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California Appellate Court Permits Use of Statistical Sampling to Prove Class Certification

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Statistical sampling has always been an effective and efficient way for plaintiffs to establish class action liability in California. After some hope that a 2011 decision by the Supreme Court of the United States might hamper that ability, a California appellate court has reaffirmed statistical sampling as a viable method available to class action plaintiffs to prove their cases.

On November 21, 2016, California's Second District Court of Appeal ruled that wage-and-hour plaintiffs are not barred from using a sample of statistical evidence as a basis to prove class certification and permitted the use of such evidence in a class action brought by a class of 10,000 to 13,000 security officers against their employer.

The decision in *Lubin v. The Wackenhut Corp*., B244383 (November 21, 2016) limited the application of the Supreme Court's employer-friendly decision in *Wal-Mart Stores, Inc. v. Dukes* 564 U.S. 338 (2011). In *Wal-Mart*, the Supreme Court had reversed a grant of class certification as to 1.5 million female employees alleging gender discrimination, ruling that a lower court's reliance upon statistical sampling had been misplaced. The trial court in *Lubin* had initially granted plaintiff's motion for class certification, but then reversed itself, based upon the then-newly decided *Wal-Mart* case. The Second District last week reversed that decision, restoring instead the trial court's original decision to certify the class.

The plaintiffs in *Lubin* alleged that the putative class members had signed written on-duty meal period agreements that did not include certain required revocation language. Rather than review each relevant agreement, the parties agreed to a statistical sampling of agreements, and to extrapolate the extent of compliant language to the entire class. After *Wal-Mart* was decided, however, the employer moved to decertify the class, contending that statistical sampling was now improper. The trial court agreed, and decertified the class.

Quoting a new Supreme Court case from 2016, the Second District in *Lubin* ruled that "*Wal-Mart* does not 'stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.'" Rather, the admissibility of statistical sampling depends "on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." Statistical sampling, the court concluded, may not have been sufficiently reliable in the *Wal-Mart* case (which was a Title VII gender discrimination case), but it was sufficiently in probative in this

wage-and-hour matter.

Lubin therefore clarifies that statistical sampling can still be used in limited circumstances to establish liability, subject to the relevancy concerns articulated in *Wal-Mart*. It is one more weapon available to plaintiffs' attorneys to prove class action claims, and is not summarily barred as the trial court had held in this case.

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Stuart D. Tochner is a shareholder in the firm's Los Angeles office, and has represented businesses and employers for over 25 years. Mr. Tochner's career is dedicated to counseling and defending employers in nearly all employment-related matters, and he represents their interests in both state and federal court, and before administrative judges and agencies. Mr. Tochner's employment litigation practice spans the breadth of the field, including wrongful termination, sexual...