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Motions Practice: Second Circuit Affirms That Partial Response to a Motion for Summary Judgment Implies Abandonment of Remaining Claims

When a defendant seeks summary judgment on multiple claims, but the plaintiff responds without addressing each claim raised, a district court may properly grant summary judgment on the unaddressed claims. In *Jackson v. Federal Express*, No. 12-1475-cv (2d Cir. Sept. 9, 2014), the plaintiff employee filed disparate treatment and retaliation claims against her employer. The employer moved for summary judgment on all claims, but the employee's response only addressed the retaliation claims. The district court concluded that the employee's failure to address the non-retaliation claims was a tacit admission that there were no issues of fact as to these claims and granted summary judgment on that basis. The Second Circuit affirmed on appeal, holding: "a partial response arguing that summary judgment should be denied as to some claims while not mentioning others may be deemed an abandonment of the unmentioned claims."

Class Actions: Ninth Circuit Affirms Class Certification Based On Valid Statistical Sampling For Liability, But Not Damages

In a recent wage and hour class action, the Ninth Circuit affirmed a class certification order under Federal Rule of Civil Procedure 23(b)(3) on the ground that "statistical sampling of class members could accurately and efficiently resolve the question of liability." *Jimenez v. Allstate Ins. Co.*, No. 12-56112 (9th Cir. Sept. 3, 2014). The class was defined to include five different types of claims adjusters (about 800 Allstate employees) in 13 offices in California. The state-law liability questions turned on whether Allstate had a practice or policy of requiring the class to work unpaid, off-the-clock overtime in violation of California law.

The Ninth Circuit rejected Allstate's arguments that its due process rights would be violated because it could not raise affirmative defenses at trial and that the use of statistical sampling contradicts *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). The Ninth Circuit explained that since *Dukes* and *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), "circuit courts including this one have consistently held that statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." In the case before it, the Ninth Circuit emphasized that the class certification order preserved Allstate's opportunity to raise any individualized defenses (e.g., a class member only performed *de minimis* amounts of off-the-clock overtime) during the damages phase of the proceedings.

Class Actions: Tenth Circuit Suggests A Different Understanding Of Dukes In Affirming Class Certification In Antitrust Case

The Tenth Circuit recently affirmed class certification and a \$400 million class-wide damages award (trebled to over \$1 billion) against the Dow Chemical Company in *In re Urethane Antitrust Litigation*, No. 13-3215 (10th Cir. Sept. 29, 2014). In *Urethane*, polyurethane purchasers advanced a price-fixing theory and sought

damages based on the "impact" of the alleged antitrust injury. Plaintiffs offered an expert model that purported to calculate prices in a competitive market, compared those prices to the actual "overcharge" prices, and extrapolated damages to the entire class. Dow challenged the trial court's decision to allow the class to proceed on this basis, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). But the Tenth Circuit distinguished *Dukes* in a different way than the Ninth Circuit in *Jimenez* (discussed above). Here, the court noted that the plaintiffs "did not seek to prove Dow's liability through extrapolation" but only to "approximate damages" which *Dukes* "does not prohibit." The court also rejected *Comcast's* application, noting that whereas in *Comcast* the district court had to determine before trial whether the plaintiffs could prove class-wide damages, here "the district court did not need to predict what would predominate at trial because by the time Dow raised this issue, the trial had already taken place." The precedential effect of this part of the decision is unclear, however, given that court went on to explain Dow waived certain decertification arguments or raised them too late.

After addressing class certification, the court also went on to affirm the jury verdict of \$400 million, rejecting Dow's Seventh Amendment argument on the grounds that "Dow has no interest in the method of distributing the aggregate damages award among the class members."

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