Employer Update

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Car Dealership Case Drives Expansion of Overtime Exemptions

By Ami G. Zweig

In This Issue

For nearly 60 years, binding Supreme Court precedent required federal courts around the country to "narrowly construe" the exemptions to the overtime pay requirements under the Fair Labor Standards Act. This doctrine meant that such exemptions were to be construed "against the employers seeking to assert them," and their application limited "to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). But as of April 2, 2018, in a development that could benefit employers across the country, that doctrine is no more.

Faced with what could have been just the limited question of whether service advisors at a California car dealership fall under the FLSA's exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," the Supreme Court, in a 5-4 decision along ideological lines, took out its machete rather than its scalpel and held not only that service advisors fall under the exemption, but that the old "narrow construction" doctrine must give way to a new "fair reading" doctrine. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). Thus, in one fell swoop, the Court transformed a case that might have otherwise had ramifications only for car dealerships and their service advisors into a decision that could affect the FLSA exemption status of an exponentially larger population, and that employers will surely seek to use as authority for reexamination or expansion of other exemption categories.

The *Encino Motorcars* Decision

To understand what an "automobile service advisor" is, one need look no further than Chief Justice Roberts's description at oral argument of his hypothetical service advisor, Fred: "if you … dropped your car off whenever you're supposed to or whenever it's broken … you talk to Fred about getting it fixed." Transcript of Oral Argument at 35:10-12, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (No. 16-1362). In other words, service advisors do not sell cars or service cars, but rather, "interact with customers and *sell them services* for their vehicles." *Encino Motorcars*, 138 S. Ct. at 1138 (emphasis added) (citation omitted).

The question before the Supreme Court was largely one of statutory construction: whether the Ninth Circuit was correct in applying the so-called "distributive canon" to the FLSA exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Applying the

distributive canon to this text, the Ninth Circuit matched "salesman" with "selling" and "partsman" and "mechanic" with "servicing," and concluded that the exemption therefore does not include *salesmen* primarily engaged in *servicing*. The Supreme Court, in its decision authored by Justice Thomas, rejected the Ninth Circuit's reasoning, explaining that "the use of 'or' to join 'selling' and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity." *Id.* at 1141. Thus, the exemption covers a "salesman … primarily engaged in … servicing automobiles," which, as the Court held, is "an apt description of a service advisor." *Id.*

While the Court could have ended its analysis there and ruled against the service advisors based solely on its rejection of the distributive canon's applicability, the Court went out of its way to also address the Ninth Circuit's "invo[cation] of the principle that exemptions to the FLSA should be construed narrowly." *Id.* at 1142. Notwithstanding that this doctrine arose from the 1960 Supreme Court decision in *Arnold v. Ben Kanowsky* (which the *Encino* majority opinion did not acknowledge), the Court "reject[ed] this principle as a useful guidepost for interpreting the FLSA" because it "relies on the flawed premise that the FLSA pursues its remedial purpose at all costs." *Id.* (citations and quotation marks omitted). Noting that the FLSA "has over two dozen exemptions," the Court declared that the exemptions "are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* Justice Ginsburg took issue with this reasoning in dissent, opining that the "narrow construction" doctrine is a "well-grounded application of the general rule that an 'exception to a general statement of policy is usually read ... narrowly in order to preserve the primary operation of the provision." *Id.* at 1148 n.7 (quoting *Maracich v. Spears*, 570 U.S. 48, 60 (2013)). Nonetheless, the majority opinion concluded that courts "have no license to give the exemption anything but a fair reading." *Id.* The Court did not opine on what a "fair reading" means, but left no doubt that saying farewell to the "narrow construction" doctrine is a turn of the tide in favor of employers.

Implications of *Encino Motorcars*

In just the first month after the Supreme Court decided *Encino*, the opinion was cited by at least eight federal district courts in FLSA exemption cases. For example, the District of Nebraska applied *Encino*'s "fair reading" doctrine in holding that a network engineer at an insurance company was exempt under the FLSA's "computer employee" exemption. *Friedman v. Nat'l Indem. Co.*, 2018 WL 1954218, at *5 (D. Neb. Apr. 13, 2018).

From a broader perspective, the potential impact of the Supreme Court's rejection of the "narrow construction" standard in favor of a "fair reading" standard should be assessed in the context of the current administration and the U.S. Department of Labor's ("DOL") recent activities intended to roll back many of the pro-employee initiatives from the prior administration. While the Supreme Court's decision is separate, of course, from the administration's policy-driven activities, taken together these changes evince a pro-business trend on developments in wage-and-hour law.

A significant example of such recent activities is the new administration's continued lack of support for the Obama-era rule that would have more than doubled the salary threshold for overtime pay eligibility. That rule was halted by a nationwide preliminary injunction issued by a federal district court in Texas in November 2016 (as we reported on in the January 2017 *Employer Update*). Under the prior administration the DOL had immediately appealed the preliminary injunction ruling to the Fifth Circuit, but under the new administration, the DOL narrowed the scope of its appeal to ask that the court only "reaffirm the [DOL's] statutory authority to establish a salary level test" but "not address the validity of the specific salary level set by the 2016 final rule ($913 per week), which the [DOL] intends to revisit through new rulemaking." Reply Brief for Appellants at 23, *Nevada v. United States Dep't of Labor*, No. 16-41606 (5th Cir. June 30, 2017).

While that narrowed appeal was pending, the district court issued a summary judgment order invalidating the 2016 final rule. *Nevada v. United States Dep't of*

Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017). That development led the DOL to voluntarily dismiss its pending appeal of the preliminary injunction order and file a new appeal of the summary judgment order, while simultaneously asking the Fifth Circuit to stay the new appeal (which the court soon did) as the DOL "revisit[s] the salary level set by the 2016 final rule" and collects "public input on questions regarding the salary level test and related issues." Unopposed Motion for Voluntary Dismissal of Interlocutory Appeal as Moot, *Nevada v. United States Dep't of Labor*, No. 16-41606 (5th Cir. Sept. 5, 2017); Unopposed Motion to Hold Appeal in Abeyance Pending New Rulemaking, *Nevada v. United States Dep't of Labor*, No. 17-41130 (5th Cir. Nov. 3, 2017). As the DOL continues to review the public input received on this issue, many commentators expect the DOL to propose a new salary threshold that would be higher than the existing level ($455/week) but lower than the level set forth in the 2016 final rule ($913/week).

Other recent DOL initiatives intended as business-friendly abound. For example:

- In June 2017, the DOL announced that it would be reinstating its prior practice (abandoned since the final days of the Bush administration in January 2009) of issuing opinion letters to businesses that raise questions about wage-and-hour compliance. *See* June 2017 DOL press release. That decision led to the DOL's reissuance, in January 2018, of 17 opinion letters that had previously been issued during the Bush administration and then withdrawn during the Obama administration, and to the issuance in April 2018 of two new opinion letters regarding compensability of rest breaks and travel time. *See* list of DOL opinion letters.
- In March 2018, the DOL launched a pilot program that allows employers to self-report violations of the federal overtime or minimum wage laws and then compensate their employees' for back wages due in exchange for a release of claims, without the risk of liquidated damages or costly litigation. *See* DOL program overview.
- According to a recent report, the DOL intends to issue new guidance instructing investigators at the Office of Federal Contractor Compliance Programs to conduct their pay audits of federal contractors based on job categories set by the companies, rather than having the investigators make their own determinations regarding appropriate job categories for wage comparison purposes (as was the policy during the Obama administration). Ben Penn & Porter Wells, *Labor Dept. to Relax Obama Pay Bias Policy, Hand Reins to Businesses*, Bloomberg Law (Apr. 19, 2018), available here.

Employer Takeaways

The *Encino* decision is significant because it changes 60 years of precedent on an issue that applies to every employer in the country, and comes at a time when the administration is taking numerous other measures intended to help businesses. Of course, only time will tell just how significant the impact of *Encino* proves to be, as it will be up to the courts to assess how a "fair reading" differs from a "narrow construction" and the extent to which that doctrinal shift moves the needle in any given misclassification case. Undoubtedly, employers faced with challenges to their exemption classifications will seek to use *Encino* as a shiny new tool in their tool belt, and may feel emboldened in doing so by the right-leaning Supreme Court and the intended pro-business initiatives of the current administration.

Still, employers should not relax their wage-and-hour compliance policies or make any drastic changes to their exempt/non-exempt classifications based on *Encino*: while the way in which the statute will be construed has changed, the requirements of the federal exemptions themselves remain unchanged. Moreover, employers must also keep in mind any applicable state labor laws, the construction of which would not be affected by the *Encino* decision. Nevertheless, over the ensuing months and years as federal courts issue new decisions applying *Encino*, employers may begin to see that certain job classifications can be revisited as a result of the "fair reading" doctrine.

The Ninth Circuit Holds that Class Certification Evidence Need Not be Admissible

By David R. Singh, Audrey Stano, and Shawn McNulty

Although the U.S. Supreme Court has made clear that a district court must conduct a "rigorous analysis" to confirm that the requirements of Rule 23 are met[1] and that a plaintiff seeking class certification must "affirmatively demonstrate" compliance with the Rule,[2] the Ninth Circuit has lowered the bar for the type of evidence that a plaintiff may rely upon to support a class certification motion. On May 3, 2018, in *Sali v. Corona Regional Medical Center*, the Ninth Circuit reversed a district court's denial of class certification in a putative employment class action, including because the district court abused its discretion in declining to consider evidence on the grounds of inadmissibility.

The Allegations and District Court Decision

Marilyn Sali and Deborah Spriggs (collectively, "Plaintiffs") are registered nurses ("RNs") formerly employed by Corona Regional Medical Center ("Corona"), an acute care hospital.[3] They filed a putative class action complaint alleging that Corona and UHS-Delaware, a healthcare management company that manages and provides administrative support to Corona (together with Corona, "Defendants"), violated California state wage-and-hour laws.[4] They purported to bring these claims on behalf of a general class and seven subclasses tracking their specific allegations.[5]

Defendants opposed class certification on multiple grounds, including because (i) Plaintiffs' proposed subclasses failed Rule 23(b)'s requirement that questions of law and fact predominate over individualized questions and (ii) Plaintiffs did not satisfy Rule 23(a)'s typicality and adequacy requirements.[6]

Judge Philip S. Gutierrez of the Central District of California denied Plaintiffs' motion for class certification, agreeing with Defendants in nearly all respects. Perhaps most significantly, he held that the Plaintiffs had not carried their burden under Rule 23(a) of demonstrating that the injuries allegedly inflicted by Defendants on Plaintiffs are similar to the injuries of the putative class members because Plaintiffs did not offer any admissible evidence of Plaintiffs' injuries in their motion for class certification.[7] Specifically, he emphasized that Plaintiffs themselves had not submitted any sworn declarations with their motion. Instead, they relied entirely upon an inadmissible declaration from a paralegal for Plaintiffs' counsel concluding that, based upon the paralegal's analysis of timekeeper and payment reports (which were not attached to the declaration), Plaintiffs were harmed as a result of Defendants' employment practices.[8]

The Ninth Circuit's Reversal

The Ninth Circuit reversed the district court decision in all material respects.[9] Most significantly in terms of precedential impact, it held that the district court abused its discretion in declining to consider evidence of typicality solely on the basis that it would be inadmissible at trial.[10]

In support of this holding, the Ninth Circuit noted that a class certification order is "tentative," "preliminary," and "limited" and that "the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery [and] [l]imiting class-certification stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence."[11] It elaborated that whether class evidence is admissible should go to the weight of the evidence, but must not be dispositive, and that the district court should instead evaluate the "persuasiveness of the evidence presented" at the Rule 23 stage.[12]

This holding is a bitter pill to swallow for the defense bar. While class certification orders are theoretically tentative, preliminary, and limited, the practical reality is that they are often outcome-determinative. When a class is certified, many – if not most – defendants settle given the enormity of potential of exposure to a class, irrespective of the merits of a case. Indeed, trials in class actions are extremely rare. Moreover, the rationale that it would be unfair to require plaintiff to proffer admissible evidence before the close of

discovery ignores the reality that, in most class actions, extensive discovery (especially bearing on Rule 23's requirements) occurs before the class certification motion. Indeed, lack of discovery from defendants surely did not preclude the named Plaintiffs in the *Sali* case from submitting declarations of their purported harm with their class certification motion.

Furthermore, as noted in the opening paragraph above, the Ninth Circuit's holding contravenes the spirit of the U.S. Supreme Court's holdings that a district court must conduct a "rigorous analysis" to confirm the requirements of Rule 23 are met[13] and that a plaintiff must affirmatively demonstrate compliance with Rule 23's requirements; *i.e.*, that there are *in fact* sufficiently numerous parties, common questions of law or fact, and adequate representative parties.[14] Moreover, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court observed that it "doubt[ed]" the district court's conclusion "that *Daubert* did not apply to expert testimony at the certification stage[,]"[15] which suggests that the Federal Rules of Evidence do apply at the class certification stage.

A Deepening Circuit Split and Potential U.S. Supreme Court Review

Joining the Eighth Circuit,[16] the Ninth Circuit's decision deepens a circuit split regarding the admissibility of evidence at the class-certification stage. On the other side of the split, which includes the Fifth Circuit and the Seventh Circuit, courts have required evidence submitted in support of a class certification motion to be admissible.[17] Similarly, the Third Circuit requires that expert evidence submitted in support of a class certification motion to satisfy Rule 702 – the federal standard expert witnesses must meet – when introducing experts at the class-certification stage.[18]

This circuit split may ultimately prompt the U.S. Supreme Court to grant certiorari and resolve the issue. In 2013's *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), the Supreme Court granted certiorari on the question of whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis, but ultimately decided the appeal on other grounds.[19] *Sali* may provide the Court with another opportunity to decide the issue.

We will continue to monitor the case, including any appeals, and will update you on any developments.

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[1] *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

[2] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

[3] *Sali v. Universal Health Services of Rancho Springs, Inc.*, Case No. CV 14-985 PSG (JPRx), 2015 WL 12656937, *1-2 (C.D. Cal. June 3, 2015).

[4] *Id.*

[5] *Id.*

[6] *Id.* at *3.

[7] *Id.* at *10.

[8] *Id.* at *10-11.

[9] *See Sali v. Corona Reg'l Med. Ctr.*, No. 15-56460, 2018 WL 2049680 (9th Cir. May 3, 2018).

[10] *Id.* at *6.

[11] *Id.* at *5 (*citing In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2001)).

[12] *Id*. at *5, 7; *see id*. ("Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification."); *id*. at *6 ("[T]he 'manner and degree of evidence required' at the preliminary class certification stage is not the same as 'at the successive stages of the litigation'—*i.e.*, at trial."); *but see id*. at *7 ("The court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence.").

[13] *Gen. Tel. Co. of the Sw.*, 457 U.S. at 161.

[14] *Id.* at 156.

[15] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2553-2554.

[16] *In re Zurn Pex Plumbing*, 644 F.3d 604.

[17] *See Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005); *see also Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802 (7th Cir. 2012).

[18] *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015).

[19] *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

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