They allege causes of action for fraudulent concealment, breach of contract and unfair business practices, among others." *Id.* at 40. The court rejected defendant's argument that it should defer to the trial court's striking of the class allegations, because an order striking an allegation differs fundamentally from an order denying class certification. The former is a legal determination that no class can be maintained, does not depend on a factual record, and is reviewed de novo. The latter depends on evaluation of a factual record and deference is owed to the trial court. *Id.* at 53–54. The court rejected Avon's argument that plaintiff was not "typical" of class members because she sought a refund for unordered products she returned, while some class members would want credits. "Avon's argument draws a distinction without a difference. A class member who continues to sell for Avon would likely be satisfied by a credit to her account. One who no longer sells for Avon would require a refund." *Id.* at 54. The court strongly rejected the trial court's rationale for holding that no common issues were pleaded:

> The trial court apparently reasoned that the plaintiffs had "varied" reasons for paying for unordered products, and that those reasons were "inconsistent with the alleged return policy which allowed for instant credit." We fail to understand the relevance of the court's rationale, which appears to question why the plaintiffs would pay for unordered and returned products when Avon allowed instant credit. The point, however, is that Avon's announced policies were allegedly not its actual policies. Moreover, the relevance of the plaintiffs' reasons, "varied" or not, for paying for unordered products is not apparent. If in fact they paid for unordered products which they returned—whether because they believed their accounts would be credited in due course, because they did not want Avon to terminate their businesses, because their instant credit was revoked, or for any other reason—Avon's refusal to provide credits or refunds contrary to its stated policies would arguably constitute unjust enrichment and an unfair business practice.

Id. at 55–56. The court agreed with Avon that each class member had separate transactions, but held that that made no difference in considering commonality:

> Taking the plaintiffs' unfair business practices claim as an example, if the class representatives prove Avon engaged in the practices alleged, each class member need not separately establish Avon's liability for engaging in that practice. The class members need only show they are members of the class—representatives who paid for unordered products they returned—and the amount of their damages. "The law unequivocally provides that each class member may establish damages independently without threatening the integrity of the class action."

Id. at 57 (citations omitted). The court rejected plaintiffs' request that the case be reassigned to a different judge on remand. *Id.* at 59–60.

16. Wages on Termination

Smith v. Superior Court, 39 Cal.4th 77, 93, 137 P.3d 218, 45 Cal.Rptr.3d 394, 11 Wage & Hour Cas.2d (BNA) 1420 (Calif. 2006), reversed the grant of summary adjudication in favor of defendant, and held that models and other persons hired for specific assignments should be considered discharged, and thus entitled to immediate payment of their earned wages, when they are released after completion of a "specified job assignment or duration of time."

D. Colorado

Chase v. Farmers Insurance Exchange, 129 P.3d 1011, 10 WH Cases 2d 856 (Colo. App. 2004), reversed the grant of summary judgment to defendant on plaintiff insurance adjustors' class claims of misclassification as exempt. The court rejected plaintiffs' argument that defendant was collaterally estopped from asserting they were exempt, because of the rejection of that argument in a class action under California law, and in a Federal court class action. As to the MDL action, which also involved a Colorado state-law subclass, the court held that defendant was not bound because collateral estoppel applies to prior judgments, and the Federal-court decision was handed down seventeen months after the decision below. Moreover, the Federal-court action had not reached a final judgment yet, and the court stated it had not yet completed its rulings on state-law issues. The court then reversed the grant of summary judgment to defendant on plaintiffs' classification claim, holding that plaintiffs had shown triable issues of fact.

E. Connecticut

Mytych v. May Department Stores Company, 260 Conn. 152, 793 A.2d 1068 (Conn. 2002), affirmed the grant of summary judgment to defendant. Plaintiffs and their class challenged the exclusion of their pro rata shares (based on their proportion of total sales that week) of unidentified returns when calculating their commissions. The court held that defendant's procedure was specified in the commission agreement each employee had signed, and therefore did not violate State law.

F. District of Columbia

Freas v. Archer Services, Inc., 716 A.2d 998, 14 IER Cases 653 (D.C. 1998), reversed the dismissal of plaintiff's wrongful discharge case, holding that an allegation that defendant fired plaintiff for bringing class claims under the D.C. wage payment and compensation laws stated a valid claim for wrongful discharge.

G. Florida

Advisory Opinion to the Attorney General re Florida Minimum Wage, 880 So.2d 636 (Fla. 2004) (*per curiam*), upheld the legality of the initiative proposing to amend the Constitution of Florida by establishing a State minimum wage and a means of private enforcement, with a doubling of back pay as liquidated damages and a provision for awards of attorneys' fees. The aspects of legality in question were the initiative's compliance with the single-issue requirement of the Florida Constitution, and the compliance of the measure's title and summary with statutory requirements of accuracy. Justice Cantero dissented. *Id.* at 643–46.

Ouellette v. Wal-Mart Stores, Inc., 888 So.2d 90 (Fla. App., 1st Dist., 2004), affirmed the denial of plaintiffs' motion to certify the class, but on grounds different from that of the lower court. The court described the case: "The appellants, alleging *inter alia* that Wal-Mart required them to work "off the clock" without compensation and did not provide them with promised rest and meal breaks, brought causes of action under theories of breach of contract, quantum meruit, unjust enrichment, and Florida statutory violations." *Id.* at 91. It stated:

> The trial court denied the motion for class certification because each class member would have an individualized claim for damages requiring proof and a separate trial. We agree with appellants that the individualized nature of their damages claims should not bar certification of the class. See *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259, 1273 (11th Cir.2004) (recognizing that "'individualized damages issues do[ ] not prevent a finding 'that the common issues in the case predominate'"; "'[t]here are a number of management tools available to a [trial] court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class'"); *Broin v. Philip Morris Cos., Inc.*, 641 So.2d 888, 891 (Fla. 3d DCA 1994) (stating that "[e]ntitlement to different amounts of damages is not fatal to a class action"; "[s]hould it become appropriate, the court may divide the class into subclasses to resolve these issues").

Id. at 91–92. The court affirmed the denial of class certification because it found the proposed class of "all current and former hourly Wal-Mart employees in Florida on or subsequent to July 13, 1997" overbroad, in that it included employees never subjected to the practice in question. *Id.* at 92.

H. Georgia

Milhollin v. Salomon Smith Barney, Inc., 272 Ga.App. 267, 612 S.E.2d 72 (Ga. App. 2005), affirmed the grant of judgment on the pleadings to the Georgia Labor Law defendant. Plaintiff had sued on behalf of a class of former employees. "Milhollin asserted claims for violations of the Georgia Labor Law, conversion, breach of contract, breach of fiduciary duty, and unjust enrichment. All these counts derived from an employee compensation agreement that he entered into with SSB known as the Capital Accumulation Plan." *Id.* at 268. He elected to receive 5% of his compensation in the form of restricted stock (at a 25% discount) that would only vest after two years' employment. He was cautioned at the time that he would lose that part of his compensation if he left, or was fired for cause, before the two years were up, and had the option of not participating in the program. Plaintiff contended that defendant's payment of the chosen percentage of compensation in this restricted form violated the statutory requirement of prompt payment of wages. The court held that the claim was untimely. The Labor Law had a two-year period of limitations, and plaintiff filed suit two and a half years after he ended his employment.

I. Illinois

Kim v. Citigroup, Inc., 856 N.E.2d 639, 648–49, 368 Ill.App.3d 298, 309 (Ill. App. 1st

Dist. 2006), *appeal denied*, 862 N.E.2d 235, 222 Ill.2d 609 (Ill. 2007), reversed the judgment on behalf of the class and held that defendant's Capital Accumulation Plan did not violate the Illinois Wage Act. The CAP involved payment of part of employees' compensation in the form of restricted stock in defendant, and the prior two years of compensation were subject to forfeiture if the employee left voluntarily. The court explained its reasoning:

> After a careful review of the Wage Act and its purposes, cases from Illinois, and cases from other jurisdictions that have had opportunity to review CAP programs, we conclude that the voluntary forfeiture of earned compensation by an employee does not violate the public policy of the state and that the trial court erred in so holding. The funds used for participation in the CAP program, although a portion of the employee's wages as stated in the CAP agreement, were voluntarily used to purchase CAP stock by the plaintiff, who was a financial planner himself. This supports the inference that he was fully aware of the forfeiture clause upon participation in the CAP; moreover, the record indicates that plaintiff chose to participate in the CAP because he felt it was a smart investment vehicle. We have already concluded that the deductions were valid under the Wage Act, and accordingly find that the forfeiture provision in the CAP program is not against the public policy of this state. Accordingly, we find the trial court erred by granting plaintiff's motion for summary judgment on this issue.

Gelb v. Air Con Refrigeration and Heating, Inc., 356 Ill.App.3d 686, 826 N.E.2d 391, 292 Ill.Dec. 250 (Ill. App. 2005), *appeal pending*, affirmed the dismissal of plaintiffs' claims under the Illinois Minimum Wage Law, on the ground that a collective bargaining agreement specified rights to overtime exceeding those required by the statute, defendants claimed to have complied with the CBA, resolution of plaintiffs' right to overtime would require construction of the CBA, and the action was therefore preempted by the Labor Management Relations Act and the National Labor Relations Act. The court stated at 693–94:

> Here, in order to determine whether defendants had violated the Wage Law, a finder of fact would have no choice but to refer to the collective bargaining agreement in order to determine the amount of wages that were due and owing to the individual plaintiffs and the other members of the proposed class. In order to ascertain whether defendants' compliance with the collective bargaining agreement in paying overtime wages violated the Wage Law, a court would have to determine the pay scale for each plaintiff, with the relevant deductions to which plaintiffs objected, and the amount of overtime each plaintiff worked in the relevant time period, and calculate those figures using the formula prescribed by the collective bargaining agreement. Moreover, the collective bargaining agreement provided for overtime compensation that, in some instances, exceeded the minimum rate mandated by the Wage Law.
>
> Because defendants asserted compliance with the collective bargaining agreement as a defense, the resolution of plaintiffs' Wage Law claim is inextricably bound up with the terms of the collective bargaining agreement, and a court would inevitably have to interpret them. Accordingly, we find that plaintiffs' Wage Law claim is preempted by federal labor laws and that dismissal on this ground was warranted.

This is a stunning misinterpretation of Federal preemption law. The court held that the claims had to arbitrated under the CBA, unless plaintiffs could show a breach of the duty of fair representation. *Id.* at 695. The court affirmed the dismissal of plaintiffs' civil conspiracy claim

on the same grounds as the wage payment claim. *Id.* at 697–98. The court held that plaintiffs could not seek recovery of punitive damages under the Illinois Minimum Wage Law:

> The statute only mentions punitive damages payable to employees in the context of an action assigned to and subsequently brought by the Director of Labor. It makes no provision for employees to recover punitive damages aside from assigning their claims to the Director. Here, there is no indication that plaintiffs ever assigned their claims to the Director. Under these circumstances, and according the statute its plain meaning, the only conclusion we come to is that plaintiffs may not recover punitive damages from employers without first assigning their claims to the Director of Labor for litigation.

Id. at 699. Finally, the court upheld the dismissal of plaintiffs' claims because some defendants had tendered to them the full amounts of their claims. On an earlier appeal, the appellate court reversed the dismissal of the individual and class claims because plaintiffs had been diligent but had not yet filed their motion to certify the class. On remand, plaintiffs filed their motion to certify, but the lower court dismissed their individual claims for mootness prior to any ruling on class certification. The court of appeals failed to draw the obvious logical conclusion that the policy of allowing the filing of a class certification motion requires that any mooting offer be barred or held in abeyance prior to the ruling on class certification. *Id.* at 700–01.

J. Indiana

Reel v. Clarian Health Partners, Inc., 855 N.E.2d 343, 353 (Ind. App. 2006), affirmed the pre-class-certification grant of summary judgment to defendant, stating:

> The upshot of all this is that while the general rule against pre-certification review of the merits of a case remains the touchstone for resolving disputes like the present, the courts have carved out a limited exception for those defendants willing to forego the protections attendant on early determination of the class issue. That exception, which the Court finds wholly applicable to this case, allows the defending party to exercise its option to waive the safeguard of res judicata implicit in Rule 23 's requirement that the class question be addressed "[a]s soon as practicable after the commencement of an action." The risk to the defendant is, of course, that if he loses on the liability issue, that result will be given effect as to a class of yet undefined numbers and composition; if he wins, he may still face subsequent prosecution by other potential class members whose claims might be barred only under the limited scope of the stare decisis doctrine.

Wal-Mart Stores, Inc. v. Bailey, 808 N.E.2d 1198 (Ind. App. 2004), *transfer denied*, 831 N.E.2d 742 (Ind. 2005), reversed and remanded the certification of the class. The court described plaintiff's allegations at 1200:

> Bailey claims that because Wal-Mart has instituted the management and payment structure in place, it has forced managers to adopt or condone wrongful cost-saving practices and encourage hourly employees to work off the clock and through rest and meal breaks. She alleges that employees are faced with the dilemma of having more work to do than can be completed in a shift, but Wal-Mart policy is to limit overtime. As a result, she contends that employees must clock out and continue to work without pay. Moreover, she claims that employees are not given rest and meal breaks or are called back to work before their break is over. Evidence demonstrated that some store

> managers edit employee time records to show that breaks were taken or that individuals clocked out without ever confirming with the employee that the break was taken or whether they left work at a certain time. Finally, Bailey alleged that employees have been locked in stores overnight and the stores were not opened on time the following morning.

(Footnote omitted.) Plaintiff sued for "unjust enrichment, breach of implied contract, conversion, and constructive fraud." *Id.* "Following a hearing, the trial court granted her motion and ordered that the class be defined as '[a]ll current and former hourly employees of Wal-Mart Stores, Inc. (including its operating divisions Sam's Club and Wal-Mart Supercenters) in the State of Indiana during the period August 1, 1998 to present.'" The court gave weight to Wal-Mart's affidavits from employees denying that they had worked without compensation as alleged: "In the view of this court, the question of whether Wal-Mart actually utilized a policy in which employees would work off the clock does not establish the basis for certification of the class. Indeed, resolution of that issue does not resolve the specific claims brought forth by Bailey or establish any particular issues with respect to those claims. . . . In general, to prove the claims pursued by Bailey, it must be shown that Wal-Mart received something that it did not pay for, i.e. labor from its employees. As certified, the class includes employees who admitted that they had never worked off the clock in any manner." *Id.* at 1202 (footnote and paragraph break omitted). The court held that the predominance test is not satisfied by a showing that the class claims arise from a common nucleus of operative fact, because that would result in the commonality determination always satisfying the predominance test. *Id.* at 1204–06. The court surveyed recent decisions and stated:

> In no way do those three decisions condone a reading of T.R. 23 such that the commonality requirement of (A)(2) and the predominance requirement of (B)(3) are one and the same. Rather, just as stated in Bolka, while there is considerable overlap between the two, T.R. 23(A)(2) requires that common issues exist while T.R. 23(B)(3) requires that those issues predominate. Therefore, while a common nucleus of operative facts may satisfy the predominance requirement, such is not necessarily so.

Id. at 1206. The court declined to address superiority, but stated that the class could be redefined on remand. The court discussed some of plaintiff's options on remand:

> In light of the possibility that Bailey wishes to proceed with certification under T.R. 23(B)(3), it may be that this action could proceed with one class made up of employees who were adversely affected by Wal-Mart policy or with several subclasses which align employees who claim that the policy affected them in a particular injurious way. Furthermore, we note the provision contained in T.R. 23(C)(4) which authorizes the action to be maintained with respect to particular issues. It may ultimately be necessary that the class action be maintained for certain issues, such as whether Wal-Mart was unjustly enriched or whether certain elements of unjust enrichment were met, but that damages would have to be calculated on an individual basis.[13]
>
> [13] This option would allow Wal-Mart the opportunity to defend against individual damage claims, which seems to be the biggest motivation in challenging the class certification.

Id. at 1207. The court also pointed out the possibility of a T.R. 23(B)(2) class for declaratory

and injunctive relief. If plaintiff chose to pursue that option, stated the court, "some monetary damages could be awarded to injured employees so long as the final relief was not predominately based upon monetary damages but was focused on an injunctive remedy." *Id.* at 1208.

K. Louisiana

New Orleans Firefighters Local 632 v. City of New Orleans, 876 So.2d 211, 214, 2003–1281 (La. App. 4th Cir. 2004), *writ denied*, 887 So.2d 475, 476 (La. 2004), affirmed in part and reversed in part "the final judgment rendered by the trial court, which awarded the Firefighters damages in the principal amount of $176,183,448.39, plus annual leave days, legal interest, $24,130,682.45 in employer pension contributions, and an adjustment to the base pay of the class members to include all longevity raises that they should have received under the law." Plaintiffs and their three classes challenged rules of the New Orleans Civil Service Commission that assertedly conflicted with State law. "Class One consisted of all active and retired firefighters who forfeited accrued annual leave under the "use it or lose it" policy. Class Two consisted of all firefighters who were denied the full measure of annual leave days. Class Three consisted of all firefighters who were deprived of the full longevity pay increases." *Id.* at 215. Plaintiffs' 1981 petition concerned only vacation pay. Their 1993 amendment concerned longevity increases. The court held that the 1993 amendment did not relate back to the 1981. *Id.* at 223. The court held that discretionary pay increases of up to 2% could serve as a credit against the 2% longevity increases to which the class was entitled in that year, but that larger discretionary increases could not be credited against longevity increases denied in another year. *Id.* at 224–25. "The fact that the City chose to give raises in excess of those required by law should not, and did not, prejudice the Firefighters." *Id.* at 225. The court held that the three-year period of limitations barred recovery of back pay prior to 1990 on the claim for longevity pay, but that the longevity pay denied before 1990 had to be taken into consideration to determine the proper base level of compensation on which the 2% increase was to be calculated. *Id.* at 228. The court held that the lower court should permit a limited new trial to include, in the damages calculations, fifteen firefighters previously omitted from the data provided by the City. *Id.* at 239–40.

L. Maine

Thompson v. Shaw's Supermarkets, Inc., 847 A.2d 406, 9 WH Cases 2d 1181, 2004 ME 63 (Maine 2004), held that the overtime requirements of Maine law prior to the 2002 amendments do not apply to interstate drivers.

M. Massachusetts

Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 893 N.E.2d 1187 (Mass. 2008), reversed the lower court's decertification of the wage and hour class, reversed the lower court's disqualification of plaintiff's expert, and reversed the grant of summary judgment on claims occurring more than three years prior to the filing of suit. The Supreme Judicial Court described defendant's written policies and training requiring all employees to be compensated for all work, forbidding managers to request or require employees to work off the clock, and requiring all employees to take rest and meal breaks. However, the Supreme Judicial Court held that there was substantial evidence that these policies were not always observed in practice:

> At least since 1989, senior Wal-Mart home office executives have been made aware that, despite the written policy directives to the contrary, store managers were

> sometimes "[a]ltering time cards to decrease reported payroll expenses" and "[i]nstructing associates to work off the clock ...." Further, at least since 1998, the home office was aware that some hourly employees "are not receiving scheduled breaks and lunches." One Wal-Mart payroll audit, known as the "Shipley audit," dated July 17, 2000, surveyed 128 Wal-Mart stores nationwide. Among other things, the Shipley audit documented that in a two-week period, 127 "[s]tores were not in compliance with company and state regulations concerning the allotment of breaks and meals as 76,472 exceptions were noted."
>
> Wal-Mart was also aware, during the class period, of allegations of "time shaving" by store managers. Two time-shaving techniques in particular feature prominently in this litigation. The first was the insertion by Wal-Mart supervisors of meal break periods into hourly employees' time records, allegedly when no meal break had in fact been taken. This effectively deprived hourly employees of compensation for the amount of time of the inserted meal break period. The second was a practice known as the "one-minute clock-out," in which a manager inserted a "clock-out" one minute after the hourly employee had clocked in (either for a shift, or on returning from a break) even though the employee had actually worked for longer than one minute.

452 Mass. at 342-43, 893 N.E.2d at 1195 (footnotes omitted). The court reversed the disqualification of plaintiff's expert, Dr. Martin Shapiro, because it was based on the erroneous view that Wal-Mart's time records—the basis for Dr. Shapiro's analysis—had to be so complete and error-free that they by themselves could establish liability. The Supreme Judicial Court held instead that the question was whether they were admissible business records despite their gaps and omissions, and held that they were:

> Wal-Mart's business records at issue in this case satisfy all of the requirements to be afforded the usual presumption of reliability. Both the timekeeper records and the point-of-sale register records were "made in good faith in the regular course of business" before this action began. G.L. c. 233, § 78. The digital records of hourly employees' card-swipes and their supervisors' subsequent insertions and amendments were all made "at the time of such act, transaction, occurrence or event or within a reasonable time thereafter." Wal-Mart has relied on these records for purposes of compensating its hourly employees, evaluating its store managers, and presumably reporting its payroll expenditures to the Commonwealth, to the Federal government, and to its own shareholders in the form of financial results.
>
> This presumption of reliability is not irrebuttable. Wal-Mart may, through admissible evidence at trial, challenge the veracity of its own records, just as it may challenge the conclusions that Shapiro and the plaintiffs draw from those records. But the records themselves, and the portions of Shapiro's testimony that consist of reconstructing and counting those records in an uncontestedly reliable fashion, are admissible.

452 Mass. at 359-60, 893 N.E.2d at 1206-07 (footnote omitted). The lower court had ordered decertification of the class on the ground that individual explanations could always refute the evidence of violations shown in the payroll records. Reversing, the Supreme Judicial Court

stated:

> We agree with the judge's observation that the great bulk of the additional material concerned Wal-Mart's national, corporate-wide labor policies and practices that make no specific reference to Massachusetts. Other material submitted by the plaintiffs, such as the Shipley Audit, does not focus in any significant way on the Commonwealth. But neither does any of this material, either directly or indirectly, exempt Massachusetts stores or Massachusetts hourly employees from labor and payroll directives imposed nationally by the home office. Because the gravamen of the plaintiffs' claims is that Massachusetts hourly employees were subjected to Wal-Mart's nationwide, uniform, wrongful actions, the dearth of specific references to Massachusetts in the additional material is not fatal to class certification.

> The plaintiffs present the additional materials, including policy directives, employee handbooks, and the like, as evidence of an implied-in-fact contract or enforceable promise concerning work breaks and off-the-clock work. See *LiDonni, Inc. v. Hart*, 355 Mass. 580, 583, 246 N.E.2d 446 (1969) ("In the absence of an express agreement, a contract implied in fact may be found to exist from the conduct and relations of the parties"). The judge found these general corporate materials (among other things) sufficiently specific to the contract issue to survive a challenge on summary judgment. They are no less persuasive on the issue of class certification, where all members of the class were unarguably the beneficiaries of identical terms of employment. The necessary bridge to liability in Massachusetts is provided by the sworn and unsworn statements of Massachusetts hourly employees and managers about missed and shortened breaks and uncompensated work.

> The judge nevertheless concluded that class treatment was not warranted on the liability issues because no Massachusetts law requires paid rest breaks and no Wal-Mart policy forbids hourly employees from waiving breaks. The error was twofold. First, the absence of Massachusetts law on work breaks, while relevant to statutory claims, does not resolve the question whether Wal-Mart contractually or otherwise promised breaks to its hourly employees. Second, the waiver issue was a factual matter that the judge should have reserved to the jury. The judge acknowledged in his decertification order that "there exist no Wal-Mart policies allowing a waiver of rest breaks and, in fact, that there were policies in place, including disciplinary, which were intended to discourage associates from not taking their earned rest breaks." Wal-Mart's evidence that some Massachusetts hourly associates felt free to skip or shorten their breaks points to a disputed issue of material fact with regard to an affirmative defense (waiver) that Wal-Mart might offer. See *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir.2003) ("Even in the unlikely event that individual waiver determinations prove necessary, the proposed class may still satisfy the predominance requirement.... Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members" [citation omitted]).

In short, the essential factual questions of liability in this case-Did a contract or agreement exist? On what terms? Did Wal-Mart breach the contract or agreement?-rest on a "sufficient constellation of common issues [to] bind[ ] class members together" for purposes of certification. *Waste Mgt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 296 (1st Cir.2000). See *Weld v. Glaxo Wellcome Inc.,* 434 Mass. 81, 91, 746 N.E.2d 522 (2001) (certification of plaintiff class appropriate where "[a]lthough the contracts ... appear to have been the product of independent, parallel negotiations, every contract created largely identical contractual obligations ... and the program appears to have been administered in a substantially similar manner across the board"); *Sniffin v. Prudential Ins. Co.,* 11 Mass.App.Ct. 714, 724, 419 N.E.2d 308 (1981) (class action appropriate where, among other things, common questions "are so tightly interwoven in the dispute that they directly affect its resolution"); *Smilow v. Southwestern Bell Mobile Sys., Inc., supra* (predominance requirement met where "common factual basis is found in the terms of the contract, which are identical for all class members").

Many of the judge's conclusions concerning the insufficiency of the additional material to demonstrate predominance, and the arguments advanced by Wal-Mart on this point, are more properly directed to questions of damages than to questions of liability. As we noted above, classes may be certified for the purpose of determining liability even where individual inquiries may be necessary on the issue of damages. See *Smilow v. Southwestern Bell Mobile Sys., Inc., supra* at 40, quoting *Blackie v. Barrack,* 524 F.2d 891, 905 (9th Cir.1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment"). See also *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 361, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (authorizing "additional proceedings after the liability phase of the trial to determine the scope of individual relief"). Where damages issues are likely to require more individualized treatment, a judge has available a number of creative methods of managing questions of remedy in a manner that protects the defendant's rights while redressing harms to individual plaintiffs. See generally Newberg, *supra* at § 4:32, at 287-288 ("Courts have developed several innovative management techniques to eliminate or minimize court burdens arising from management difficulties posed by class actions. With reference to problems of complexity or numerousness of individual questions remaining in a class action, courts have pointed to or have agreed to use devices such as conditional class certification[,] ... limitation of the class to particular issues[,] ... bifurcated trials for liability and damages, common proof of class damages, use of special masters or magistrates, use of liaison and lead counsel for the parties, class recovery distribution techniques involving cy pres notions, and monitoring procedures for time expended by class counsel to avoid duplication or excessiveness of hours"). The judge should have recognized the availability of these alternatives before essentially denying thousands of potentially meritorious, yet small, claims. See, e.g., *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), quoting Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 497 Prefatory Note (1967) (class actions protect "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"); *Fletcher v. Cape Cod Gas Co.,* 394 Mass. 595, 603, 477 N.E.2d 116 (1985) ("We recognize that in some instances even one common question of

> law or fact may be found to predominate over individual questions so as to warrant certification of a class action"); *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 105, 922 A.2d 710 (2007), quoting *Amchem Prods., Inc. v. Windsor, supra* ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights").

452 Mass. at 366-69, 893 N.E.2d at 1210-13 (footnotes omitted). The court held that the lower court also erred in holding that plaintiffs would have to present testimony from employees in each distinct job category in each of the 47 stores defendant maintained in Massachusetts. "In this case, the burden the judge imposed on the plaintiffs would be both onerous and unproductive in light of overwhelming evidence that all of the class members-people who staff the grill counter, receivers, cashiers, and so on-were subject to the identical terms and conditions regarding breaks and off-the-clock work, which (according to company policy) were to be followed stringently." 452 Mass. at 370, 893 N.E.2d at 1213-14. The court rejected the reasoning of the lower court that unpaid meal periods have no value, and held that their value was to be determined at trial, if plaintiffs succeeded in establishing that defendant's representations to its employees constituted a contractual promise that they would have 30-minute meal periods. 452 Mass. at 374-75, 893 N.E.2d at 1216-17. The court also held that, while plaintiffs had not shown fraudulent concealment of defendant's time-shaving given the number of ways in which employees could check the accuracy of their time, there was a triable issue of fact as to whether defendant was equitably stopped from asserting the statute of limitations on the time-shaving claims:

> In this case the plaintiffs presented evidence from former Wal-Mart managerial and payroll personnel in Massachusetts and elsewhere that they personally inserted meal breaks or one-minute clock-outs in hourly employees' time records or witnessed others doing so. They submitted documents attesting to Wal-Mart's awareness over many years that the problem of time shaving was widespread. And they argue that, given that most class members made the minimum wage and had small amounts of time allegedly shaved from their records, the individual losses may have been too small to be readily detectable. We conclude that in the circumstances of this case, this evidence is sufficient to send to the jury the factual question whether a reasonable hourly employee would or should have known that time was being shaved from their paychecks, even though some hourly employees may have monitored their paychecks very closely.

452 Mass. at 377-78, 893 N.E.2d at 1218-19 (footnotes omitted).

Connolly v. Suffolk County Sheriff's Department, 62 Mass.App.Ct. 187, 198, 815 N.E.2d 596, 16 AD Cases 18 (Mass. App. 2004), affirmed the denial of back pay for lost overtime in a case seeking relief for a policy that barred officers on light duty from volunteering for overtime. "The hearing officer correctly concluded that, although the facts supported a finding of discrimination, such a finding does not per se support an award of compensatory damages where the plaintiffs' proffered method of damage calculation failed to reflect the reality that a host of unpredictable factors would have affected their opportunity to receive any overtime shifts."

Swift v. Autozone, Inc., 441 Mass. 443, 806 N.E.2d 95 (Mass. 2004), vacated the grant of

summary judgment to plaintiffs and their class, and held that defendant's paying time and a half to employees working on Sunday, barred the inclusion of Sunday hours in overtime for that week, or alternatively allowed the premium payments for Sunday work to be credited against required overtime payments.

N. Michigan

Allen v. MGM Grand Detroit, LLC, 260 Mich.App. 90, 675 N.W.2d 907 (Mich. App. 2003), *appeal denied*, 470 Mich. 866, 680 N.W.2d 893 (Mich. 2004), reversed the denial of summary judgment to defendant. The Michigan Minimum Wage Law of 1964 applies if application of the FLSA would result in a lower minimum wage. The amount of the minimum wage, and the overtime rights, were identical in both statutes. Plaintiffs argued that the three-year period of limitations under the MWL and argued that application of the FLSA would give them only two years of recovery, thus satisfying the condition of the MWL. The court rejected this reasoning, noting that the MWL refers to nineteen sections of the FLSA as points of comparison, but does not refer to 29 U.S.C. § 216(b).

O. Minnesota

Milner v. Farmers Ins. Exchange, 748 N.W.2d 608, 610-11 (Minn. 2008), affirmed in part and reversed in part the decision of the Court of Appeals. The Minnesota Supreme Court summarized the case and its rulings:

> This appeal concerns a class action lawsuit brought under the Minnesota Fair Labor Standards Act (MFLSA or the Act) by a group of claims representatives against their employer, Farmers Insurance Exchange (Farmers). A jury found that the claims representatives were misclassified as "exempt," but the jury awarded no compensatory damages. Based on the conclusion that Farmers violated the MFLSA by misclassifying the claims representatives and failing to keep any time records for them, the district court granted injunctive relief and ordered Farmers to pay $376,000 in civil penalties and $1.8 million in attorney fees to the claims representatives. The court of appeals affirmed in part as modified, reversed in part, and remanded. The court of appeals concluded that the district court had the authority to issue an injunction and impose civil penalties, but that civil penalties are payable to the state and the use of a multiplier in calculating the attorney fee award is inappropriate. We affirm in part and reverse in part and hold that (1) an employer's misclassification of employees as exempt from the MFLSA, standing alone, is not a violation of the Act, but the failure to make and keep the required wage and hour records is a violation; (2) the MFLSA authorizes district courts to issue equitable relief in the form of injunctions and civil penalties when an employer has violated the Act, and compensatory damages are not a prerequisite for such relief; (3) civil penalties assessed under the MFLSA are payable to the state; and (4) attorney fees awards must reflect the limited degree of success achieved by the plaintiffs. We remand to the district court for recalculation of the civil penalties and attorney fees.

The court remanded the case and directed the lower court to re-examine the lodestar and the 1.5 multiplier.

P. Montana

Sieglock v. Burlington Northern Santa Fe Railway Company, 319 Mont. 8, 81 P.3d 495, 2003 MT 355 (Mont. 2003), reversed the denial of class certification to employees presenting privacy claims. The case involved defendant's publication of "a list of names of the top three hundred overtime wage earners in its track department," which included "personal information about the employees, including their city and state of residence and social security number." *Id.* at 10. The listed employees came from 24 States, and the court held that there no common questions of law had been shown. It remanded the case so that the lower court could determine whether there was a common core of salient facts, justifying class certification. *Id.* at 15.

Q. Nevada

Baldonado v. Wynn Las Vegas, LLC, 194 P.3d 96 (Nev. 2008), affirmed the lower court and held that there is no private right of action to enforce Nevada labor laws such as the restraints on who can share in tip pools. The court held that the responsibility for enforcement lies with the Labor Commissioner.

Jane Roe Dancer I-VII v. Golden Coin, Ltd., 176 P.3d 271, 13 Wage & Hour Cas.2d (BNA) 956 (Nev. 2008) (*per curiam*), reversed the denial of class certification and the dismissal of plaintiffs' claims. The court held that the Nevada Wage and Hour Law provided greater benefits to employees than the FLSA, because it did not allow a tip credit offset against the employer's obligation to pay the minimum wage. The court held that the filing of the class action tolled the period of limitations on the claims of each class member, which meant that the class representative's claims were timely and she was an adequate representative.

R. New York

Alix v. Wal-Mart Stores, Inc., 57 A.D.3d 1044, 868 N.Y.S.2d 372 (N.Y. App. 3d Dept. 2008), affirmed the denial of class certification. The court described plaintiffs' claims: "Plaintiffs' complaint, in essence, is that defendant used its store level managers to implement a corporate-wide policy that systematically deprived many of its employees of proper compensation through the manipulation of time records and the implementation of employment practices designed to compel employees to work off the clock without compensation." The court held that the class was defeated by plaintiffs' failure to show that their own time records were manipulated, by what the court considered a conflict of interest by the inclusion of 8,000 hourly managers in the class, and by the defendant's right to explore the individual circumstances behind each data point in a statistical analysis. The court held that an administrative remedy before the State Commissioner of Labor would be superior to a class action.

Lamarca v. Great Atlantic and Pacific Tea Co., Inc., 55 A.D.3d 487, 868 N.Y.S.2d 8 (N.Y. App. 1st Dept. 2008), affirmed the grant of class certification to employees on their overtime claims. The substantive part of the decision, in total, stated:

> The named plaintiffs' claim that they were not paid for overtime work is typical of

> the claims of the class, as it arises out of the same course of conduct, i.e., that, as a result of the pressure defendant placed on individual store managers to keep payroll costs down, in conjunction with its express policy forbidding off-the-clock work and mandating payment of overtime, stores were chronically understaffed and employees were permitted, or pressured, to work overtime without compensation (*see Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 22, 574 N.Y.S.2d 672 [1991]). Questions of law or fact common to the class will predominate over questions that affect only individual members, because defendant conceded that all its stores are managed pursuant to uniform policies set by it and that the corporate policies that drove managers to deprive employees of overtime pay were in effect for all the stores during the class period (*see Pesantez v. Boyle Envtl. Servs.*, 251 A.D.2d 11, 12, 673 N.Y.S.2d 659 [1998]). Defendant's attack on the adequacy of the named plaintiffs to serve as class representatives raises minor and collateral issues of impeachment that are insufficient to disqualify a class representative (*see Pruitt*, 167 A.D.2d at 25, 574 N.Y.S.2d 672).

Brandy v. Canea Mare Contracting, Inc., 825 N.Y.S.2d 230, 34 A.D.3d 512 (N.Y. App. 2d Dept. 2006), affirmed the certification of a class of laborers on public works contracts against sureties on common-law claims for failure to pay wages, but rejected plaintiffs' argument that their prevailing-wage claims should not be dismissed for failure to exhaust administrative remedies.

Maurer v. State Emergency Management Office, 13 A.D.3d 751, 786 N.Y.S.2d 620 (N.Y. App., 3d Dept., 2004), held that the four-month period of limitations on Article 78 proceedings began to run on plaintiffs' claims for the "capping" of voluntary payments of overtime to exempt employees during the emergency response to the September 11, 2001, attack on the World Trade Center began running when the improper paychecks were issued, and that plaintiffs' claims were therefore untimely. The court held that the pendency of a timely challenge in another case, which was not a class action and in which plaintiffs did not intervene, did not extend these plaintiffs' period of limitations.

S. North Carolina

Harrison v. Wal-Mart Stores, 613 S.E.2d 322 (N.C. App. 2005), affirmed the denial of class certification. "Plaintiffs alleged that, in contravention of Wal-Mart policies and unwritten contracts with Plaintiffs, Wal-Mart engaged in widespread wage and hour abuses, including failing to record and pay for all of the time employees were required to work and failing to permit employees to take or complete lunch and rest breaks. Plaintiffs pled six claims for relief: breach of contract for off-the-clock work, breach of contract for missed rest and meal breaks, quantum meruit, unjust enrichment, tortious interference with contractual relations, and violations of the North Carolina Wage and Hour Act." *Id.* at 324–25 (footnote omitted). Plaintiffs moved to certify a class objectively defined as consisting of all employees who worked at one of defendant's North Carolina stores within a stated time period. The court held that the proposed class was untenable because it included employees who were not subjected to the practices alleged, relying on defendant's affidavits from employees in sustaining that finding. *Id.* at 326–27. The court held that individual issues predominated over common issues as to the "unwritten, unilateral contract" claims, because it would require an examination of the existence and formation of each employee's asserted contract, the understandings of individual employees

as to what had been promised them, the statements of "countless" present and former Personnel Managers, and the actions of each individual employee in deciding whether to take a break or to punch out for a break that was taken. *Id.* at 828. Plaintiffs' claims for unjust enrichment and quantum meruit were similarly rejected. *Id.* at 828–29. The court rejected class certification of the statutory claims on the same grounds. *Id.* at 829. Finally, the court held that there was a conflict within the class because the proposed definition included supervisors, who may have caused or tolerated violations that injured other class members. *Id.* at 830.

Whitehead v. Sparrow Enterprise, Inc., d/b/a Labor Finders, 167 N.C.App. 178, 605 S.E.2d 234, 10 WH Cases 2d 296 (N.C. App. 2004), *review denied*, __ S.E.2d __, 2005 WL 2051307 (N.C. July 29, 2005), involved a temporary employment agency of casual labor. Applicants would arrive in the morning and sign in, and the defendant would hire them when it had a customer desiring casual labor. The court described the operation of defendant's business as follows:

> Defendant's hiring policy is structured on a first come first serve basis. Individuals seeking work must arrive at defendant's office early in order to be considered available for employment. At their first hiring, the class members are required to sign the "House Rules." The "House Rules" discloses defendant's hiring process, the details and rules of employment, hours of operation, the hourly wage, hours worked, and standard deductions which include optional transportation expenses. Plaintiff signed the "House Rules" on 2 January 2001.
>
> Upon arrival in the morning, the class members write their names on a sign-in sheet and wait for an assignment of available jobs. The "House Rules" specifically states such time is not compensable, "Hours worked and pay are determined from the time the worker starts working at the customer's establishment And (sic) ends when the work is completed at the customer's establishment." While waiting, the class members often eat breakfast, read a newspaper, watch television, talk, or sleep.
>
> The class members who are offered work are called to the assignment desk and provided a description of the job and pay. If they accept the position, they are asked whether they have transportation available. If they do not, the class members will ride with either a fellow employee or in defendant's van. The cost to the class members is $1.00 each way. The "House Rules" explains the transportation program and cost to the participant.
>
> After receiving work assignments, defendant provides general safety equipment like hard hats, boots, and gloves to those employees who would need them. The class members either wait for the van pool or secure their own transportation to the job site. They are allowed to do whatever they want during this period, so long as they arrive at the job site on time. Those who select defendant's van pool are not given any instructions about the job during the ride. Plaintiffs have the option to be paid at the end of the workday or at a later time.

Id. at 180. Plaintiff filed a class action with the following claims: "First, plaintiff argued the wage deductions for the communal transportation were illegal under N.C. Gen.Stat. § 95-25.8. Second, plaintiff argued employees who elect to use the optional transportation should be paid for time spent while both waiting for the van and riding to and from the job sites under N.C.

Gen.Stat. § 95-25.6." *Id.* at 180–81. The court affirmed the grant of summary judgment to defendant on all claims. It stated that the North Carolina Wage and Hour Act ("NCWHA") is patterned on the FLSA, and that Federal regulations and decisions under the FLSA may be used for nonbinding guidance. It stated that it is not bound by the decisions of Federal courts other than those of the Fourth Circuit construing North Carolina law. The court held that defendant was subject to the sections of the NCWHA on which plaintiff had sued, the provisions on Wage Payment and Withholding of Wages, not the provisions from which employers are exempt if they are covered by the FLSA (Minimum Wage, Youth Employment, and Record Keeping). *Id.* at 182–83. It held that the deduction for transportation was proper. *Id.* at 183–87. The court held that the employment contracts clearly excluded travel time and waiting time from compensation. Turning to Federal law, it held that the Portal to Portal Act did not require compensation for waiting time because it was preliminary or postliminary, and not part of a principal activity. The court relied heavily on the fact that class members were free to use their travel time as they wished, to travel by any means of transportation they wishes, and to take as long traveling as they wished, as long as they were at the work site on time. *Id.* at 190–91. The court held that defendant did not engage any of them to wait. It then turned to travel time, and set forth the Federal standards:

> Travel time is only compensable under The Portal to Portal Act if it is a principal activity of the employee. 29 U.S.C. § 254. Normal commuting from home to work and back is considered ordinary travel and not a "principal activity" absent a contract stating otherwise. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34 and 785.35 (2004). Travel from an employer's campus to the "actual place of performance" is noncompensable. 29 C.F.R. § 790.7(e) (2004). However, travel between job sites *after* work has begun for the day is compensable. *Wirtz v. Sherman Enterprises, Inc.*, 229 F. Supp. 746, 753 (1964) (emphasis supplied); 29 C.F.R. § 785.38 (2004).

Id. at 191. The court accepted a Federal court's determination that the important factors are "(1) whether workers were required to meet at the defendant's office before going to the job site; (2) whether workers performed labor before going to the job site; and (3) whether workers picked up and carried tools to the job site." It held that arriving to sign up for employment is not the same as an instruction to assemble at the office, and that no labor is performed at the office. *Id.* at 192. Defendant did provide protective equipment to employees after they were hired for the day. The court accepted the Federal distinction that hard hats, boots, and gloves, are like common hand tools and are not like specialized equipment. "The receipt of nonspecialized protective equipment does not make travel time compensable under 29 C.F.R. § 785.38. If its issuance constituted the beginning of 'hours worked,' employers could just wait until employees were at the job site before passing them out to save money." *Id.* at 192–93.

Hyman v. Efficiency, Inc., 167 N.C.App. 134, 605 S.E.2d 254, 10 WH Cases 2d (306 (N.C. App. 2004), *review denied*, 359 N.C. 851, 618 S.E.2d 239 (N.C. 2005), was to the same effect as *Whitehead v. Sparrow Enterprise, Inc., d/b/a Labor Finders*.

T. <u>Ohio</u>

Petty v. Wal-Mart Stores, Inc., 148 Ohio App.3d 348, 773 N.E.2d 576, 2002-Ohio-1211 (Ohio App. 2002), *review denied*, 96 Ohio St.3d 1466, 2002-Ohio-3910, 772 N.E.2d 1203 (Ohio 2002), affirmed the denial of class certification. Plaintiffs' first proposed class definition consisted of Ohio employees who had been subjected to the practices challenged during the

relevant period. The court found that the members of such a class could not be identified by reasonable effort, and that it would require an examination into the merits of each employee's claim to determine whether or not he or she was part of the class. Plaintiff's second proposed class definition was Ohio employees working for defendant during the relevant period. The court also disapproved this definition: "In our view, the problem with the expanded class proposed by Petty is not that its members are not identifiable. The problem is that it has been expanded so far beyond any rational relationship to the plaintiffs' theory of recovery that no common issues predominate." *Id.* at 355. Turning to commonality and predominance, the court stated:

> The issues in this case are individual to each putative plaintiff. For example, there is evidence that some of the plaintiffs were expressly required to work off the clock by their managers, while others perceived pressure and thought that they had to do so. Some of the plaintiffs testified that they merely chose to work off the clock. There are also issues regarding whether each of the managers in the more than one hundred Ohio stores knew that their employees were working off the clock, and whether they knowingly permitted them to do so. Also, there is evidence that some plaintiffs did not bother to clock in or out regardless of whether they took their breaks and meals, and that some purposely chose not to take their breaks and meals for reasons unrelated to work, e.g., some wanted to leave work early, so they skipped breaks and meals, and one putative plaintiff who was trying to quit smoking did not take breaks in order to avoid the temptation to smoke.
>
> Also, the evidence in the record indicates that the damages provable by each putative class member will vary widely. With regard to the issue of differing damages, we note that the "overwhelming weight of authority" indicates that class certification should not be denied solely on the basis of disparate damages. . . . However, disparate damages may present an adequate basis for denial in some cases. . . . In this case, the damages are not susceptible of class-wide proof because there is no acceptable method of computing the damages on a class-wide basis. The damages will be highly individualized and depend on the testimony of each employee to determine how many breaks or meals they missed, how much time they were required to spend working off the clock, as well as the amount of their wages. Therefore, we find that the disparate damages supports the denial of the class certification.

Id. at 356 (citation omitted).

U. Oregon

Gafur v. Legacy Good Samaritan Hosp. and Medical Center, 344 Or. 525, 185 P.3d 446 (Ore. 2008), held that employees who were not allowed a paid rest period for each four-hour period of work, but who were paid for the entire four hours, did not have a claim under the Oregon wage and hour laws. The court did not give deference to a contrary regulation of the Oregon Bureau of Labor and Industries.

Aguirre v. Albertson's, Inc., 201 Or.App. 31, 117 P.3d 1012 (Ore. App. 2005), involved a plaintiff who had unknowingly been a class member in a 20-state class action asserting both FLSA and state-law claims for off-the-clock work. That case was *In re Albertson's, Inc. Employment Practices Litigation*, MDL Docket No. 1215. She did not opt into the FLSA claims

in the MDL action in the District of Idaho, but the court held that her state0law claim was still covered by that action because she also did not opt out of the state-law subclass. Albertson's was defending and settling the Idaho action at the same time it was removing plaintiff's case to Federal court, and when it subsequently failed to object to remand of the case to state court in Oregon after plaintiff dismissed her FLSA claims with prejudice in order to obtain the remand. The MDL notice of proposed settlement was not sent to plaintiff's current address and she never received it. Finally, Albertson's made dishonest responses and objections to plaintiff's discovery requests, concealing the existence of the MDL action although a fair response would have required its disclosure. The court held that Albertson's had a duty to alert the MDL court, and the Federal and State courts in Oregon, of the existence of both cases, but failed to do so until after plaintiff had dismissed her FLSA claims with prejudice. The court held that plaintiff was not barred by claim preclusion, because Albertson's waived the defense of claim preclusion by its acquiescence in plaintiff's pursuing her claims in two fora: the Oregon individual action and the Idaho class action.

Wilson v. Smurfit Newsprint Corporation, 197 Or.App. 648, 107 P.3d 61 (Ore. App. 2005), involved defendant's sale of its facility to another company pursuant to an agreement under which the new company hired virtually all but five of defendant's employees. There were requirements of re-application and a drug test. Seniority was not carried over. The plaintiff class principally claimed that this was a termination entitling them to receive their canal paychecks one day after the sale. Because they received their final paychecks several days later, thet claimed penalties under Oregon law, consisting of one eight-hour day's worth of wages for each business day by which the payments were late, up to a maximum of thirty days. They also claimed improper deductions of health insurance premiums from their final paychecks. The court held that the sale of a business is treated as a termination under the Oregon statute even if the employee's employment continues under the new employer, and that the defendant had a statutory duty to accelerate the final payment of wages. It stated at 655–56:

> Further, even if some business sales might not result in termination, the present one surely did. The undisputed facts in the summary judgment record demonstrate that the transition between plaintiffs' employment with defendant and their employment with SP was not, as defendant contends, seamless. No plaintiff had a guaranteed job with SP. All had to apply for employment and submit to drug testing. Union members lost their seniority, with adverse consequences for their retirement dates and pensions. Further, defendant referred to plaintiffs' "employment termination date" in a notice occasioned by the pending sale, and it informed plaintiffs that its coverage of pension and insurance benefits would end as of November 10, 1999. By any measure, the employment relationship between defendant and all plaintiffs ended on that date.

The court rejected defendant's arguments drawn from Federal cases. It affirmed the lower court's grant of summary judgment on the issue. The court held that Veterans' Day counted as a regular business day for purposes of the statute, because the CBA and defendant and its non-union employees treated it as a regular work day. *Id.* at 657. It refused to give weight to contrary regulations: "We recognize that Bureau of Labor and Industries (BOLI) regulations define 'business day' in such a way as to exclude Veterans Day. . . . However, BOLI is not a party in this case and it does not have independent authority to enforce ORS 652.140; that statute carries a private enforcement mechanism," *Id.* at 657–58. While there is also a statute defining Veterans' Day as a holiday, "the private agreement between defendant and its employees

supersedes the statutory definition." *Id.* at 658. Plaintiffs' second set of claims for penalties for late payment arose from defendant's delayed payment to employees covered by the CBA of the thirty days' wages required by the CBA if defendant were to close the mill. "In the present case, defendant did not pay qualified union plaintiffs their severance pay until after the Ninth Circuit affirmed the arbitrator's order because, under the terms of the CBA, the obligation to pay the benefits arose only 'in the event the company should decide to close permanently the Newberg mill,' and defendant believed that the event had not occurred." *Id.* The court found that it was not clear whether the defendant's sale of the mill constituted a closure under the CBA, so the payments were not due on the day following the sale. It described the test of "willful" failures to pay: "The Supreme Court cases, then, establish that an action is willful if it is fully knowing, intentional, and voluntary. Clearly, a malicious action or one taken in bad faith qualifies. Equally as clearly, an employer does not act willfully if it acts without fully knowing that the historical circumstances triggering the obligation have occurred (for example, that the employee has quit) or if it acts based on an innocent miscalculation that is not careless." *Id.* at 662–63. The court summarized the cases:

> In contrast, an employer acts "willfully" when it has or should have the requisite knowledge at the requisite level but fails fully to pay the employee because it believes that some source of law external to ORS chapter 652—a personal debt, a term of the employment contract, or something similar—entitles the employer to reduce or eliminate the obligation. The reasonableness or good faith of that belief does not matter. . . . Put another way, an employer need not pay wages owed at termination if it reasonably believes that the employee cannot make a *prima facie* case that the wages are due and owing. However, the employer does not escape the obligation merely because it believes that it has an affirmative defense or counterclaim against the employee's claim—even if, in fact, such a defense or counterclaim exists. In such a case, the employer must pay the wages and then bring "a separate action for damages."

Id. at 665–66 (citation omitted). The court held that defendant's belief in its interpretation of the CBA became unreasonable after the arbitrator reached his decision. "Parties to a CBA submit disputes to arbitration in order to determine definitively the meaning of their agreement." *Id.* at 667. The court relied on the doctrine that judicial review of arbitration awards is narrow. "In light of that hyper-deferential standard of review, defendant either knew or should have known with a high degree of certainty that its appeals would fail. We therefore conclude that defendant acquired the requisite information on which to base its decision to pay severance benefits when the arbitrator's decision requiring it to do so became final." *Id.* The court reversed the lower court's denial of relief on these claims. The court rejected defendant's argument that Oregon Rule of Civil Procedure 32 barred class treatment of claims for minimum penalties. The relevant language was: "A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 USC 1640(a) or any other similar statute." The court agreed with plaintiffs that the referenced statutes were both consumer protection statutes, and held that the language "any similar statute" could not reasonably be construed to apply to all claims for statutory penalties, because the legislature could have so provided if it so desired. Next, the court held that defendant's deduction of medical insurance premiums for five days after the end of employment was an impermissible deduction. The purchaser of the facility also deducted premiums for the same days. The court pointed out that the form employees signed to allow the deduction of the premiums contemplated that the employees would be active employees for the periods covered by the premiums. The court held

that the lower court erred in denying the class's motion for summary judgment on claims for $200 and for the penalty of thirty days' wages. *Id.* at 669–72. Finally, the court held that the statutory penalties were subject to prejudgment interest at the statutory rate of 9% per annum. *Id.* at 672–74. The court held that the exception to prejudgment interest for damages not readily ascertainable commonly applies to punitive damages, but statutory penalties are readily ascertainable. *Id.* at 673–74. The court held that the interest began to run when the maximum thirty days' penalty had been incurred. *Id.* at 674. P.J. Edmonds concurred in part and dissented in part. *Id.* at 676–84.

Young v. Oregon, 195 Or. App. 31, 96 P.3d 1239 (Ore. App. 2004), *review allowed*, 338 Or. 57, 107 P.3d 1239 (Ore. 2005), concerned the right of salaried employees to overtime under an Oregon law repealed two years after its enactment. The Oregon Supreme Court has not yet issued its decision. Relying on analogies to the FLSA, the intermediate court held that there was no requirement or expectation that workweeks were standard 40-hour weeks, and that employees were entitled to overtime based on the regular rate in the context of fluctuating workweeks. Thus, their overtime compensation had to be based on their regular rates for all work done that week, and an additional half-time for hours worked in excess of 40 hours that week. *Id.* at 37–41. The court held that the State acted willfully, and was liable for penalty wages, with respect to employees whose employment terminated after the earlier appellate decision on liability for the named plaintiffs, but not to employees whose employment terminated before that decision. *Id.* at 41–49. The court re-affirmed prior case law to the effect that "if an employer has actual knowledge that it has an obligation to pay overtime or if such knowledge reasonably can be imputed to the employer, a good faith belief that it has an excuse for not paying overtime will not allow the employer to escape imposition of a penalty under ORS 652.150(1)." *Id.* at 43 (citation omitted). Finally, the court held that the State was immune to the claim prejudgment interest absent a specific provision subjecting it to such liability, and that there was no such provision in the overtime law.

V. Pennsylvania

Lugo v. Farmers Pride, Inc., __ A.2d __, 2009 WL 96139, 2009 PA Super 5 (Pa.Super. Jan. 15, 2009) (No. 582 EDA 2007), reversed the decision of the Philadelphia Court of Common Pleas and held that the Pennsylvania Minimum Wage Act required the payment of the minimum wage for the time of animal workers in donning and doffing protective gear.

Urbano v. Stat Courier, Inc., 878 A.2d 58, 2005 PA Super 190 (Pa. Super. 2005), reversed the grant of summary judgment on plaintiff's personal and class claims against one defendant for alleged violations of the Pennsylvania Wage Payment and Collection Law, and affirmed the grant as to another employer. If plaintiff was an employee, the court held, the private agreement to dispute pay claims within a short period was inoperative, because no private agreement can reduce rights under the statute. The court held that plaintiff had shown enough information to require trial on the issue whether he was an employee covered by the statute or an independent contractor not covered:

> The fault with the trial court's analysis is in its failure to recognize that evidence of the parties' relationship is not solely found in the agreements. Admittedly, the agreements identified Appellant as an independent contractor; however, Appellant's complaint alleged additional facts found outside the agreements. "[A]n agreement of the parties to a designation of their relationship that is contrary to the employer/employee

> relationship established otherwise is unavailing to effect a change." . . . While the terms of the agreement are relevant when identifying whether an employee/employer relationship exists, it is just one of the criteria to be utilized.

Id. at 62 (citation omitted).

W. South Carolina

Williams v. South Carolina Dept. of Corrections, 372 S.C. 255, 641 S.E.2d 885 (S.C. 2007), affirmed the dismissal of the prison-inmate class action under the South Carolina Payment of Wages Act. Defendant Williams Technologies, Inc., sponsored a prison workshop program, and pursuant to South Carolina law paid $4.00 per inmate-hour to the Department of Corrections. The Department both determined what was to be paid to inmates, as opposed to payments under restitution orders, for example, and paid the inmates. The court held that the sponsor was not the employer of the inmates because it did not pay them, and payment was the most relevant test under the Wage Payment Law. Judge Pleicones dissented. *Id.* at 888.

X. Tennessee

Posey v. City of Memphis, 164 S.W.3d 575 (Tenn. App. 2004), *appeal denied*, rejected the plaintiff firefighters' Equal Protection challenge to the calculation of their pensions, holding that there were sufficient differences between firefighters and law enforcement officers that differences in pension rights did not violate the Equal Protection Clause.

Y. Texas

Wal-Mart Stores, Inc. v. Lopez, 93 S.W.3d 548, 19 IER Cases 492 (Tex. App.-Houston, 14th District 2002), reversed the grant of class certification on claims for breach of an oral contract. "Appellees allege that due to uniform Wal-Mart policy they were required to work through rest and meal breaks and to work 'off-the-clock' without pay. Appellees seek to represent a class consisting of all current and former hourly employees who were employed by Wal-Mart and Sam's Club in Texas after June 23, 1996. There are 264 Wal-Mart and 61 Sam's Club stores in Texas. The proposed class consists of approximately 350,000 current and former employees." *Id.* at 552. The employee handbook stated that it did constitute a contract. Plaintiffs sued for breach of "a common oral contractual obligation to provide rest and meal breaks and to pay its hourly employees for all work performed." *Id.* at 553. The court held that individual issues would predominate over common issues. Its discussion of missed breaks typifies its approach:

> As in *Basco*, individual issues regarding the formation of 350,000 contracts in this case will predominate over any common issues. Appellees claim Wal-Mart made express contractual offers of rest and meal breaks during the orientation process. Because each orientation session was conducted by different Wal-Mart personnel at different stores, proof of an oral contract with each class member will require a determination of the terms of the contract through offer and acceptance. Any determination concerning a "meeting of the minds" necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did. A determination must also be made as to the authority of each Wal-Mart manager who allegedly made such an offer and each employee's belief regarding whether that manager

had or lacked authority to make the offer.

> Even if appellees establish Wal-Mart had 350,000 oral contracts to provide rest and meal breaks, individual issues regarding the alleged breach of each contract will also predominate over common issues. Affidavits of current and former Wal-Mart employees submitted by appellees raise individual issues. For example, a number of employees state they missed rest and meal breaks, but offer no explanation for why they missed their breaks, *i.e.*, whether store management required the employee to work through the break or whether the employee voluntarily chose not to take a break for personal reasons, or why no time adjustment request form was submitted to reflect the hours worked so the employee could be appropriately compensated.[2]
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> ———
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> [2] Wal-Mart submitted affidavit testimony from employees who state whether they take a rest break or if they take a shorter meal break is of their own choosing. Some employees state if they are called back to work before their rest break is over they can finish the break at a later time. If they are called back to work before their meal break is over, they can clock back in and are paid for that work or they can submit a time adjustment request form to reflect the extra time worked.

The court reached the same conclusion with respect to plaintiffs' claims of breach of an implied-in-fact contract, *id.* at 557–58, and as to off-the-clock work, *id.* at 558. The court rejected plaintiffs' effort to analogize their case to pattern-and-practice employment discrimination cases, and rejected FLSA precedents on approximations because the FLSA is not involved in this contract case. *Id.* at 559–60.

Z. Washington

1. Commonality

Weston v. Emerald City Pizza LLC, 151 P.3d 1090 (Wash. App. 2d Div. 2007), reversed the grant of class certification because of the lack of evidence of a common work pattern among the general managers in the class. Defendant relied on the executive exemption. Plaintiff contended the exemption was inapplicable because the managers generally did production work. The court found that "Weston fails to provide any evidence that Emerald City required all managers to perform mostly production duties, not managerial duties," and that it was his duty to do so. *Id.* at ¶ 20.

2. Administrative Exemption

Mitchell v. PEMCO Mutual Insurance Co., 142 P.3d 623, 629, 134 Wash.App. 723, 737 (Wash. App. 1st Div. 2006), affirmed the lower court's finding that casualty and property claims adjusters were exempt from overtime requirements under the administrative exemption. The court rejected plaintiff's argument that the lower court should have considered defendant's reclassification of automobile claims adjusters as nonexempt, in connection with considering whether casualty and property claims adjusters were exempt. The court stated: "The fact that PEMCO had reclassified its APD adjusters, who have different job duties than the casualty and property adjusters, then would not have aided the trial court in determining whether the job duties of casualty and property adjusters amounted to exempt administrative work." It held that differences in job duties The court also held that the three-year period of limitations applied to

wage and hour claims.

3. Outside Salesperson

Miller v. Farmer Bros. Co., 150 P.3d 598, 602, 136 Wash. App. 650, 12 Wage & Hour Cas.2d (BNA) 329 (Wash. App. 1st Div. 2007), affirmed the grant of summary judgment to the plaintiff class, and affirmed the lower court's fee award based on historical rates. The court held that Route Sales Representatives were not exempt outside salespersons, and were entitled to overtime. The court stated:

> Farmer Brothers' definition of "making sales" is too broad and must be rejected. If making a sale is nothing more than exchanging product for payment, then almost all deliveries would qualify as outside sales. There is no question that when a customer pays for and receives a product, a sale has occurred. But that does not necessarily mean that the RSR has "made" the sale. To "make" is defined as "[t]o cause (something) to exist." "Making sales" involves creating the sale—that is, persuading a customer to buy a product he has not already consented to buy.

(Footnote omitted.)

4. Application of Washington Law to Out-of-State Work by Washington Employees

Miller v. Farmer Bros. Co., 150 P.3d 598, 605–06, 136 Wash. App. 650, 12 Wage & Hour Cas.2d (BNA) 329 (Wash. App. 1st Div. 2007), affirmed the grant of summary judgment to the plaintiff class, and held that Washington wage and hour law generally applies to Washington employees working out of state.

5. Pay Parity for the Washington State School for the Blind

Delyria v. State, __ P.3d __, 2009 WL 200247 (Wash. Jan. 29, 2009) (No. 80602-1), reversed the Court of Appeals and held that only base salary was included within the meaning of "salary" in the Washington statute requiring pay for the teachers at the Washington State School for the Blind to be on a parity with teachers in local schools. The court held that supplemental payments for school district teachers who take on "additional time, additional responsibilities, or incentives" is not included within "salary" for that purpose.

AA. West Virginia

Gulas v. Infocision Management Corporation, 215 W.Va. 225, 599 S.E.2d 648, 21 IER Cases 876 (W.Va. 2004), reversed the denial of class certification on plaintiff's claim that defendant failed to pay the wages required by contract, and held that discovery is required before deciding class certification. The court also reversed the lower court's denial of plaintiff's motion to substitute class representatives to cure the problem that plaintiff was individually barred by *res judicata* from suing and acting as a class representative,

BB. Wisconsin

Champine v. Milwaukee County, 280 Wis.2d 603, 696 N.W.2d 245, 2005 WI App 75 (Wis. App. 2005), *review denied*, 700 N.W.2d 273, 2005 WI 134 (Wis. 2005), affirmed in part

and reversed in part the grant of judgment on the pleadings to defendant. The court held that defendant could not breach its contract with employees who had retired, by reducing sick-leave accruals and applying the reduction to work they had already performed prior to their retirement. "Although an employee does not automatically have the right to be paid for accrued sick allowance, an employer may provide a payout provision. Where that occurs, as in this case, such a benefit represents a form of deferred compensation that is earned as the work is performed. The benefit can be changed, but only as it is related to work not yet performed." *Id.* at 251. However, the court rejected the plaintiff class's claim that the reduction violated the Wage Claim Act with respect to current employees, entitling them to a 50% penalty. The court explained:

> Exactly when it is, and to whom, that the accrued sick allowance should have been paid, but was not, is not explained. The Class members who have retired have received either cash or the equivalent value of health insurance. The amount of their accrued sick allowance could be calculated at the date of their retirement; it was not subject to further adjustment because of illness or continued work. That is not true of the Class members who have not retired. The value of their accrued sick allowance is an unknown factor until the date of their actual retirement because it depends on both the person's income at retirement and the remaining accrued sick allowance that person has earned and not used. All that is "owed" today is an accounting entry. No unpaid payment of cash is presently due.

Id. at 253.