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'BELL II': HOW-TO GUIDE FOR WAGE-AND-HOURS LITIGATION

Focus Column
Employment Law
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With the attention of the wage-and-hour class-action bar focused on the upcoming decision of the state Supreme Court in Sav-on v. Superior Court, expected in 2004, the Feb. 9, 2004, decision of the 1st District Court of Appeal in Bell v. Farmers Ins. Exch., 2004 DJDAR 1440 (Bell III), took many by surprise. With the validity of employee class actions under review in Sav-On, Bell III wholeheartedly sanctions their use to recover wages for groups of employees.

More significant than the result, affirming a $120 million overtime award, the 58-page opinion is a how-to guide for trying wage-and-hour class actions using statistical sampling and extrapolation to prove class-wide damages. The court also dispelled employer arguments supporting the administrative overtime exemption and clarified the role of opinion letters by the state Division of Labor Standards Enforcement and U.S. Department of Labor, a hot issue for wage-and-hour lawyers.

Along with four current and former employees, Rose Bell filed a statewide class action on behalf of 2,402 claims representatives working in Farmers Personal Lines Division to recover overtime pay. Farmers classified these employees as "exempt" from state overtime laws under the administrative exemption.

Based on an extensive evidentiary showing that the claims representatives shared common questions of law and fact with respect to their claims for overtime, the trial court certified the class. The Court of Appeal dismissed Farmers' appeal from this unappealable order. Bell I.

The trial court granted the plaintiffs' motion for summary adjudication on the exempt-nonexempt issue. In a watershed decision leading to a procession of successful overtime class actions brought by claims representatives and adjusters, the Court of Appeal affirmed Farmers' liability for overtime. Bell v. Farmers, 87 Cal.App.4th 805 (2001) [Bell II].

The court found the claims representatives were engaged primarily in providing the claims adjusting services marking Farmers' core business. They fell "squarely on the production side of the administrative/production worker dichotomy," obviating the need to inquire whether they exercised the requisite discretion and independent judgment to fall under the administrative exemption.

Management of the damages-phase trial proved hotly contested. Based on the concept that liability on behalf of a class is founded on representative testimony, the plaintiffs proposed proof of classwide aggregate damages by representative evidence using statistical sampling. Farmers countered that differences in work schedules required that overtime damages recoverable by each class member be individually tried, declaring the necessity for 2,500 depositions. Both sides retained statisticians and completed 295 depositions. Extrapolating from this representative sampling, the two experts calculated average weekly overtime of 9.42 hours, with a 0.9 hours margin of error.

After one day of deliberation, the jury unanimously awarded $88,647,787 for time-and-a-half overtime and $1,210,337 for double time. The trial court entered a post-trial order distributing unpaid overtime of $90,009,209.12 plus prejudgment interest capped at $32,303,048 plus $24,584 per day until the judgment was entered, less costs and fees payable to class counsel as a percentage of the common fund and "service payments" (also denominated class representative enhancements, or incentive awards) to the named plaintiffs.

Payments to the employees providing deposition testimony forming the representative sampling would be made according to their testimony of overtime hours worked. Other payments would be made to those submitting proof-of-claim forms and providing statements of average weekly overtime hours worked. Payments would be based on these statements and information from the Farmers database. Class members would be given an opportunity to challenge individual awards, with unresolved disputes referred to a special master.

All of this sounds very orderly and logical, but what's noteworthy is that no published decisional authority describes procedures for trial or post-trial class management and distribution. Bell III now provides that guidance.

On appeal from the jury verdict, Farmers again challenged the nonexempt determination, citing a change in the law based on post-Bell II authority, as well as class certification and trial management using statistical sampling. The Court of Appeal sided with the employees on all three issues. In each area discussed, the court dismissed arguments repeatedly asserted by employers in class cases, providing clear guidelines for class certification and trial management procedure in future cases.

Farmers' first line of attack was that federal cases after Bell II outline a change in law regarding the administrative-production worker dichotomy superseding the law of the case from Bell II. It found Bothell v. Phase-Metrics Inc., 299 F.3d 1120 (9th Cir. 2002), Webster v. Public School Employees of Washington, 247 F.3d 910 (9th Cir. 2001), Palacio v. Progressive Ins. Co., 244 F.Supp.2d 1040 (C.D. Cal. 2002), compatible with Bell II and confirmed the continued efficacy of the administrative-production worker dichotomy. Finding an opinion letter issued by the Division of Labor Standards Enforcement more reliable than a subsequent opinion letter issued by the Department of Labor at the behest of insurers, the court refused to follow out-of-circuit authority relying on the department. The Court of Appeal affirmed that the claims representatives were nonexempt production employees entitled to overtime pay.

Nevertheless, the court took judicial notice of several Department of Labor opinion letters. It noted that, in contrast to notice-and-comment rule making, these letters "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Bell III, quoting Skidmore v. Swift & Co., 323 U.S. 134 (1944). This statement sheds light on the potential position of appellate courts with respect to employers' attacks and the governor's current review of Division of Labor Standards Enforcement opinion letters under Executive Order S-2-03 for allegedly violating of the Administrative Procedures Act as "underground regulations" not complying with public-comment requirements.

Farmers' class certification challenge asserted that individual questions predominated. Amici curae relied on language from Ramirez v. Yosemite Water

Co., 20 Cal.4th 785 (1999), that the exempt-nonexempt determination is a "fact-intensive" inquiry, commonly argued as a statement of policy disfavoring misclassification class actions. The court refused to make such a blanket interpretation, stating "close attention to the facts may require an individual adjudication of exempt status in certain cases while permitting a group adjudication in others." Bell III. Notably, Farmers had not asserted differences in class members' duties as a basis for opposing certification. Farmers had moved to decertify based on the presence in the sampling of noneligible employees not claiming any overtime, but the court found this did not defeat the predominance of common issues.

Farmers argued individual minitrials were required to adjudicate damages-related issues, such as overtime hours. The court dismissed this argument based on a long line of authority holding that the community-of-interest requirement is not defeated simply because each member of the class may at some point be required to demonstrate eligibility for recovery or the amount of individual damages. "[I]f 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." Bell III.

The court refused to find two thousand so-called "Berman" hearings brought by the Labor Commissioner superior to private class treatment. It flatly rejected the argument that average recovery of $37,394 was "too large" to be consistent with policies underlying adjudication of numerous claims often focusing on small potential awards. According to the court, "the size of individual claims does not necessarily have a bearing on the consideration of judicial efficiency favoring class actions." Bell III.

Providing the first detailed discussion of the use of statistical sampling in California class actions, the court found it was within the discretion of the trial court to issue trial-management orders using statistical sampling and extrapolation to calculate aggregate classwide damages. The trial court can weigh the imperfections of statistical inferences with the opportunity to vindicate important employee policies underlying minimum wage and overtime rights, without clogging the courts or deterring small claimants with the cost of litigation. The court cited public-policy considerations noted in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), as authorizing a reduced standard of proof for overtime damages.

Farmers' critique that statistical sampling violated its due-process rights to have damages established accurately was rejected. The court found

Farmers' position "at odds with the growing acceptance of scientific statistical methodology in judicial decisions and scholarship." Bell III. However, it reversed the portion of the judgment awarding $1,210,337 for double-time compensation after concluding that due-process concerns satisfied with respect to the time-and-a-half calculations were not met.

Finally, the court affirmed the award of attorney fees as a percentage of the common fund, confirming the propriety of this method of calculating fees in California wage-and-hour class cases.

The Supreme Court will weigh in with the final word on misclassification class-certification procedure in Sav-On v. Superior Court. In the meantime, the unanticipated guidance Bell III provides marks a big step in the development of practical standards for effective class trial management. Unless the Supreme Court whisks it away, Bell III is a must-read for all wage-and-hour class-action attorneys. The full opinion covers a great deal of ground and merits a close reading.

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