Recent Trends in FLSA Class Action Litigation

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Agenda

I. "Hot" Wage and Hour Claims Employers are Currently Facing

II. Are You a Target for Plaintiffs' Counsel and State and Federal Agencies?

III. Independent Contractor Classification Issues

IV. Class Action Requirements and Strategies for Beating the Class

V. The Influence of Dukes on Class Litigation: The Trickle Down Effect

Trends in Wage and Hour Class Action Suits

- Certain industries tend to lend themselves to particular types of wage and hour class actions.
  - **Hospitals/Healthcare Workers:**
    - Meal Break Cases
    - Why?
      - The nature of the work nurses and other healthcare workers perform gives rise to a level of unpredictability in terms of scheduling meal breaks, particularly when there is an acute or emergency situation involving patients.
    - What types of claims?
      - Failure to provide meal breaks and failure to compensate for meal breaks not taken. Many of the claims are centered on automatic payroll deductions for missed meal breaks.

Trends in Wage and Hour Class Action Suits *Cont*.

- **Restaurants/Service Industries:**
  - Tip Pooling Cases
  - Why?
    - Many of the non-supervisory employees in these industries are paid primarily by tips collected from customers in addition to a small hourly rate.
  - What types of claims?
    - Improper sharing of tips with management personnel who did not provide customer service, confiscation of tips by employers, and failure to properly allocate all "service charges" to the tipped employees.

Trends in Wage and Hour Class Action Suits *Cont*.

- **Manufacturing/Food Processing:**
  - Donning and Doffing Cases
  - Why?
    - The need for protective gear and clothing gives rise to claims.
  - What types of claims?
    - These claims usually arise out of employer policies that require employees to clock-in after they have dressed in protective gear and before they have removed such gear, leading to claims that the employer has not paid the employees for all hours worked.

Trends in Wage and Hour Class Action Suits *Cont*.

- **Retail:**
  - Overtime/Misclassification Cases
  - Why?
    - Retailers commonly classify low-level managers as exempt from overtime, making them susceptible to such claims.
  - What type of claims?
    - Most often a claim is made that supervisors are required to perform non-exempt work (e.g., stocking shelves, helping customers), therefore, they should be paid overtime.

“Hot” Wage and Hour Class Action Claims

Meal Breaks and Rest Periods

- The FLSA does not require meal breaks and the DOL recognizes that an employer need not pay an employee for a bona fide meal break. Shorter breaks, however, are compensable under the FLSA and often under state law.
  - In contrast, many state laws require that employees be provided with a meal break (usually an unpaid, 30-minute break) after a certain number of hours worked in a day.
- Many employers have policies or practices where the period of the meal break is automatically deducted from the number of hours worked (often in electronic payroll systems), resulting in a deduction from the employee’s pay, whether or not the employee actually took a meal break.
  - Many class actions are founded on the simple allegation that although the deduction occurred, the employer did not actually provide a meal break, or required employees to perform the functions of their job while on the break.

"Hot" Wage and Hour Class Action Claims *Cont.*

- For example:
  - **Federal Express Drivers' Class Action Settled for $5.2 Million**
    - Case/Jurisdiction: *Taylor et al. v. FedEx Freight Inc.*, 5:10-civ-02118, USDC N.D. California
    - Status: After attempts to decertify the class, cross-motions for Summary Judgment and a mediation that failed initially, the USDC for the Northern District of California approved a $5.2 million settlement between FedEx and the class in September 2011.

"Hot" Wage and Hour Class Action Claims *Cont.*

- **Rent-A-Center Managers Class Action Settled for $2.7 Million**
  - Case/Jurisdiction: *James v. Rent-A-Center Inc.*, Case No. BC450587, Superior Court in California, L.A. County
  - Status: The Court gave preliminary approval to a $2.7 million settlement in September 2011. As a result of the litigation, Rent-A-Center changed its policies to ensure that all employees are reimbursed for all off-the-clock work performed.

"Hot" Wage and Hour Class Action Claims *Cont.*

- **UniFirst Sales Rep Class Action Settled for $2.6 Million With $100,000 Set Aside for Civil Penalties**
  - Case/Jurisdiction: *Taylor v. UniFirst Corp. et al.*, 3:10-civ-02296, USDC, S.D. California
  - Status: Settlement of $2.6 million was approved by the Court in October 2011, including a $100,000 payment to the California Labor and Workforce Development Agency under the Private Attorney General Act for civil penalties.

Off-the-Clock Work

- These types of claims assert that the employer required work to be done or activities to be performed for the benefit of the employer during periods for which the employer did not pay the employee.
  - **Before or After Shifts or During Meal Breaks**
    - *Temporary Staffing Agency Settles Suit for Off-The-Clock Work for $2.75 Million*
      - Case/Jurisdiction: *Sullivan v. Kelly Services, Inc.*, 4:08-cv-03893, USDC N.D. California
      - Status: In September 2011, the Court approved a $2.75 million settlement, including five years of injunctive relief in which Kelly is required to pay at least the state minimum wage for time employees spend interviewing (unless state law changes during the period of the injunction).

Off-the-Clock Work *Cont.*

- *Class Action Against Unit of GE Settled for $1 Million*
  - Case/Jurisdiction: *Morales v. GE Osmonics Inc, et al.*, 3:10-cv-01045, USDC S.D. California
  - Status: In January 2012, the court certified the class for settlement purposes and approved a $1 million settlement agreement.

Donning and Doffing Claims

- ***Illinois Federal Court Certified a Class of Kraft Plant Employees***
  - Case/Jurisdiction: *Curry v. Kraft Foods Global Inc*., 1:10-cv-01288, USDC, N.D. Illinois
  - Status: In September 2011, the Court certified the class despite Kraft's allegations about the differences in the gear required, hours worked and practices of doffing gear while on the clock among the class members, finding that those were damages issues, not relevant to the certification of the class. In addition, the Court rejected arguments that the putative class representatives were inappropriate because they had purchased drugs on company property, lied on their job applications and engaged in workplace violence. However, in January 2012, the Court granted Kraft summary judgment based upon a collective bargaining agreement that excused Kraft from paying for time spent donning and doffing gear.

Donning and Doffing Claims *Cont.*

- ***North Carolina Federal Court Certified a Class of Smithfield Packing Co. Employees Despite <u>Dukes</u>***
  - Case/Jurisdiction: *Mitchell et al. v. Smithfield Packing Co., Inc*., 4:08-cv-00182; *Horne et al. v. Smithfield*, 5:09-cv-00042; and *Harris v. Smithfield*, 4:09-cv-00041, all in the USDC for the E.D. North Carolina
  - Status: The Court certified various classes in the cases in September 2011, rejecting the employer's arguments that factual differences between the class members precluded a finding of commonality or typicality in light of the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*. The Court rejected the argument, finding that the common policy of paying workers based upon scheduled times in the plants at issue made the cases dissimilar to *Dukes*, where "there was no single decision, policy or plan at issue."

Misclassification/Overtime Claims

- Most often a claim is made that low-level managerial staff or shift supervisors are misclassified as exempt by the employer in order to avoid the payment of overtime, but are required to perform non-exempt work. Alternatively, claims are made that the employees in the class were classified as exempt even though they do not qualify under any of the recognized exemptions. Therefore, the class asserts that they should be classified as non-exempt and paid overtime for all hours they worked in excess of 40 hours per week.
  - **JPMorgan Chase Settles Underwriter Overtime Case for $42 Million**
    - Case/Jurisdiction: *Davis et al. v. JPMorgan Chase & Co.*, 6:01-cv-06492, USDC W.D. New York
    - Status: In October 2011, the Court granted final approval to the $42 million settlement.

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Misclassification/Overtime Claims *Cont.*

- **Dick's Sporting Goods Settled Class Actions in NY and NE for $15.5 Million**
  - Cases/Jurisdictions: *Barrus v. Dick's Sporting Goods Inc.*, 05-cv-06253, USDC W.D. New York; *Stackhouse v. Dick's Sporting Goods Inc., et al.*, 8:10-cv-00421, USDC D. Nebraska
  - Status: Approval of the settlement was sought in January 2011 in the USDC for the Western District of New York, where a nationwide class action was filed. In July 2011, the Court certified the class action for settlement and granted final approval to the settlement.
- **JPMorgan Loan Officer Overtime Case Settled for $9 Million**
  - Case/Jurisdiction: *Kaminske et al. v. JPMorgan Chase Bank NA,* 8:09-cv-00918, USDC C.D. California
  - Status: The Court conditionally approved the settlement in September 2011, subject to a final application comparing the settlement amount to the likely recovery at trial. Plaintiffs' attorneys will receive $3 million in fees and $200,000 in costs. Motions related to the settlement and attorneys' fees were filed in January 2012 and are currently pending.

Misclassification/Overtime Claims *Cont.*

- **Owner of Supermarket Chain Found Personally Liable for $3.5 Million Class Action Settlement**
  - Case/Jurisdiction: *Torres et al. v. Gristede's Operating Corp. et al.,* 1:04-cv-03316, USDC, S.D. New York
  - Status: The Court granted final approval of a $3.5 million settlement in December 2010. Subsequently, in July 2011, the company filed a motion seeking modification of the settlement terms. The Court placed a motion for summary judgment concerning the personal liability of Gristede's owner back on the docket. In its ruling, the Court found that the owner was an employer under the FLSA and New York law, and found that he was jointly and severally liable for the overtime damages owed.
- **$2.2 Million Settlement for Natural Gas Operators and Controllers**
  - Case/Jurisdiction: *Lugliani v. Kinder Morgan G P, Inc., et al.*, 8:10-cv-01303, USDC C.D. California
  - Status: The Court tentatively approved the $2.2 million settlement, subject to justification by the plaintiffs' counsel of the $10,000 bonus payment to the class representatives.

Tips Claims

- There are a variety of wage and hour claims based upon tipping, including “tip pooling” cases, tip confiscation cases and cases where tipped workers assert that they were entitled to payment of the minimum wage for non-tipped work.
  - **Exotic Dancers File Class Action Against Penthouse Club for Confiscating Tips**
    - Case/Jurisdiction: *Hunter v. The Executive Club LLC et al.*, 1:11-cv-06465, USDC, S.D. New York; related case 1:10-cv-1145
    - Status: The case was filed in September 2011, and the plaintiff sought to join her claim with another class action pending against the club, which was allowed. Motions to file Amended Answers were filed in January 2012 and are pending.

Tips Claims *Cont.*

- **Supreme Court Refuses to Hear Appeal of Tip Credit Case Against Appelbee's**
  - Case: *Applebee's Int'l Inc. v. Fast, et al.*, 11-425, U.S. Supreme Court
  - Lower Court and Appellate Decision: A class of approximately 43,000 current and former servers and bartenders was conditionally certified in 2007, and the USDC (Missouri) agreed with the class that the servers/bartenders should be paid minimum wage for substantial non-tipped work (which comprised more than 20% of their total work time). The Eighth Circuit agreed, ruling that Applebee's violated the FLSA by failing to pay provide tipped employees the full minimum wage for general preparation and maintenance duties for which they could not be tipped. The Court held that a tip credit could not be used to offset the minimum wage requirement for non-tipped tasks.
  - Supreme Court Status: The Supreme Court refused to review the Eighth Circuit's decision, leaving the precedent in place, as well as a split in the circuits over this issue.

Failure to Pay PTO/Vacation Pay

- In many jurisdictions, state law requires employers to pay departed employees for earned, but unused personal and vacation time.
- For example:
  - **JPMorgan Settles Vacation Forfeiture Case for $9.2 Million**
    - Case/Jurisdiction: *Villegas v. J.P. Morgan Chase & Co. et al.*, 4:09-cv-00261, USDC N.D. California
    - Status: Preliminary court approval was sought in October 2011 for the $9.2 million settlement in which 80% of the settlement would go to the vacation pay sub-class. Motions concerning the settlement are currently pending before the Court.
  - **Kmart Settles Class Action by Part-Time Workers for Failure to Pay PTO**
    - Case/Jurisdiction: *Lopez v. Kmart Corp. et al.*, 2:09-cv-01334, USDC C.D. California
    - Status: Court approved the settlement of approximately $104,000 in October 2011.

Commissions/Minimum Wage

- The FLSA and many state laws permit employees to be paid based upon commissions only, provided that the employee's total compensation, divided by all hours worked in a given pay period, provides the employee with at least minimum wage for each hour worked. In addition, under the FLSA, in order for an employer to avoid payment of overtime to commissioned employees, other conditions must be met, including the following:
  - The employee must be employed by a retail or service establishment;
  - The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a work week; and
  - More than half the employee's total earnings in a representative period must consist of commissions on goods or services.

Commissions/Minimum Wage *Cont.*

- Unless all three conditions are met, the overtime exemption is not applicable, and overtime pay must be paid for all hours worked over 40 hours in a work week at one and one-half times the regular rate of pay (which is calculated by dividing total compensation paid, including commissions, by the number of hours worked by the employee).
  - **Commissioned Loan Officers Win $9 Million Award for Failure to Pay Minimum Wage and Overtime**
    - Case/Jurisdiction: *Daniels et al. v. Premium Capital Funding, et al.,* 08-cv-04736, USDC E.D. New York
    - Status: In September 2011, a jury awarded the class $4.5 million in damages, which the Court doubled to $9 million. The owners of Premium Capital were found personally liable as employers under the FLSA, but the claims against the unit manager were dismissed by the jury, finding that he could not be considered an "employer" within the meaning of the FLSA. Notices of appeal were filed in October 2011 by the owners of Premium Capital. However, in December 2011 the appeal was dismissed due to the owners' failure to file the necessary forms with the Second Circuit.

Are you in the Department of Labor's Crosshairs?

- In recent years, the federal Department of Labor ("DOL") has not been shy about announcing the targets of its enforcement actions.
- In 2010, the DOL announced an initiative aimed at identifying wage and hour violations in the healthcare industry.
  - According to the DOL, at that time, fewer than 36% of the healthcare employers investigated in the prior five (5) years were in compliance with the FLSA.
  - As a result of the DOL initiative, Plaintiffs' attorneys targeted hospitals and other healthcare institutions, soliciting employees from those employers to report abuses in order to initiate class action litigation.
- In a presentation to a group of attorneys in New York in February 2011, M. Patricia Smith, the Solicitor of Labor, announced that the DOL was targeting low-wage industries where subcontractors and franchise arrangements are prevalent for enforcement actions. Those industries included:
  - Restaurants
  - Hotels
  - Construction
  - Agriculture
  - Janitorial

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Are you in the Department of Labor's Crosshairs? *Cont.*

- The DOL's Budget in Brief for Fiscal Year 2011 disclosed the creation of a new multi-agency "Misclassification Initiative", which was designed to coordinate federal and state efforts to enforce labor law violations that result from the misclassification of employees as independent contractors. The Wage and Hour Division of the DOL requested $12 million for the Initiative so that 90 FTE support field investigators could conduct an additional 4,700 investigations. The initiative for FY 2011 was directed at industries with "misclassification characteristics," including:
  - Construction
  - Child Care
  - Home Health Care
  - Grocery Stores
  - Janitorial
  - Business Services
  - Poultry and Meat Processing
  - Landscaping
- The FY 2012 Budget in Brief upped the ante with a $15.2 budget for the Misclassification Initiative, 107 FTE support field investigators and a goal of another 3,250 investigations for the year. As in FY 2011, the focus was on "industries that have higher rates of violations," with the list of targeted industries remaining the same for FY 2012.

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Independent Contractors
A Legitimate Business Model Under Attack

- Independent Contractor Classifications Are Under Attack.
  - More frequent IRS and DOL audits.
  - Increased legislative efforts.
- The impetuous for the Attack.
  - Coopers & Lybrand study estimates that the federal government lost $34.7 billion in taxes between 1996 and 2004 because of worker misclassification.
  - Department of Labor study claims as many as 30% of businesses misclassify workers.
- The goal of the attack.
  - Close the loopholes (section 530 of the Revenue Act of 1978) and to identify the misclassifications.

Independent Contractors Misclassification Temptations

- Federal and state tax withholdings avoided (income taxes, social security, Medicare, etc.).
- No requirement for workers' compensation insurance.
- No expectation of fringe benefits, such as health insurance, vacation, and paid sick leave.
- Most labor and employment law do not apply.
  - Anti-discrimination statutes inapplicable.
  - Minimum wage and overtime laws do not apply.
  - Break laws regarding meal and rest period avoided.
- Administrative cost savings associated with payroll, recordkeeping and expense reporting/reimbursement.

Independent Contractors
How to Properly Classify

- What is an independent contractor?
  - There is no set definition. Employers must look for guidance from the interpretations of the courts and enforcement agencies.
  - The basic definition.
    - Employee – anyone who performs services for an employer if the employer can control what will be done and how it will be done.
    - Independent Contractor – where the employer has the right to control only the result of the work, not the means and methods (the where, when and how) of accomplishing the result.

Independent Contractors
How to Properly Classify

- The basic definition gets more complicated.
  - Revenue Ruling 87-41 – the “twenty factor test”
  - The “economic realities” test
    - Both are designed to look at the relationship as a whole, to get beyond the titles and labels and whether or not a 1099 or W-2 was issued.

Independent Contractors
How to Properly Classify

- Important Classification Considerations
  - Whether the work performed is part of the company's primary business or a distinct occupation separate from the company's other workers.
  - Whether the worker has a significant investment in his/her business with meaningful opportunity for profit/loss.
  - Whether the worker is paid on a project basis or on an hourly/weekly or other periodic basis.
  - Whether the worker provides his or her own tools, equipment and supplies and pays his/her own expenses.
  - Whether the business prevents the worker from working for others.
  - Whether the relationship may be terminated "at-will" or for failing to meet specific deliverables.
  - Whether the worker must be provided job specific training.
  - Whether the relationship is continuous and on-going or project based.
  - Whether the worker is provided benefits, such as health care insurance.

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Independent Contractors
The Costs of Misclassification

- Back taxes, state and federal, plus interest and penalties (social security, Medicare, unemployment, etc.).
  - Many of these back tax obligations are not dischargeable in bankruptcy.
- The domino effect:
  - The claim travels from one worker to the next and from one agency to the next.
  - It is easy to start the dominos. It may be as simple as a claim for unemployment or workers' compensation.
- Criminal penalties - criminal offense for a contractor to knowingly misclassify an employee as an independent contractor.
  - Criminal penalties exist in NY, NE, CT, IL, MA and NJ. Being proposed in PA.

Independent Contractors Legislative Efforts – The Attack

- ***Employee Misclassification Prevention Act of 2010***
  - Reintroduced on Oct 13, 2011
  - FLSA amendment
  - Notice obligations - of status classification and a DOL site providing information on employee rights.
  - Record keeping obligations - companies to keep detailed records of non-employees (hours worked, payments, classifications)
  - Penalties - civil penalties $1,100 per worker and up to $5000 per worker for willful. Anti-retaliation provisions
  - Punitives - treble damages for willful violations of the minimum wage or overtime laws for misclassified employees

Independent Contractors Legislative Efforts – The Attack

- **Playing Field Act of 2010**
  - Close the loophole – focus on limiting the applicability of section 530 of the Revenue Act of 1978.
    - Section 530 - relieves an employer of employment tax misclassification liabilities if the employer meets three requirements: (i) reasonable basis (judicial precedent, IRS ruling, past IRS audit or industry practice supports the classification); (ii) substantive consistency; and (iii) reporting consistency.
    - Recently used by FedEx to avoid a $319 million back tax assessment by the IRS related to FedEx's classification of its Ground Division drivers as independent contractors.
  - Other efforts to close the loophole.
    - Independent Contractor Proper Classification Act of 2007.
    - Taxpayer Responsibility, Accountability and Consistency Act of 2009.

Independent Contractors
Mitigating the Risk

- Document, document, document.
  - Utilize an independent contractor agreement.
  - Disclose the tax and benefit consequences.
- Enact practices and procedures consistent with the independent contractor relationship, including staff training.
- Periodically review classifications.
- Seek legal counsel on classification issues.

FLSA Class Standards

- Minimum wages / Overtime (more than 40 hours per week)
- Collective action
- Requires opt in
- Rule 23 does not apply
- "Similar situated" is the standard
  - Modest factual showing required
  - Of factual nexus between plaintiff's situation and that of other employees
  - Young v. Cooper Cameron Corporation, 229 F.R.D. 50 (S.D.N.Y. 2005)

Massachusetts

- Not time sensitive
- Notice to class members not required
  - Only as ordered by court
  - No opt out

Illinois

- Simple Statute
  - Numerosity
  - Commonality
  - Predominance
  - Adequacy
  - Appropriateness
  - No typicality
  - Exclusion as of right

New York

- Numerosity
- Commonality
- Typicality
- Superiority

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Factual Focus

- Wal-Mart
- In re Hydrogen Peroxide, 552 F. 3d 305 (3d Cir. 2008)
- Philips Petroleum v. Shutts, 472 U.S. 797 (1985)

Dukes v. Wal-Mart

- Reliance on allegations (*Eisen*) v. evidence (*Falcon*) → Rigorous analysis
- Any "competently crafted class action complaint literally raises common 'questions'"
- "Significant proof" of commonality required
- Evaluate the merits, as necessary

Dukes v. Wal-Mart
Now Applied In Many Contexts

- Pollution Cases
- Mass Tort Cases
- Wage/Hour Cases
- Consumer Fraud Cases
- Antitrust Cases

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Chinese Daily News v. Wang

- $7.7 million award under FLSA to California employees of Chinese Daily News

- Reversed by U.S. Supreme Court in unanimous decision → Injunctive and declaratory relief claims do not allow for monetary relief

Implications For Pre-Certification Discovery & Class Hearings

- More extensive inquiries into the merits
  - Merits determinations to be made as needed
  - Assess witness credibility
  - Bifurcation of discovery(?)
  - Injunctions classes – State v. Federal
- Evidentiary hearing – Live witnesses(?)
- Growing prevalence of *Daubert* motions at the class certification stage

Approaches to Certification

- Staged Discovery
- Trial Plan
  - Espenscheid v. DirectSat. USA, LLC, 09-cv-625bbc, 2011 WL 2009967 (D. Wisc., May. 23, 2011)
- Evidentiary Hearings

Approaches to Certification

- Beware of:
  - Bellwether trials
  - Test case
    - Select group of plaintiffs
    - Can be dispositive of all claims
    - Sommers v. Abraham Lincoln Federal Savings & Loan Assoc., 66 F.R.D. 581, 592 (E.D.Pa. 1975)
    - Byrnes v. IDS Realty Trust, 70 F.R.D. 608 (D. Minn. 1976)

Approaches to Certification

- Pre- Certification Summary Judgment
  - Owens v. Hellmoth & Johnson, PLLC 550 F. Supp. 2d 1060, 1070 (D. Minn. 2008)
  - Kerkhof v. MCI Worldcom, Inc., 282 F. 3d, 45, 55 (1st Cir. 2002)
- Submission of Expert Reports and Hearing

Approaches to Certification

- Choice of Jurisdiction
  - Pippins v. KPMG (S.D.N.Y. No. 11 Cir. 377, 1/13/12)
    - (Wal-Mart not applicable to FLSA)
  - Ulysses Aburto v. Verizon California, Inc., No. 11-03683, C.D. Calif., 2012 U.S. Dist. LEXIS 329) (Calif. Labor Code)
  - Margarita Rosales v. El Rancho Farms, No. 09-00707, E.D. Calif., 2011 U.S. Dist. LEXIS 142779 (Calif. Labor Code)
  - Martin Guillen v. Marshalls of MA, Inc., No. 9575, S.D.N.Y., 2012 U.S. Dist. LEXIS 4364

Hybrid Actions: Opt-In v. Op-Out Classes

- FLSA intent to limit class size v. expansive Rule 23
- More stringent Rule 23 certification standards
- Rules Enabling Act issues
- Implications for dismissals of state law claims in federal court

Communications With Putative Class Members

- Before class certification
- Before expiration of the opt-out period
- After expiration of the opt-out period
- Taking discovery from absent class members
- It is critical to consult your local jurisdiction's laws

Class Action Jurisdiction

- CAFA grants jurisdiction over class actions if the amount in controversy exceeds five million dollars in the aggregate, minimal diversity of citizenship exists, and the class contains at least 100 members. 28 U.S.C. §1332(d)(2).
- Subject to exceptions in the form of discretionary and mandatory remand provisions.
  - Plaintiff bears the burden to prove these exceptions by a preponderance of the evidence – *See In re: Hannaford Bros. Co. Customer Data Security Breach Litig*., 564 F.3d 75, 78 (1st Cir. 2009); *Kaufman v. Allstate N.J. Ins. Co*., 561 F.3d 144, 153 (3d Cir.2009); *In re Sprint Nextel Corp*., 593 F.3d 669, 673 (7th Cir. Jan. 28, 2010); *Westerfeld v. Indep. Processing*, LLC, 621 F.3d 819, 822 (8th Cir. 2010).

Thank you

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