IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

CHRISTINE DAVID and RODNEY CLURE, individually and on behalf of all others similarly situated, Plaintiff, v. BANKERS LIFE AND CASUALTY COMPANY, a foreign corporation; and ALBERT HAWKS, an individual, Defendants.	No. 11-2-21154-1 SEA MEMORANDUM DECISION GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

THIS MATTER having come on duly and regularly before the above-entitled court upon on Plaintiffs' Motion for Class Certification, and the court heard argument of counsel and considered all the briefs, declarations, exhibits and legal authorities. Plaintiffs motion is GRANTED.

WASHINGTON CLASS ACTION LAW

Plaintiffs seek class certification pursuant to Civil Rule ("CR") 23. Plaintiffs and the putative class of agents sold insurance policies in the State of Washington for Banker's Life and Casualty Company ("Bankers"). Bankers treated these agents as independent contractors. Plaintiffs argue they

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were employees under the Washington Minimum Wage Act, RCW 49.46, *et seq*. ("MWA) and were denied its protections of minimum wage and overtime pay.

Washington law favors resolution of cases through class actions, when appropriate. The requirements of CR 23 are liberally construed toward this end. Nelson v. Appleway Chevrolet, Inc., 160 Wash.2d 173, 157 P.3d 847 (2007). Often noted in favor of allowing certification is the "state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice". Scott v. Cingular Wireless, 160 Wash.2d 843, 851-52, 856-57, 161 P.3d 1000 (2007). Because a class is always subject to a later decertification, trial courts should err in favor of certification. Moeller v. Farmers Insurance Co. of Wash.,155 Wash. App. 133, 148 (2010), aff'd, 173 Wash.2d 264 (2011). However, the trial court must conduct a rigorous analysis of each of the CR 23 requirements to determine whether a class action is appropriate in any particular case. Miller v. Farmer Bros Co., 115 Wash. App. 815, 820, 64 P.3d 49 (2003).

RELEVANT SUBSTANTIVE LAW

Some Washington courts have found that wage and hour claims are well-suited to class action resolution. See, e.g., Pellino v. Brink's Inc., 164 Wash. App. 668, 267 P.3d 383 (2011). Courts in other jurisdictions, however, have found that the number of individualized issues in MWA claims can outweigh any efficiency that might be gained from class resolution. See, e.g., In re FedEx Ground Package System, Inc. Employment Practices Litigation, 273 F.R.D. 499, 513 (N.D. Ind. 2010). In Walker v. Bankers Life and Casualty Co., 2008 WL 2883614 (N.D. Ill. 2008), a federal district court considered a misclassification claim similar to the case at bar, brought against Bankers by its agents who argued they were employees, not independent contractors. The Walker court decertified the class because of variation in evidence among agents. Notably, the Walker decision was based on S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341, 769 P.2d 399, 256 Cal.Rptr. 543 (Cal.

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1989), where the California Supreme Court applied the "right to control" standard to claims under its version of the MWA. Significantly, the Washington Court of Appeals has rejected that standard: "Borello is not on point for the question that must be addressed by this court: what test should be applied under Washington's MWA?" Anfinson v. FedEx Ground Package System, Inc., 159 Wash.App. 35, 57, 244 P.3d 32, 43, aff'd. 174 Wash.2d 851 (2012).

The Washington Supreme Court has settled the question of the test to be applied under the MWA for determining whether workers are employees or independent contractors. In Anfinson v. FedEx Ground Package System, Inc., 174 Wash.2d 851, 281 P.3d 289 (2012), the Court adopted the economic dependence test. Anfinson, 174 Wash.2d 851. The Court explained that the MWA is remedial legislation and therefore is liberally construed. Anfinson, 174 Wash.2d at 870. Categorization of workers as independent contractors exempts those workers from coverage by the MWA. Id. A liberal construction, therefore, is one that favors classification as an employee. Id. The economic dependence test provides broader coverage than does the "right to control" test. Id.

The central question, Anfinson instructs, is whether the worker is economically dependent upon the alleged employer or is instead in business for himself or herself. Anfinson, 174 Wash.2d at 871. Relevant factors are:

(1) The degree of control exercised by the alleged employer;

(2) the extent of the relative investments of the worker and the alleged employer;

(3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer;

(4) the skill and initiative required in performing the job; and

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(5) the permanency of their relationship.[1]

Hopkins v. Cornerstone America, 545 F.3d 338, 343 (5th Cir. 2008); Anfinson, 174 Wash.2d at 869.

The factors are not exclusive and the determination must be made based upon the circumstances of the whole activity. Anfinson, 174 Wash.2d at 870-71. Regarding the degree of control factor, "[c]ontrol is only significant when it shows an individual exerts such control over a meaningful part of the business that she stands as a separate economic entity." Hopkins, 545 F.3d at 343.

CR 23 FACTORS

To certify a class, the trial court must make specific findings on the record with respect to each of the CR 23 factors. Schwenderman v. USAA Casualty Insurance Co., 116 Wash. App. 9, 19, 65 P.3d 1 (2003). They are: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy of representation. CR 23(a). Also required are that questions of fact or law must predominate, and that a class action is the superior procedure. CR 23(b)(3).

Numerosity

The class must be so large that joinder is not practical. Miller v. Farmers Bros., 115 Wash.App. at 821. Over 40 is presumptively too large for joinder. Pierce v. Novastar, 238 F.R.D. 624, 630 (W.D. Wash. 2006). Here the agents number 1,156. The numerosity factor is met.

Commonality and Predominance

The claims must arise out of a common course of conduct or common nucleus of operative facts in relation to all class members. Pellino v. Brinks, Inc., 164 Wash.App. at 683. The predominance requirement of CR 23(b)(3) is met where common questions of law or fact predominate over questions affecting only individual class members. Pellino, 164 Wash.App. at 683, fn.5.

[1] The Anfinson court cited Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979), which listed a sixth factor: "whether the service rendered is an integral part of the alleged employer's business".

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Here common questions predominate. All agents were classified as independent contractors in accordance with company policy and signed the same contract. All agents were paid under the same commission schedule. When an agent left Bankers, the policyholder remained the client of Bankers, not of the agent. In other words, agents did not have their own "book of business". Bankers prohibited agents from selling the products of competitor insurers. They were "captive" agents. Agents worked out of Bankers' offices or out of their home offices; none leased independent commercial space. These working conditions applied to all agents. This evidence bears on whether the agents were employees or in business for themselves. Anfinson, 174 Wash.2d at 871.

In addition, Bankers had a work and meeting schedule that agents were expected to follow. Bankers controlled distribution of sales "leads", provided standard telephone scripts, imposed restrictions on advertising and marketing, and expected completion of certain forms following sales calls.

Bankers points out differences among agents in application of its policies regarding outside employment, work hours, training, use of telephone scripts and monitoring of sales practices, use of standard marketing products, and the like. Bankers argues that such variation in working conditions among the agents precludes a finding that common issues predominate. However, some variation in work experience is expected in a MWA claim, and a narrow interpretation of the predominance requirement "would contravene the clear policy in this state that CR 23 should be read liberally in the interest of judicial economy." Miller v. Farmer Bros. Co., 115 Wash.App. at 827.

The pivotal issue is whether a trier of fact –despite this variation among agents of freedom from company policies– could still find economic dependence, the test of employee status under Anfinson. A trier of fact could do so. It was Bankers, not the agent, who determined whether an agent would be

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exempt from standard company policies. Whether, considering all the circumstances, the agents were or were not in business for themselves is a jury question.

Defendant's contention that the agents were exempt outside salespersons also does not defeat certification. There are common questions of fact, though disputed, whether agents were free to regulate their own work hours.

Typicality and Adequacy

Representative claims are typical if they are reasonably coextensive with those of absent class members. Typicality is satisfied if the claim arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Pellino, 164 Wash.App. at 684. Here, Ms. David and Mr. Clure were regarded as independent contractors, and were subject to the company policies described above. Typicality is met.

Bankers challenges only Ms. David's adequacy because she has or is in China. However, Ms. David plans be in Washington for the trial. Adequacy is met.

Superiority

A class action for these claims is superior to the alternatives of individual lawsuits or joined plaintiffs. Alternatives would pose unnecessary costs to the judicial system with multiple lawsuits concerning the same legal issue and kinds of evidence concerning agents' economic dependence. In addition to judicial efficiency, class treatment of these claims would promote access to justice because litigation costs are prohibitive for most individuals.

If it turns out that individual factual issues are so numerous that class treatment is inappropriate, this court has available "a variety of procedural options", up to and including decertification of the class, expressly authorized by Washington law. See Sitton v. State Farm Mutual Auto Ins., 116 Wash.App. 245, 255, 63 P.3d 198 (2003) ("courts have a variety of procedural options to reduce the burden of

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resolving individual damage issues, including bifurcated trial, use of subclasses or masters, pilot or test cases with selected class members"). At this point, however, the Court will follow Washington law and "resolve doubts in favor of allowing the class." Moeller v. Farmers Ins. Co. of Wash., 155 Wash.App. at 148.

DISMISSAL OF ALBERT HAWKS

Albert Hawks argues that plaintiffs cannot meet the CR 23 requirements as to him, because plaintiffs seek to certify a statewide class action and Hawks did not manage three of Bankers' six offices, Tacoma, Vancouver and Spokane. Mr. Hawks is correct. He had no relationship to agents working out of those other three offices, and thus those agents could not have been economically dependent on him. Certification is denied as to Mr. Hawks.

CONCLUSION

For the foregoing reasons, certification is GRANTED as to Bankers, but DENIED as to Mr. Hawks. Plaintiff is directed to prepare written findings and conclusions regarding the CR 23 factors, consistent with this memorandum decision. Additional evidence can and should be described in the findings on the CR 23 factors.

DATED this 2nd day of December, 2013.

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