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CONFLICTS OF INTEREST

Court of Appeal tackles attorney disqualification in class setting

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One law firm represented two different classes of employees in wage and hour lawsuits against Apple. After the first class was certified, Apple asked the court to disqualify the law firm from representing the second yet-to-be certified class. Apple argued that adverse interests between members of the two groups of employees created an irreconcilable conflict for the firm. The trial court agreed and disqualified the firm from representing the second class. The court of appeal affirmed the decision.

Firm attempts to represent employees in two separate class actions

In 2011, Brandon Felczer and other nonexempt employees, represented by Hogue & Belong, filed a wage and hour class action against Apple in San Diego County Superior Court. The employees claimed that Apple's meal and rest period policies, failure to timely pay employees upon termination, and failure to provide accurate wage statements violated California law. In 2014, a court certified the *Felczer* class.

Nine months later, Hogue & Belong filed another class action against Apple on behalf of former employees Stacey and Tyler Walker. The Walkers alleged that Apple revoked employee access to its online "myPage" portal immediately upon the termination of their employment and before the Walkers and other terminated California employees could

download their final wage statements. Apple denied that a class action was appropriate because, rather than using a uniform policy in California, it assigned responsibility for delivering final paychecks and wage statements to its retail store managers (also known as store leaders).

Apple asked the court to disqualify the law firm as plaintiffs' counsel in the Walkers' action. The company contended that by representing both the certified *Felczer* class and the putative *Walker* class, the firm had an irreconcilable conflict of interest because in advocating on behalf of the Walkers, it would necessarily have to take a position adverse to the interests of certain clients in the *Felczer* case.

In support of its disqualification motion, Apple submitted a declaration from Marnie Olson, the HR manager responsible for its Southern California retail stores. Olson testified that Meg Karn, the store leader for the Carlsbad store (where the Walkers worked), was responsible for issuing the Walkers their final pay and pay stubs. Karn, like many other Apple employees, had been a nonexempt employee before she was promoted to store leader and was therefore a member of the certified *Felczer* class.

Apple argued that to establish the Walkers' claim that it had a uniform policy of not providing final wage statements, Hogue & Belong would have to cross-examine Karn, and possibly other *Felczer* class members, about the mechanics of the Walkers' terminations, including whether Apple had a uniform policy on employee terminations and whether Karn had handled the Walkers' termination correctly. The trial court granted Apple's motion and disqualified the firm in the *Walker* action.

On appeal, the Walkers claimed the trial court erred in its conclusions that:

- (1) Karn, as an unnamed member of the *Felczer* class, was a client of Hogue & Belong;
- (2) The Walkers' and Karn's interests conflicted; and
- (3) Disqualification was automatic. The court of appeal affirmed the disqualification order.

As an unnamed class member, Karn was a client of the firm

On appeal, the threshold issue was whether, by representing the certified *Felczer* class, Hogue & Belong also represented Karn, who was technically an unnamed class member. Class certification alters the relationship between class counsel and absent class members. Courts generally consider certification the defining event for determining representation for conflict-of-interest purposes.

The Walkers asked the court of appeal to disavow that rule, contending it was impractical because the identities of absent class members are often unknown, making it impossible to determine all conflicts and impractical to deal with unknown, unnamed class members. The court of appeal declined to do so. Because the *Felczer* class had been certified and Karn's identity and significance as a witness were known, the trial court found correctly that the law firm represented Karn for purposes of determining a conflict of interest.

The Walkers' interests conflicted with Karn's

Rule 3-310(C) of California's Rules of Professional Conduct provides that an attorney shall not, without the informed written consent of each client, simultaneously represent two clients with adverse interests in separate matters. Doing so constitutes an unethical conflict of interest. When a conflict presents itself, a court may act on its own, or on the motion of a party, to disqualify the attorney.

The attorney's actual intention and motives are immaterial. Disqualification is generally automatic. In a class action context, disqualification is even more likely because class counsel must meet a heightened professional standard before being permitted to represent absent class members. The Walkers argued that any potential conflict of interest between Hogue & Belong and Karn was speculative and hypothetical. The court of appeal disagreed.

The Walkers also alleged that Apple had violated California labor law by maintaining a uniform policy of terminating employees' access to myPage immediately upon termination and before employees could obtain their final wage statements. In response, Apple submitted evidence that any failure to timely deliver final wage statements to the Walkers did not result from uniform company policy but rather from an error by their store leader, Karn. That created the possibility that Karn could be compelled to testify, creating a conflict between her interests and the Walkers' interests.

For example, to support the Walkers' position that Apple's failure to provide a final wage statement resulted from a uniform companywide policy, Hogue & Belong would likely need to cross-examine Karn to establish that she was not responsible for providing the Walkers with final pay stubs. Alternatively, if Karn were to testify that she was either unaware that she had a duty to provide the Walkers' final wage statements or knew of that duty but simply failed to fulfill it, she could undermine Apple's confidence in her as a store leader and thereby jeopardize her career.

Under those circumstances, it would be unseemly for Karn's own lawyer to have her take a position adverse to her own interests but beneficial to the firm's other clients. Doing so would violate the firm's duty of loyalty to Karn. Even though she did not have a direct stake in the outcome of the Walkers' lawsuit, she had a practical interest in not being portrayed as a liar or as an incompetent manager. And she had a right not to have her lawyer put her in such a position. Thus, the firm had a conflict of interest by virtue of its

simultaneous representation of the Walkers and Karn.

The Walkers also argued that disqualification was premature because Karn might never testify, their class might not be certified, or the case might settle before trial. The court rejected those arguments because creating such a broad exception would swallow the rule itself. *Walker v. Apple, Inc.* (California Court of Appeal, 4th Appellate District, 9/28/16).

Bottom line

It is not unusual for a law firm to develop contacts among employees at a particular company and represent multiple employees in cases against the same employer. This dynamic can create potential conflicts of interest, particularly when plaintiffs' counsel effectively represents numerous employees in a class action context. In those circumstances, attorneys on both sides of a dispute need to be particularly sensitive to potential conflicts of interest.

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