2009 California State Bar Meeting

Los Angeles Lawyer

September 2009 /$4

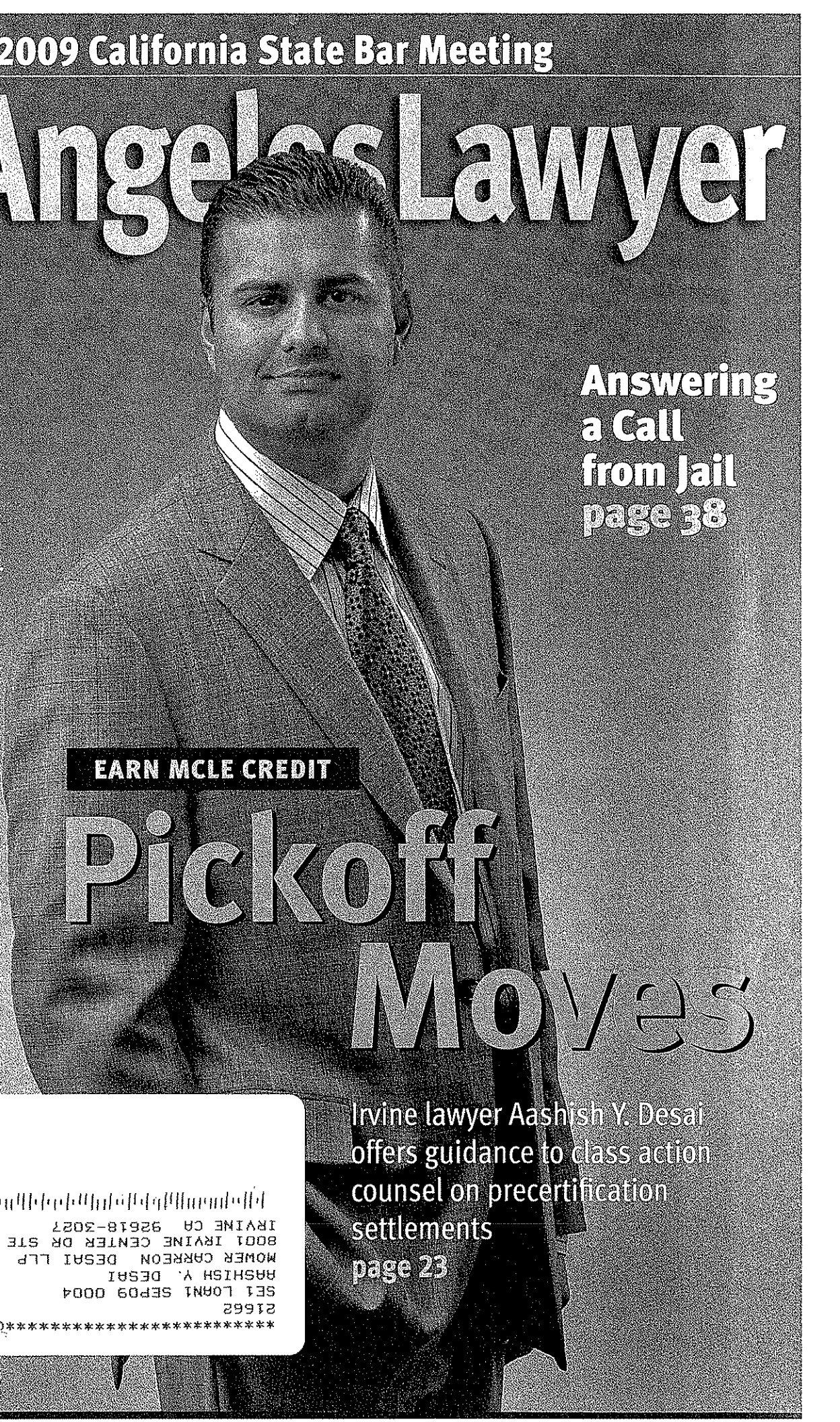
PLUS

Use of GPS Tracking Devices
page 30

Answering a Call from Jail
page 38

The EB-1 Visa Program
page 12

When Litigants Declare Bankruptcy
page 16



EARN MCLE CREDIT

Pickoff Moves

Irvine lawyer Aashish Y. Desai offers guidance to class action counsel on precertification settlements
page 23

MCLE ARTICLE AND SELF-ASSESSMENT TEST

By reading this article and answering the accompanying test questions, you can earn one MCLE credit.

To apply for credit, please follow the instructions on the test answer sheet on page 25.

by Aashish Y. Desai

Pickoff Moves

Does a recent appellate decision allowing employers to negotiate precertification settlements with potential class plaintiffs spell the end of wage and hour class actions?

CLASS ACTIONS can serve as an indispensable vehicle to resolve claims for a large number of people in one fell swoop. They can provide peace for the defendant, reasonable fees for the lawyers, and equitable relief for the class members. Nevertheless, the potential for abuse looms over these advantages. This has led to rules for class action settlements that require them to conform to certain standards and be approved by the court. However, a recent case—*Chindarah v. Pick Up Stix, Inc.*[1]—has cast doubt on both the settlement process and the need for judicial approval.

Still, all is not lost for the plaintiffs' bar. In the wake of *Chindarah*, a creative and practical solution exists for those able to navigate the often turbulent intersection of federal and state standards.

In *Chindarah,* the Fourth District of the California Court of Appeal allowed an employer to enter into private settlement and release agreements with its employees, one at a time, over various wage and hour claims despite a pending class action lawsuit over the very same issues. The plaintiffs argued that the releases were void under Labor Code Sections 206 and 206.5, which provide that an employee cannot release wage claims unless payment for the wages have been made. This right to receive full wages cannot be released or waived. Thus, the plaintiffs argued, since the class members were misclassified as exempt employees, they were due additional overtime wages that should not have been subject to release.[2]

The court of appeal had a different view. While the court noted that Labor Code Section 206.5 nullifies a release that an employee signs as a condition to receiving payment of earned wages, it drew a distinction for wages that may or may not be due depending upon a bona fide dispute.[3] According to the court's reasoning, wages that formed the basis of a bona fide dispute could no longer be classified as paid wages and thus did not fall within the ambit of the Labor Code statutes.[4]

Since the settlements were entered into before the plaintiffs moved for class certifi-

Aashish Y. Desai is a partner at Mower, Carreon & Desai, LLP, where his litigation practice is focused on class and collective actions involving wage and hour, antitrust, and consumer issues. He wrote an amicus curiae letter brief asking the California Supreme Court to grant review of *Chindarah v. Pick Up Stix, Inc.*

cation, there was no class to certify, and the class action was rendered moot. Despite the argument that the *Chindarah* decision was not only a profound misapplication of the law but invited a solicitation scheme involving covert, one-sided, potentially misleading communications, the California Supreme Court denied a petition for review.[5]

The consequences of *Chindarah* are profound. For employers, the decision provides an opportunity to "pick off" class members and thwart potentially devastating wage and hour class action suits. For employees, it may be the beginning of the end. Indeed, just weeks after the petition for review was denied, another appellate decision, *Watkins v. Wachovia Corporation*, adopted the reasoning of *Chindarah*, holding that the settlement of the plaintiff's claims deprived her of standing to pursue the class action altogether.[6] The strategy is gaining traction, but there are practical and legal problems that have yet to be addressed by courts.

The elimination of judicial review of settlements opens the door to the unfettered abuse of the rights of absent class members, who are generally without adequate knowledge of the claims in the class action. As a result, settlements can be, and often are, for substantially less than the claims are worth. To protect against these occurrences, the American Bar Association's Model Rules of Professional Conduct require that the formal parties to the class action, or counsel for the formal parties, may not, without knowledge or consent of the court, communicate individual settlement proposals directly or indirectly by written or oral communications with the potential and actual class members.[7]

California has not adopted the ABA Model Rules, but the state should codify the ABA rule's sound approach regarding communications in class action settlement proposals. In the context of a settlement, the possibility of abuse exists when the defendant desires to limit its liability. For example, in a case in Georgia,[8] both defendant's counsel and the defendant bank's in-house counsel were involved in a telephone campaign to solicit exclusion requests from approximately 4,000 prospective class members. The court found that the solicitation activities were improper and unauthorized, thereby disqualifying counsel from further participation in the lawsuit. The court ruled the solicitation scheme was covert, one-sided, misleading, coercive, and in violation of the ABA Rules of Professional Conduct.

In California, courts recognize that to prevent fraud, collusion, or unfairness to absent class members, a class settlement requires court approval.[9] Thus, *Chindarah* may turn the settlement process on its head by eliminating the approval protocol. While class representatives, who are represented by counsel, are prevented from entering into private settlement without court approval, absent class members, who are not represented by any counsel, thwart judicial scrutiny of their settlement. Approval of an "agreement" between an employer and an employee outside of the adversarial context of a lawsuit would violate the spirit of the law surrounding settlements of class actions. Indeed, regarding this issue, federal law differs from California law.

In enacting the Fair Labor Standards Act (FLSA),[10] Congress recognized that "due to the unequal bargaining power" between employers and employees, mandatory legislation was necessary to prevent private contracts between employees and employers.[11] In particular, the legislative history of the FLSA shows that Congress intended to protect employees from substandard wages and excessive work hours.[12]

Validity of Waivers

The U.S. Supreme Court first addressed the validity of waivers under the FLSA more than 60 years ago. In *Brooklyn Savings Bank v. O'Neil*, two employees had signed waivers of FLSA rights in exchange for payment of stipulated sums due for overtime wages. When the employees brought an action against their employer for liquidated damages and attorney's fees, the employer argued that the employees' waivers barred their FLSA claims.[13]

The Supreme Court disagreed. The Court observed that in each case, waivers of private rights guaranteed by the FLSA were void as contrary to the public policies the FLSA was intended to further. Moreover, the Court noted that the FLSA's requirement that an employer shall not employ a worker longer than the specified time without payment of overtime compensation was mandatory—and thus an employee may not waive his or her right to overtime compensation: "Where private right is guaranteed in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."[14]

Shortly after deciding *O'Neil*, the U.S. Supreme Court revisited the waiver issue. In *D.A. Schulte, Inc. v. Gangi*,[15] an employer disputed whether its employees were covered by the FLSA and therefore refused to pay them overtime wages. When the employees threatened legal action, the employer paid the claimed overtime wages in exchange for waivers from the employees of "any other or further obligations in connection [with the FLSA]."[16] The employees later filed suit to recover liquidated damages. In its defense, the employer pleaded affirmatively that the waivers were obtained in the settlement of a bona fide dispute over the scope of the FLSA's coverage.[17]

In concluding that the waivers were invalid, the Supreme Court opined that the FLSA remedies "cannot be bargained away by bona fide settlements of dispute over coverage."[18] The Court said that "the purpose of [the FLSA] which...was to secure for the lowest paid segment of the nation's worker a sustenance wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." To allow such waivers would thwart the public policy underlying the FLSA.[19]

The employer in *Chindarah*, like the defendants before the U.S. Supreme Court, asserted that wage and hour waivers should be treated as simple contracts and thus enforced or rescinded on the same grounds as other contracts. The Supreme Court made clear that this rationale is flawed. While parties are generally allowed to voluntarily enter into binding contracts, "contracts tending to encourage violations of laws are void as contrary to public policy."[20] Moreover, according to the Court, "To permit an employer to secure release from a worker...would tend to nullify the deterrent effect which Congress plainly intended that [the FLSA] should have. Knowledge on the part of the employer that he cannot escape liability...by taking advantage of the needs of his employees tends to ensure compliance in the first place....."[21]

Federal law establishes the minimum level of protection for employees throughout the United States, including California.[22] In determining the protection afforded employees under California law, the courts in *Chindarah* and *Watkins* implicitly determined that the California Legislature intended to grant California workers less protection than they would receive under federal law. This conclusion is not only inconsistent with federal law but also with recent California appellate decisions as well. For example, in *Armenta v. Osmose, Inc.*,[23] the court of appeal concluded: "A review of our labor statutes reveals a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally."[24]

Proposed Solutions and Consequences

Although waivers of FLSA rights are generally invalid, the FLSA allows an employee to waive his or her wage claims through two specific methods.[25] First, the FLSA allows for a judicially approved stipulated judgment in which the employee files suit directly against the employer. Second, it permits waiver when the secretary of labor supervises the payment

MCLE Test No. 184

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Employers may enter into private settlements of disputes with individual employees despite a pending class action lawsuit involving the same issues.
True.
False.

2. Labor Code Section 206.5 nullifies a release that an employee signs as a condition to receiving earned wages.
True.
False.

3. Wages that form the basis of a bona fide dispute between an employer and an employee no longer qualify as earned wages under Labor Code Section 206.5.
True.
False.

4. Settlement of a class representative's claims deprive the representative of standing to pursue the class action.
True.
False.

5. A class action settlement generally does not require court approval.
True.
False.

6. Congress enacted the Fair Labor Standards Act in response to the "unequal bargaining power" between employers and employees.
True.
False.

7. Private waivers under the FLSA are enforceable as long as they are not contrary to public policy.
True.
False.

8. FLSA remedies can be bargained away by bona fide settlements of disputes over coverage.
True.
False.

9. California labor law generally provides greater protection to employees than its federal counterpart.
True.
False.

10. The FLSA allows for judicially stipulated judgments to compromise a disputed wage claim.
True.
False.

11. The FLSA does not permit a waiver of a wage claim when the secretary of labor supervises the payment in full of the settlement.
True.
False.

12. Preventing communications by class counsel does not implicate First Amendment principles.
True.
False.

13. Federal courts have no authority to issue a temporary restraining order prohibiting an employer from offering settlements to its employees precertification.
True.
False.

14. Federal courts may establish precise definitions for permitted contact precertification with absent class members.
True.
False.

15. The FLSA has an opt-in requirement whereby absent class members must affirmatively agree to be part of the action.
True.
False.

16. Under Business and Professions Code Section 17200, a state law opt-out class may proceed based upon a FLSA violation.
True.
False.

17. Section 17200 not only incorporates other laws but treats violations of those laws independently.
True.
False.

18. In enacting the FLSA opt-in provision, Congress did not seek to prevent windfall payments such as liquidated damages.
True.
False.

19. The remedy under California's Unfair Competition Law is limited to restitution.
True.
False.

20. Congress did not consider whether plaintiffs who limit their claims to restitution under the UCL should have to comply with an opt-in requirement.
True.
False.

MCLE Answer Sheet #184

PICKOFF MOVES

Name _____

Law Firm/Organization _____

Address _____

City _____

State/Zip _____

E-mail _____

Phone _____

State Bar # _____

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. **Study the MCLE article in this issue.**
2. **Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.**
3. **Mail the answer sheet and the $15 testing fee ($20 for non-LACBA members) to:**

   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

   Make checks payable to Los Angeles Lawyer.
4. **Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.**
5. **For future reference, please retain the MCLE test materials returned to you.**

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ True	☐ False
2.	☐ True	☐ False
3.	☐ True	☐ False
4.	☐ True	☐ False
5.	☐ True	☐ False
6.	☐ True	☐ False
7.	☐ True	☐ False
8.	☐ True	☐ False
9.	☐ True	☐ False
10.	☐ True	☐ False
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

in full of a settlement reached between the employee and the employer. The scenario in *Lynn's Food Stores, Inc. v. United States*,[26] an Eleventh Circuit decision, is illustrative in light of the facts in *Chindarah*.

In *Lynn's*, the Department of Labor determined that the employer had violated several FLSA provisions and was liable to its employees for back wages. After failing to arrive at a settlement with the Labor Department, the employer negotiated a settlement directly with the 14 employees. The employer offered the employees a total sum of $1,000 to be divided among them, in exchange for each employee's waiver of all claims arising under the FLSA. The employer then sought judicial approval of the settlement.[27]

The Eleventh Circuit refused to grant approval of the settlement because the waiver agreements fell "into neither recognized category for settlement of FLSA claims."[28] It determined that the waiver agreements could not be approved because they were neither supervised by the Department of Labor nor entered as a stipulated judgment in an action brought by the employees. Further, the court concluded that approval of an "agreement" between an employer and employee fell outside of the adversarial context of a lawsuit brought by the employees and therefore would be a clear violation of the letter and spirit of the FLSA.[29]

The fear is that *Chindarah* will obviate the need for judicial review of class action settlements because employers will be able to resolve claims, one at a time, with each of their employees for pennies on the dollar. In this respect, employers will have an incentive to ignore California's wage and hour laws, knowing that any class action lawsuit can be easily mitigated by cheap releases.

Communication with class members is a major issue in class actions. After the case is filed, incentives are present on both sides to discuss the merits of their respective positions. The court usually tries to manage these communications so that the parties are able to obtain information and inquiries from class members while avoiding communications that may interfere with the conduct of the litigation itself. Because the law provides little guidance, much is left to the court's judgment and discretion. Under the broad supervisory authority granted to them, courts may enter appropriate orders to regulate the communication directed to class members.

Of course, because any prior restraint on speech implicates First Amendment principles and could interfere with the functioning of a corporation, courts are necessarily careful when considering whether to impose a limit on communications between an employer and its employees.[30] Although no formal attorney-client relationship exists between class members and proposed class counsel, there is, at least, an "incipient fiduciary relationship."[31] Also, communication with class members is enhanced in wage and hour cases. Key witnesses are often both class members and employees of the target defendant; thus, both sides must rely upon the same individuals for evidence and for assistance in developing winning themes for trial. This creates more than a little tension, but some courts have been willing to control the process.

For example, one federal court recently issued a temporary restraining order prohibiting an employer from offering settlement offers to its employees precertification.[32] In that case, the defendant required its employees to waive their FLSA rights as a condition of receiving a severance package. The plaintiffs, however, argued that this constituted retaliation and discrimination in violation of the spirit of the FLSA. The court agreed and noted that "having made the severance package available to all employees both in practice and in writing in connection with the [defendant's] employment manual, such a 'term, condition, or privilege' of employment cannot, consistent with [the FLSA], be doled out in a discriminatory fashion, i.e., based upon whether or not an employee is participating in an FLSA action."[33] The same logic may well apply to state claims under the California Labor Code.

Another federal court set forth precise definitions for permitted contact precertification with absent class members.[34] Specifically, the court ordered that any communication by defendants to the putative class members, on specific subjects, had to be in writing and filed with the court. One of the topics that the court was concerned about was the "settlement or other resolution of the claims and issues presented in the action."[35] The court excluded from its order any communication between the parties concerning the ordinary course of business or the development of factual information for the defense of the action.[36]

Since many agree that the employers' strategy in *Chindarah* and *Watkins* to negotiate and settle with individual class members would not be permissible under the FLSA, class counsel may want to import the FLSA into their state law wage and hour actions. The most obvious reason why plaintiffs do not want to do this is the "opt-in" requirement under the FLSA.[37] But that issue can be obviated. Under Business and Professions Code Section 17200, California's Unfair Competition Law (UCL), a state law opt-out class may proceed based on an FLSA violation.[38]

The best argument against this is preemption. Federal preemption of state law may be express or implied. However, absent explicit preemptive language, there are only two types of implied preemption: field and conflict preemption.[39] Congressional intent is the "ultimate touchstone" of any preemption analysis, express or implied[40]—and there is a presumption against implied preemption of state law in areas traditionally regulated by

The fear is that *Chindarah* will obviate the need for judicial review of class action settlements because employers will be able to resolve claims, one at a time, with each of their employees for pennies on the dollar.

the states.[41] Courts "are not to conclude that Congress legislated ouster of [a state] statute... in the absence of an unambiguous congressional mandate to that effect."[42]

California's UCL prohibits any "unlawful, unfair or fraudulent business act or practice."[43] Critical to this analysis, Section 17200 incorporates other laws and treats those violations independently under the state statute.[44] Almost any federal law may serve as the basis for a UCL claim.[45] Since the FLSA does not expressly preempt state law, the best argument for preemption is conflict preemption.

Employers argue that the UCL stands as an obstacle to the congressional purposes embodied by the FLSA. They assert that conflict preemption should prevent plaintiffs from turning an opt-in collective action into an opt-out class action. But this difference in the two laws would result in conflict preemption only if the UCL procedures stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress."[46] In enacting the opt-in provision, Congress sought to prevent "windfall payments, including liquidated damages," which are absent in a UCL action. Under the UCL, the remedy is limited to restitution.[47] Of course, there is no legitimate reason to believe that Congress considered whether plaintiffs who limited their claims to restitution under the UCL should have to comply with an opt-in requirement.[48]

Thus, class counsel can, if they are careful, circumvent the opt-in requirement altogether by basing their UCL claim on an FLSA predicate. Indeed, the UCL even doubles the statute of limitations for these wage claims.[49] This may be the key to preventing private settlements with absent class members that are neither administratively supervised nor judicially approved. For parties pressing class action claims, this solution, at the very least, may be a viable alternative to *Chindarah* until the California Supreme Court decides to weigh in on the issue.

---

[1] Chindarah v. Pick Up Stix, Inc., 171 Cal. App. 4th 796 (4th Dist. 2009), *reh'g denied* (Mar. 29, 2009), *rev. denied* (June 10, 2009).
[2] *Id.* at 800-01.
[3] *Id.* at 803.
[4] *Id.*
[5] *Id.*, *reh'g denied* (Mar. 29, 2009), *rev. denied* (June 10, 2009).
[6] Watkins v. Wachovia Corp., 172 Cal. App. 4th 1576, 1585-88 (2d Dist. 2009), *rev. denied* (June 24, 2009).
[7] *See* ABA MODEL RULES OF PROF'L CONDUCT R. 3.4, 4.2, 8.4; NEWBERG ON CLASS ACTIONS §11:75 (2004) (noting that the "elimination of court review can open the door to potential abuse of the rights of absent class members, who are generally without adequate knowledge of the claims in the [class] action").
[8] Cleiner v. First Nat'l Bank of Atlanta, 99 F.R.D. 77 (N.D. Ga. 1983) (commercial lending; bank note fraud).
[9] Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1800 (1996); CAL. R. CT. 3.770(a); In re Microsoft I-IV Cases, 135 Cal. App. 4th 706, 723 (2006).
[10] 93 CONG. REC. 2162 (Apr. 8, 1974) (remarks of Sen. Donnell); 29 C.F.R. §790.4; *see also* United States v. Cook, 795 F. 2d 987, 988 (Fed. Cir. 1986).
[11] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945).
[12] *Id.* at 706.
[13] *Id.* at 705-06.
[14] *Id.*
[15] D.A. Schulte, Inc. v. Gangi, 328 U.S. 106 (1946).
[16] *Id.* at 112 n.5.
[17] *Id.* at 112.
[18] *Id.* at 114.
[19] *Id.* at 116.
[20] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 710 (1945).
[21] *Id.* at 709-10.
[22] Aguilar v. Association for Retarded Citizens, 234 Cal. App. 3d 21 (1991).
[23] Armenta v. Osmose, Inc., 135 Cal. App. 4th 314 (2005).
[24] *Id.* at 323-24.
[25] Lynn's Food Stores, Inc. v. United States, 679 F. 2d 1350, 1352-53 (11th Cir. 1982).
[26] *Id.* at 1352.
[27] *Id.*
[28] *Id.* at 1353.
[29] *Id.* at 1354.
[30] Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981).
[31] Knuth v. Erie-Crawford Dairy Coop. Ass'n, 463 F. 2d 470, 472 (3d Cir. 1972).
[32] Allen v. SunTrust Banks, Inc., 549 F. Supp. 2d 1379 (N.D. Ga. 2008).
[33] Bublitz v. E.I. Dupont de Nemours & Co., 196 F.R.D. 545 (S.D. Iowa 2000).
[34] *Id.* at 545, 549-50.
[35] *Id.* at 549-50.
[36] *Id.*
[37] 29 U.S.C. §216(b) (Class actions instituted under the FLSA are considered collective or representative actions, in which the individual employees must affirmatively opt-in to the action to garner the benefit of any settlement or verdict.).
[38] Harris v. Investor's Bus. Daily, Inc., 138 Cal. App. 4th 28 (2006) (Cause of action alleging violations of the FLSA under state Unfair Competition Law was not preempted by the FLSA's opt-in requirement.).
[39] Crosby v. National Foreign Trade Council, 530 U.S. 363, 371 (2000).
[40] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96, 98 (1992).
[41] California v. ARC Am. Corp., 490 U.S. 93, 101 (1989).
[42] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963).
[43] BUS. & PROF. CODE §17200.
[44] Chabner v. United Omaha Life Ins. Co., 225 F. 3d 1042, 1048 (9th Cir. 2000).
[45] Saunders v. Superior Court, 27 Cal. App. 4th 832, 838 (1994).
[46] Williamson v. General Dynamics Corp., 208 F. 3d 1144, 1152 (9th Cir. 2000).
[47] Tomlinson v. IndyMac Bank FSB, 359 F. Supp. 2d 898, 901 (C.D. Cal. 2005) (FLSA is not a bar to a Rule 23 opt-out class certification of UCL claims predicated upon FLSA violations. As a result, an opt-in FLSA action can become an opt-out UCL action.).
[48] *Id.* at 901.
[49] Bahramipour v. Citigroup Global Markets Inc., 2006 WL 449132, at *7 (N.D. Cal. Feb. 22, 2006) ("By allowing 'opt-out' class actions and longer statute of limitations of Unfair Competition Law claims, California provides increased protections for its workers, furthering the central purpose of the FLSA.").