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I. COURTS DIVIDED OVER THE CERTIFICATION IMPLICATIONS OF *COMCAST*

In *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), cable subscribers filed a class action antitrust suit under four theories of liability. The District Court granted certification, but limited it to the single liability theory capable of class-wide proof. The damages model, however, was not limited to this single theory of anti-competitive behavior. Appealing certification, Comcast argued that individualized issues would predominate, because the model could not serve as common proof. The Third Circuit refused to address the issue, concluding (erroneously) that it overlapped with the merits of the case. The Supreme Court, not surprisingly, reiterated that courts must consider issues that bear on certification, even if they overlap with the merits. On this point, the Supreme Court's *Comcast* decision is little more than a reiteration of the instruction from *Dukes*, and prior cases, that courts must resolve fact issues that implicate certification. Of interest, however, was the Court's language about the ability of individual damage inquiries alone to preclude certification:

> And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.

Id. at 1433.

Three-way split following *Comcast*

Since *Comcast*, courts have gone in three directions. Some have denied certification on the grounds that individualized damage inquiries prevent common issues from predominating. *See, e.g., Fernandez v. Wells Fargo Bank, N.A.*., 2013 WL 4540521 (S.D.N.Y. Aug. 28, 2013) ("Even if the plaintiffs had come forward with evidence concerning a common policy, they would still be required to offer that some approach to damages satisfies the preponderance requirement."). Others find ways to distinguish *Comcast*, and cling to oft-quoted (but now suspect) language that individualized damage inquiries alone cannot defeat predominance. The Ninth Circuit took this position in *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013). The Court pointed to the Supreme Court's acknowledgement, in *Dukes*, that individualized claims for monetary damages belong in Rule 23(b)(3). The Court ignored,

however, the Supreme Court's admonition, in *Dukes*, about "Trial by Formula," and due process concerns when individualized issues are tried on a class-wide basis. While individual damages belong in 23(b)(3), and amounts can differ, they must nonetheless be established with common proof. In *Leyva*, the timekeeping system permitted an accurate calculation of damages for each and every class member. In fact, the employer used the system to calculate over $5 million in total class damages in order to remove the case to federal court under the Class Action Fairness Act. Thus *Leyva* is more properly understood as a case where *Comcast* did not apply, rather than a conclusion that individual damage inquiries comport with Rule 23.

In contrast to these two lines of authority, some courts have tried to craft a middle ground, certifying the class for liability purposes only under Rule 23(c)(4).[1] *See, e.g., Jacob v. Duane Reade, Inc.*, 2013 WL 4028147 (S.D.N.Y. Aug. 8, 2013). The legitimacy of this bifurcation approach is unclear.

Is bifurcation still permissible?

Even prior to *Comcast*, the circuit courts of appeal were split on whether a court could use Rule 23(c)(4) to isolate common issues, when common issues failed to predominate over the entire claim or action. Pre-*Comcast* precedent from the Second, Sixth, Seventh, and Ninth Circuits permit limited certification, while the Fifth Circuit has strictly applied the predominance requirement to the cause of action as a whole. It will be interesting to see whether these lines continue after *Comcast*. After all, there is little difference between a bifurcated order and the District Court's flawed order in *Comcast* to certify a single liability theory. The Supreme Court reversed the decision in *Comcast*, because the inability of class-wide proof of damages destroyed predominance and defeated the limited purpose of a class action. The fact that liability was a common issue was apparently irrelevant. While some courts like to quote the dissent from *Comcast*, it was, after all, the *dissent*.[2]

II. LEGAL STRATEGY REGARDING OFF-THE-CLOCK CLAIMS – MOTION TO DISMISS VERSUS MOTION FOR SUMMARY JUDGMENT

Off-the-clock claims are one of the most common claims employers face. Fortunately, there is a noticeable trend requiring plaintiffs to provide greater specificity in their allegations. This is based in part on the recognition that the FLSA does not cover "gap time" claims (claims for uncompensated work under 40 hours in a week). Simply alleging that work was performed without pay is insufficient, as the FLSA only provides relief for nonpayment of *overtime*. To establish liability under the FLSA for unpaid overtime, a plaintiff must prove that: (1) she performed overtime work for which she was not properly compensated, and (2) the employer had actual or constructive knowledge of that work. Earlier this year, two Circuit Courts of Appeal clarified the pleading and evidentiary requirements for such claims. *See Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013) ("To plead a plausible FLSA overtime claim, Plaintiffs must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week."); *Carmody v. Kansas City Bd. of Police Com'rs*, 713 F.3d 401, (8th Cir. 2013) (even under relaxed evidentiary burdens, such as when an employer fails to keep time records, plaintiffs have a prima-facie burden to establish specific dates and hours that unpaid overtime occurred, and compensation owed).

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[1] Federal Rule of Civil Procedure 23(c)(4) states: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."

[2] *See, e.g., Jacob*, 2013 WL 4028147 at *10 (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ. dissenting) (noting that individual damage calculations do not preclude class certification)).

The knee-jerk response to these cases is to file more motions to dismiss. There is often merit to this position, as courts now appear more receptive to these arguments. One recent example is *Pazda v. Blast Fitness Group Personal Training, LLC.*, 2013 WL 4659688 (N.D. Ill. Aug. 29, 2013). In *Pazda*, a fitness trainer challenging her classification as exempt from overtime brought claims under the FLSA and Illinois law. The defendant successfully moved to dismiss for failure to state a claim. According to the Court, dismissal is appropriate when the Complaint fails to properly alleged the overtime hours worked. The Court also dismissed the class and collective action claims, because "a class representative must have a cause of action in his own right in order to bring a class action." *Id*. at *4.

But employers should understand the downside to this approach. Pleadings can be amended. Deposition testimony is harder to change. If a court grants a motion to dismiss, it will almost certainly be with leave to amend. The plaintiff will then also be on guard (and may well be coached) to provide specificity in deposition testimony and interrogatory responses. Even if the testimony is false, credibility is an issue for the jury. For an employer, this costs money. It is little consolation that a court order denying summary judgment describes how the witness is not very credible. Rather than spend the money on a motion to dismiss, it may be cost effective to instead engage in targeted discovery on the named plaintiff's claim. If the employee refuses to provide the requisite specificity, summary judgment is appropriate. And the employee will not be able to file an affidavit with specificity that was not provided earlier. *See Carmody*, 713 F.3d at 405-07 (affirming summary judgment; appropriate to strike affidavits that attempted to establish the amount and extent of hours worked). Even if summary judgment is denied, the "fact issue" established by the plaintiff to survive summary judgment will almost certainly be individualized in nature, setting up a more solid defense to class certification.

With every litigation decision, an employer must weigh the costs and benefits of available options. It is incumbent upon counsel to discuss these options freely with the client at the outset. Only then can the client settle on an appropriate and cost-effective litigation strategy. If the plaintiff is likely incapable of providing any specificity, or if an offer of judgment is desired,[3] it may be best to file a motion to dismiss. Otherwise, summary judgment may be the best chance at securing finality of an individual action and/or defeating certification in the class or collective context.

[3] Another reason to file a motion to dismiss is to force specificity, thereby enabling an offer of judgment to the plaintiff, which can deprive the court of subject-matter jurisdiction. The feasibility, and pros and cons, of this approach is beyond the scope of this advisory. Even with some recent guidance from the Supreme Court, this is an unsettled area of law requiring consultations with counsel.